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571	Phanindra Singh v. The King-Emperor ...	18	891
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581	Jibanessa Khatun v. Majidunnessa Khatun ...	18	398
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667	Panchu Mondal v. Sheikh Isaf ...	18	391
669	Thakur Basant Singh v. Mahabir Pershad ...	19	340
679	Hari Lal Sinha v. Tripura Charan Ray ...	19	129
695	Maharaj Bahadur Sing v. Basunta Kumar Roy ...	18	876
698	Gagan Chandra Choudry v. Alak Chand Saha ...	18	996
701	Devi Prosad Chaudbury v. Golap Bhagat ...	19	273
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750	Nimani Kumar v. Kedar Nath Ghosh ...	20	151
752	Chattrapat Dugar v. Kharaj Singh Luchmiram ...	19	435
754	Bhicha Ram Sahi v. Bishambhar Nath Sahi ...	17	957
761	Hiran Kumar Chowdhury v. Mangal Sen ...	20	222
765	Ganesha Row v. Tuljaram Row ...	19	515
774	Aktowali v. Tarak Nath Ghose ...	17	266
779	Nanda Lal Pathuk v. Mohunt Chanurpat Das ..	18	143
781	Rasik Lal Sen v. Krishna Mohan Mondal ...	18	249
782	Harmanage Narain Singh v. Ram Gopal Achari ...	19	417
787	King-Emperor v. Harkumar Burman Roy ...	20	216
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795	Ananta Ram Tewary v. Sheikh Altab Sarkar ...	20	409
797	Kidar Nath v. Mathu Mal ...	18	946
802	Monohar Pal v. Srimati Anania Moyee Dassee ...	20	198
807	Rakhal Chandra Ghosh v. Ashutosh Ghosh ...	19	931
810	Guru Charan Hajam v. Suklal Hajam ...	19	588
812	Syed Shah Hamid Hossain v. Patna Municipality ...	15	548
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820	Monohar Mukerjee v. Khettra Nath Sabui ...	19	625
824	Sarba Mahton v. The Emperor ...	20	211
825	Shabijan Sheikh v. Emperor ...	19	510
827	Asgar Ali Biswas v. The King-Emperor ...	20	609
829	Raja Debi Bakhsh v. Habib Shah ...	19	526
833	Chamatkari Dasi v. Triguna Nath Sardar ...	19	989
835	Jagendranath Singh v. Secretary of State ...	17	921
841	Umeshananda Dutta Jha v. Sir Ravaneswar Prasad Singh...	17	969
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860	Gangadhar Mondal v. Rajendra Nath Ghosh ...	19	652
862	Tikait Ajant Singh v. Christien, F. T. ...	16	567
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868	Ram Nath Singh v. Basanta Narain Singh ...	19	630
871	Shananda Chandra Pal v. Siri Nath Ray Choudury ...	17	432
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141	Ramamurthi Dhora v. Secretary of State ...	19	656
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148	Sengoda Goundan v. Varadappan	13	39
151	Anantanarayana Iyer v. Savithri Ammal ...	13	458
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194	Moitheensa Rowthan v. Apsa Bivi	12	444
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216	Venkata Reddy, *In re* ...	14	659
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258	Marangami Rowthen v. Nagur Meera Labbai ...	18	185
263	Chengiah v. Rajah of Kalahasti ...	15	445
266	Sama Row v. Doraisami Chettiar	18	763
270	Nathuram Shivaji v. Krishna ...	18	1008
271	Visvanathaswamy Naicker v. Kamu Ammal ...	*To be reported.*	
288	Lakshmi Narasimha Row v. Repalli Sitaramaswami ...	19	440
290	Lakshminarasimham v. Ramachandra ...	18	308
293	Alagappa Chetty v. Dasapa Chettiar ...	18	332
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298	Varahaswami v. Ramachandra Raju ...	18	520
301	Subramania Mudaliar v. Ranganatham Chettiar ...	18	506
310	Devarayan Chetti v. Muthuraman Chetti ...	18	515
313	Ramiah v. Rukamani Ammal ...	18	138
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333	Annapurnamma v. Akkayya ...	19	12
342	Rama Aiyangar v. Jagannadha Pandia Aiyar ...	18	719
345	Suraj Narain v. Ikbal Narain ...	18	30
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358	Vidyaranya Bharathi v. Adoni Bheema Row ...	18	58
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418	Dhanapala Chetti v. Anantha Chetti ...	18	973
426	Secretary of State for India v. Abdul Rahiman ...	16	6
428	Ganjayya v. Ramaswami ...	19	362
429	Ross v. Secretary of State for India ...	19	353
450	Lakshma Ammal v. Tyagaraja ...	18	378
455	Venkatachella Chetty v. Narayana Aiyar ...	19	672
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462	Narahari Sahu v. Korithan Naidu	19	881
463	Ganapathi Bhatta, *In re* ...	19	310
469	Ramamurthi v. Secretary of State for India ...	19	656
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474	Sivanna v. Venkatakrishna ...	19	478
476	Rajarama Aiyar v. Ramasami Aiyar ...	19	660
477	Mangayya v. Sriramulu ...	19	448
479	Kamayya v. Yerakota ...	19	221
482	Subbiah v. Dilawar Khan ...	19	241
483	Hyder Sahib v. Giria Chettiar ...	19	496
484	Mani v. Subbarayar ...	19	663
488	Natesa Aiyar v. Appavu Padayachi	19	462
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511	Veeranan v. Vellappayal ...	19	386
512	Vemula Jambalayya v. Rajamma	15	859
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517	Krishnamachariar v. Krishnamachariar ...	19	452
530	Secretary of State for India v. Rajah of Pittapur ...	19	667
533	Brahmanaikudu v. Mahalakshmi...	17	487
534	Veerappudayan v. Muthukaruppan Thevan ...	19	589
538	Secretary of State for India v. Bhanamurthy ...	17	373
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548	Puthempurayal Amman Pariyayi v. Pakran Haji ...	15	262
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571	Venkatachella Goundan v. Rangaratnam Aiyar ...	20	374
592	Rajah of Ramnad v. Arunachellam Chettiar ...	19	596
619	Ramanathan Chettyar v. Kalimuthu Pillay ...	18	189
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652	Kanaka Ramayya v. Minakshi Naidu ...	12	389
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664	Veerappa Chetty v. Kadiresan Chetty ...	20	385
678	Radakrishnayya v. Secretary of State ...	19	846
680	Venkata Rangayya Appa Rao v. Secretary of State ...	19	227
693	Varadarajulu Chettiar v. Narayana Sami Chetty ...	20	518
697	Venkatarayacharlu v. Krishnamacharlu ...	20	515

(C).—13 MADRAS LAW TIMES, FOR APRIL-MAY 3RD, 1913.

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406	Kanhaya Lal v. National Bank of India, Ltd. ...	18	949
415	Majmudar Hiralal Ichhalal v. Desai Narsilal Chaturbhujdas ...	18	909
419	Bhupathirazu Venkatapathiraju Garu v. President, Taluk Board, Narasapur ...	19	727
421	Logadapathi Chinnayya v. Kotla Ramanna ...	19	579
434	Kidar Nath v. Mathu Mal ...	18	946
437	Lala Soni Ram v. Kanhaiya Lal ...	19	291
445	Arthanari Goundan v. Ramaswami Goundan ...	20	304
450	Venkatachala Goundan v. Rangaratnam Aiyar ...	20	374
460	Kayarohana Pathan v. Subbaraya Thevan ...	19	690
463	Veerappudayan v. Muthukaruppa Thevan ...	19	589
466	Katragadda Radhakrishna Naidu v. Secretary of State for India	19	846
468	Kareti Brahmanaikudu v. Kareti Mahalakshmi ...	17	487
469	Raja Rajeswara Dorai v. Arunachellam Chettiar ...	19	596
487	Baijnath Ram Goenka v. Nand Kumar Singh ...	18	956
488	Richard Ross Skinner v. Kunwar Naunihal Singh ...	19	267
497	Mohideen Kutti v. Parker ...	19	700
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506	Sevathamuthu Asari v. Reverend J. N. K. Masquite ...	19	721
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515	Mullangi Venkatarangam Chetty v. Venkatasubbammah ...	19	740
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364	Tirapayya v. Mallidi Ramaswami	19	362
365	Subramaniam Chetty v. Doraisinga Tevar ...	16	943
368	Salava Cunniah Chetty v. Thiruvengada Rangaramanujachariar ...	18	622
369	Sundara Reddiar v. Subbiah Koundan ...	18	610
370	Ravinuthala Venkatappiah v. Secretary of State ...	16	895
371	Marangami Rowthen v. Karupati Nagur Meera Labbai Rowthen...	18	185
374	Subba Row v. Rama Row ..	18	353
378	Chaganti Atchaparazu v. Raja Yelugoti Kristna Yachandrulavaru ...	19	225
379	Valia Konikkal Edom Kelu Achen v. Valia Konikkal Edom Lakshmi Nettyar Ammal ...	18	234
381	Syed Tajuddin Sahib v. Shaik Ali Ahamed Sahib ...	18	358
382	Samalapalli Mangayya v. Samalapalli Sriramulu ...	19	448
383	Avula Guruvaya v. Avula Venkunnah ...	18	212
387	Logadapatti Chinnayya v. Kotla Ramanna ...	19	579
399	Venkatachella Chetti v. Narayana Iyer ...	19	672
400	Veerappudayan v. Muthu Karuppa Thevan ...	19	589
403	Kidar Nath v. Mathu Mal ...	18	946

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417	Sri Raja Venkata Rangayya Appa Rao Bahadur v. Secretary of State ...	19	227
427	Katragadda Radha Krishnayya Naidu v. Secretary of State ...	19	846
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432	Karumusi Brahmanna Sastrulu v. Jaldu Venkata Subha Row ...	19	848
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470	Lala Soni Ram v. Kanhaiya Lal ...	19	231
478	Secretary of State v. Rajah of Pittapur ...	19	667
480	Sivatha Muthu Asari v. Reverend Mesguita ...	19	824
481	Thakur Basant Singh v. Mahabir Pershad ...	19	340
487	Tekait Krishna Prasad Singh v. Moti Chand ...	19	296
494	Venkanna Iyer v. Secretary of State ...	19	732
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65	Sarwa v. Emperor ...	19	946
68	Sheikh Moti v. Emperor ...	19	949
72	Bindeshri Prasad v. Vishwanathdas ...	19	858
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86	Ghasiram v. Liladhar ...	20	257
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109	Hamid-ud-din Ali Shah v. Court of Wards, Nanpara Estate ...	18	319
		20	275
119	Masalo v. Azizullah Khan ...	20	32
122	Har Nandan v. Rachpal ...	18	30
129	Suraj Narain v. Ikbal Narain ...	19	340
136	Basant Singh v. Mahabir Pershad		
145	Bisheshar Shukul v. Bir Indra Kant Singh ...	20	450
146	Ajudhia Prasad v. Yasin Ali Khan	20	457
148	Sohan Lal v. Jot Singh ...	20	458
157	Raja Ram v. Prag Narain ...	20	465
161	Mahadin v. Sheo Prasad ...	20	577
163	Muhammad Taqi v. Muhammad Baqar ...	20	580
173	Kali Shankar v. Sheo Dayal ...	20	586
178	Har Sahai v. Hon'ble Raja Ali Muhammad Khan ...	20	266
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74	Aya Ram v. Thari Bai ...	19	87
75	Man Singh v. Rasul ...	18	750
76	Sham Lal v. Chhajju Mal ...	19	51
77	Dilmir v. Devi Das ...	19	84
78	Gian Chand v. Behari Lal ...	18	761
79	Fazal Ilahi v. Muhammad Jan ...	18	795
80	Fateh Muhammad v. Fateh Muhammad Khan ...	18	758
81	Sajawal v. Sodagar Singh ...	18	796
82	Nihal Singh v. Hira ...	18	787
83	Court of Wards v. Ilahi Bakhsh ...	17	744
84	Mahomed Khan v. Akbar Khan ...	18	384
85	Khuda Bakhsh v. Mathra Das ...	18	182
86	Ganga Ram v. Dina Nath ...	18	526
87	Municipal Committee of Lahore v. Nand Lal ...	18	816
88	Madan Mohan Lal v. Abdul Rahman ...	18	356
89	Sardar Begam v. Mehr Chand ...	18	820
90	*Musammat* Mahfusan v. Muniram	18	323
91	Ghannu Mal v. Sant Das ...	18	327
92	*Musammat* Sardara v. Emperor ...	18	351
93	Dasondhi v. Buta ...	18	452
94	Bhagat Singh v. Sada Nand Brothers ...	18	309
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98	Dulia v. Farid ...	18	485
99	Imam Din v. Emperor ...	18	272
100	Dalip Kaur v. Fatti ...	18	920
101	Chhubu Mian v. Har Charn Das ...	18	529
102	Bhag Bhari v. Sadiq ...	18	534
103	Mohar Singh v. Taj Mohamed ...	18	532
104	Hussain Bibi v. Jagan Nath ...	18	278
105	Shams-ul-nissa v. Secretary of State ...	18	489
106	Jodha v. Hira ...	18	251
107	Gauhar Khan v. Sher Muhammad Khan ...	18	256
108	Babu Khan v. Mir Khan ...	18	283
109	Shah Jahan v. Jhande Khan ...	18	216
110	Saghar v. Nur Ahmad ...	19	239
111	Ishar v. Dalip Singh ...	18	218
112	Firm of Kanhaya Lal-Mohan Lal of Amritsar v. Radha Kishen ...	18	205
113	Rahamatullah Khan v. Secretary of State ...	18	799
114	Alam Shah v. Nur Zaman Shah ...	18	804
115	Sant Singh v. Nathu Mal ...	18	480
116	Narinjan Singh v. Natha Singh ...	18	868
117	Emperor v. Waryam ...	18	886
118	Deoki v. Bakht Mal ...	19	783
119	Ram Bheja Mal v. Muhammad Amin ...	19	784
120	Thakri v Gurdit Singh ...	19	253
121	Ralia Ram v. Haro Mal ...	*Not reportabe.*	
122	Gopal Das v. Municipal Committee of Lahore ...	19	781
123	Ganga Singh v. Kashi Ram ...	18	314
124	Charles Louis Drefus v. Jai Chand	18	316
125	Sewa Ram v. Dheru Shah ...	18	318
126	Atar Singh v. Allah Din ...	18	445
127	Kidar Nath v. Mathu Mal ...	18	946
128	Ibrahim v. Emperor ...	18	265
129	Tawakal Shah v. Jiwe Shah ...	18	511
130	Dalip Singh v. Umrao Singh ...	19	788
131	Labh Singh v. Gurcharn Singh ...	19	730
132	Honda Ram v. Chhibar Mal ...	19	847
133	Fazal Hussain v. Mrs. Holmes ...	19	943
134	Bakhshi Mathra Singh v. Khushal Devi ...	19	921
135	Sohan Singh v. Lakhu Mal ...	19	5
136	Dal Singh v. Bakhshish Singh ...	19	8
137	Fatteh Muhammad v. Sultan Muhammad ...	19	122
138	Nathu v Manji Ram ...	18	608
139	Abdul Hamid Khan v. Mehr Jan ..	19	837
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INDIAN CASES.

1913.

VOLUME XIX.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 249 OF 1912.
March 10, 1913.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
Choudhri BAHAL SINGH AND OTHERS
—DEFENDANTS—APPELLANTS
versus
NAIT RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Pre-emption—Money deposited in Court by pre-emptor after first Court's decree—Decree set aside by Appellate Court—Whether plaintiff entitled to interest on deposit money—Mesne profits—Vendee's right.

A pre-emption suit was decreed by the first Court. The plaintiff deposited the pre-emptive money in Court in proper time and obtained possession. On appeal, the decree was set aside.

The vendee then got back possession of the property and claimed mesne profits for the period during which plaintiff was in possession:

Held, (1) that the vendee was entitled to mesne profits for the period;

(2) that the plaintiff was not entitled to interest on the money he had depcsited in pursuance of the first Court's decree.

Execution first appeal from the decision of the Additional Judge of Meerut, dated the 15th of April 1912.

Mr. *Boys*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The only point pressed before us in this case is really a simple one. The plaintiffs-respondents obtained a decree for pre-emption as against the present appellants and in pursuance thereof paid a certain sum of money into Court within the time allowed and obtained possession. The vendees appealed and on appeal, the suit was dismissed. In the meantime the money had remained in Court untouched. The vendees then applied for restoration of possession and mesne profits. The plaintiffs raised objection that for the period during which the money was lying in Court, they were entitled to interest thereon, because the vendees could and ought to have taken it out of Court and appropriated it. The lower Court has acceded to this plea and has in accordance therewith held that the vendees were not entitled to mesne profits for 1316 and half of 1317 *Fasli*, the period during which the money was lying in Court. The vendees have come up here on appeal and it is urged on their behalf and with considerable force that though perchance they might have taken the money out of Court, they were not bound to do so, and as on appeal it was held that the suit for pre-emption was a bad one, there is no justice or equity in making them liable for the interest in question. The result of the litigation between the parties is that it has been held that the pre-emption suit ought not to have been brought and the appellants-vendees were fully justified in resisting claim. The cases quoted by the Court below, reported as *Hakim Vilayat Ali* v. *Abdus Salam* (1), *Bhagwan Singh* v. *Ummat-ul-Hasnain*(2), do not really help us in the matter. We can see no justice in making the appellants reimburse to the plaintiffs the loss which has accrued by reason of their own foolish action in bringing the suit for pre-emption. In our opinion, both justice and equity demand

(1) A. W. N. (1895) 13.
(2) A. W. N. (1896) 42; 18 A. 262.

that the plaintiffs should bear the result of their own action and that the appellants should not be made to bear the loss incurred. We set aside the order of the Court below and hold that the appellants are entitled to mesne profits for 1316 and half of 1317 *fasli* and we remit the case to the Court below under Order XLI, rule 25, for ascertainment of the amount. The parties may give further evidence. Ten days will be allowed for objections on receipt of the finding.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 6 OF 19

March 6, 1912.

Present:—Mr. Justice Twomey.

MAUNG SEIN AND ANOTHER—DEFENDANTS —APPELLANT

versus

NGWE NU—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court deciding case upon point not taken by plaintiff in Court of first instance--Contending mortgagees—Priority—Registration Act (III of 1877), s. 48—Power of Appellate Court to decide upon plea not taken in first Court—Where no evidence in rebuttal necessary.

In a suit between contending mortgagees, the Appellate Court found against the plaintiff's plea as to the fraudulent nature of the defendant's mortgage, but instead of dismissing the suit, made out a fresh case for the plaintiff, namely, that her registered mortgage took effect before the defendant's oral mortgage. On second appeal to the Chief Court:

Held, (1) that, having regard to the provisions of Order XLI, rule 33, Code of Civil Procedure, the lower Appellate Court was right in determining the respective legal rights of the contending mortgagees with reference to the Registration Act in spite of the plaintiff's defective pleading.

(2) that the mortgaged property having been sold in pursuance of the defendant's oral mortgage without reference to the plaintiff's mortgage, the sale should be annulled.

An appellant is not allowed to raise in the Court of Appeal a plea which he did not raise in the lower Court where the nature of the plea is such that if raised originally the respondent might have been able to rebut it.

Mr. *Ba Dun*, for the Appellants.

Mr. *S. S. Halkar*, for the Respondent.

JUDGMENT.—The first and the principal question raised in this appeal is whether the lower Appellate Court, having found against the respondent's plea that the 2nd appellant's mortgage was fraudulent, should not have dismissed the respondent's suit forthwith instead of making out a fresh case for the respondent, namely, that her registered mortgage took effect before the 2nd appellant's oral mortgage. Although the claim of priority under section 48, Registration Act, was not expressly set up in the plaint, the Divisional Judge considered that he was bound to deal with it as it concerned an obvious legal right. I think this view is correct. An appellant is not allowed to raise in the Court of Appeal a plea which he did not raise in the lower Court where the nature of the plea is such that if raised originally the respondents might have been able to rebut it. But the priority of the respondent's mortgage in this case is clearly not a point on which any rebutting evidence could be forthcoming. It is beyond dispute that the appellant's mortgage is postponed to the respondent's by the operation of section 48, Registration Act. Having regard to the provisions of Order XLI, rule 33, Code of Civil Procedure, I have no doubt that the Divisional Court was right in determining the respective legal rights of the contending mortgagees with reference to the Registration Act in spite of the plaintiff-respondent's defective pleading.

The only other matter for consideration is whether the respondent was not too late to assert her priority after the property had already been sold in pursuance of the appellant's oral mortgage. The sale took place on the 29th June 1909 and was carried out without reference to the respondent's mortgage although a sale decree had been granted on that mortgage on 22nd December 1908 by the same Court. The action of the Court in selling the property without reference to the respondent's mortgage was highly irregular. Under section 73, Code of Civil Procedure, the Court could sell the property free of the respondent's mortgage only with the mortgagee's consent (giving the mortgagee the same rights against the sale-proceeds as she had against the property sold). Seeing that the respondent's consent was not asked for or obtained, the property should have been sold subject to her mortgage. The irregularity was sufficient to justify the Court in annulling the sale. Instead of doing so, the Divisional Court has ordered that the purchaser shall redeem the respondent's mort-

gage or suffer the land to be re-sold in satisfaction of that mortgage. But the auction-purchaser may lose by this order. The amount realized on re-sale may not cover the respondent's mortgage debt *plus* the sum of Rs. 234 paid by Maung Sein.

In modification of the Divisional Court's decree, I direct that the auction-sale shall be annulled and that the respondent is entitled to have the land sold in pursuance of her mortgage decree free from the 2nd appellant, Ma Mya Gale's mortgage.

The respondent's costs in this Court will be borne by the 2nd appellant.

Decree modified.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 93 OF 1911.
January 15, 1913.
Present:—Mr. Justice Kensington.
AMIR—PLAINTIFF—APPELLANT
versus
JIWAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Abandonment—Land left in possession of persons not related to owner—Living at distance of a few miles.

Where an owner left his land in possession of a person not related to him, had no concern with it for over 20 years, and lived at another village seven or eight miles off and cultivated other land:

Held, that this was sufficient evidence of abandonment.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 29th day of July, 1910, affirming that of the Munsif, 2nd class, Sharakpur, dated the 20th December 1909, dismissng the claim.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of Shahabal alone out of the numerous plaintiffs whose suit has been dismissed by both the lower Courts.

After hearing arguments, I am satisfied that plaintiff's suit has been rightly dismissed. It has been distinctly found that the plaintiffs abandoned their land in suit before 1891 with no intention of resuming possession, and this finding is clearly justified as the plaintiffs have been living all this time at another village only seven or eight miles away, where they

admittedly owned other lands. The defendants are not shown to be related to the plaintiffs and it is impossible to believe that they would have been permitted to take possession of this land and to mortgage the greater part of it without reference to the plaintiffs, if the latter were still asserting any sort of ownership rights. It is too late now for the plaintiffs to try and establish that the land still belongs to them. With the exception of the question of abandonment, there is no other point raised in the grounds of appeal which can be considered in an appeal under section 70 (1) (*b*) of the Punjab Courts Act as it stood prior to Act I of 1912. The appeal is accordingly dismissed with costs to the defendants.

Appeal dismissed,

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 824 OF 1909.
February 26, 1913.
Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.
THANGASWAMI THEVAN—DEFENDANT No. 1—APPELLANT
versus
RAJARAM NAIDU AND OTHERS—PLAINTIFFS DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 60—Deposit—Limitation only from date of demand.

A receipt was in these terms:—"As Annammalai Chetty was not there, having gone out to Devakota and as it was learnt on inquiry that Karuppiah Pillay who was the said person's *kariasthan* and Kanakkupillay had gone out to Poovanthe, etc., you have deposited, as they were not in the village, the said sum of Rs. 1,400 with us and we have received the same. This document is the receipt therefor:"

Held, that the sum was a deposit and was hence payable only on demand and that Article 60 of Schedule II of the Limitation Act applied.

Appeal against the decree and judgment of the Additional Sub-Judge, Madura, in A. S. No. 265 of 1908, dated 18th December 1908, confirming that of the District Munsif of Manamadura, in O. S. No. 87 of 1907, 26th November 1907.

Plaintiff paid to the 1st defendant's father and 2nd defendant a sum of Rs. 1,400 under the following receipt. "Receipt dated 11th May 1894 given to M. Rajaram

THANGASWAMI THEVAN *v.* RAJARAM NAIDU.

Naidu by us two persons..... At the request of Marutha Servaigarar and his son Maruthaviram Servai, who are the defendants in the decree which was transferred from the Court of the District Munsif, Tirumanagalam, to the file of the Manamadura Court, Annamalai Chettiar obtained the transfer and on the understanding that this day Rs. 1,400 should be paid to Annamalai Chettiar, it was asked that the usufructuary registered mortgage deeds which had been executed by Marutha Servagarar, the 1st defendant, in the said suit for Rs. 1,100 to P. N. Rowther should be transferred for no consideration to Somasundaram Chettiar, son-in-law of the said Annamalai Chettiar. Accordingly Rasu Thevar has executed a private agreement. Accordingly, the defendants in the said suit, *viz.*, Maruthaservai, etc., fearing that in case of Rs. 1,400 not being paid, the aforesaid Rs. 100 would be forfeited requested you to obtain the transfer of the said decree; you have consented to it and have brought this day the amount to be paid the said Rs. 1,400 and made inquiries at the place for the said Annamalai Chetty. But as he was not there having gone to Devakotta and as it was learnt on inquiry that Karuppayya Pillay, who was the said person's *kariasthan* and Kanakkupillay, had gone out to Porvantha etc., you have deposited, as they were not in the village, the said sum of Rs. 1,400 with us and we have received the same. This document is the receipt therefor." The plaintiff sent a notice demanding the amount on 13th February 1904. On this receipt, the plaintiff brought a suit on 11th February 1907, saying that the amount was deposited on the understanding that it should be returned on demand. The defendants pleaded, *inter alia*, that the suit was barred by limitation. The District Munsif held that the amount was deposited and held:—The Article applicable to the present case is Article 60 and I think that the absence of a written stipulation in the receipt to pay back the deposit amount on demand would not take the case out of the four corners of Article 60. The demand was made by the plaintiff on the defendants on the date of his notice and the suit is within three years from that date.' He decreed the suit. There was an appeal. The Additional Sub-Judge passed the following judgment:—

"The main argument advanced in this appeal is that the suit is barred by limitation. It appears that the plaintiff proposed paying a sum of Rs. 1,400 to a certain Annamalai Chetty for the assignment of a decree. The story is that being unable to find Annamalai Chetty or his manager, the money was left with the defendants. The receipt, Exhibit A, sets forth all the transactions which led up to the proposed payment; then follows a simple acknowledgment of receipt of the money but there is no provision as to its future disposal. It appears that within a few months of the execution of Exhibit A, Annamalai Chetty himself executed the decree and, consequently, the necessity for the intended payment disappeared. It is suggested that the defendants were to pay the money to Annamalai Chettiar before he should execute the decree and that the money was received for the use of the plaintiff. The contention is that Article 62 or 65 applies. There is no doubt that if either is applicable, the suit is barred. That any such action was to be taken by defendants with the money as is now suggested was, of course, not the appellant's original case and as has been pointed out, the receipt is silent on the matter. I am unable to see how Article 65 can apply. The money must have remained with the defendants subject to any demand for return or other direction as to its disposal. Article 62 seems to apply more to cases where money is received or retained under circumstances which create an implied trust in favour of another. In the present instance, the money was placed with the defendants by plaintiff himself apparently in order to suit his own convenience. The District Munsif has held that Article 60 applied to the present case and if this be so, the suit is in time. It has been urged that in Article 60 the word deposit has a technical meaning confined to transactions between banker and customer. A decision reported as *Ishur Chunder Bahaduri* v. *Jibun Kumari Bibi* (1) is referred to in support of this position. I do not, however, read that decision to mean that Article 60 applies, only to such dealings with bankers as are commonly known as deposits. The fact that Exhibit A does not set out

(1) 16 C. 25.

any condition for payment on demand is also relied on but I do not think the absence of express words to this effect is sufficient to make Article 60 inapplicable. In the present instance, I do not know what term could more appropriately be used to describe the transaction than the word *deposit* and I think that the District Munsif was right in holding that the Article which applies is No. 60."

The 1st defendant appealed to the High Court.

Mr. *K. N. Aiya*, for the Appellant.

Mr. *N. R. K. Tatachari*, for the Plaintiff.

JUDGMENT.—The judgment of the lower Court is right. The second appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1152 OF 1912.

March 12, 1913.

Present:—Justice Sir Frederick Robertson, KT.

Babu SOHAN SINGH—PLAINTIFF—PETITIONER

versus

Bhagat LAKHUMAL—DEFENDANT RESPONDENT.

Limitation Act (IX of 1908), Sch I, Arts. 95, 97—Suit based on fraud or failure of consideration—Revision—Misapprehension of nature of the claim and pleadings.

Plaintiff sued on the allegation that 14 years before suit he purchased certain property from the defendant, that the defendant deceived him as to his title, and that some two years and nine months before suit a third person dispossessed the plaintiff claiming the property as his own. The suit was for the return of the purchase money and damages:

Held, that the suit was governed either by Article 95, or by Article 97, of the Limitation Act, and was within time.

The Chief Court will revise the orders of the lower Courts where they have misapprehended the nature of the claim, and the pleadings of the parties, and have wrongly dismissed the suit as barred by time.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the order of the District Judge, Rawalpindi, dated the 25th April 1912, confirming that of the Munsif, 1st class, Rawalpindi, dated the 23th February 1912, dismissing plaintiff's suit.

Bhagat *Govind Das*, for the Petitioner.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—This is an application for revision but it is one which must be accepted, inasmuch as it is clear that the lower Courts have misapprehended the nature of the claim, and the pleadings of the parties and have wrongly dismissed the suit on the ground that it is barred by limitation.

The allegations of the plaintiff are that in 1896 he purchased certain property from the defendant for which he paid Rs. 300, that the defendant deceived him as to his title and fraudulently led him to believe the property to belong to the defendant which it did not; and that some two years and nine months before suit a third person dispossessed the plaintiff, claiming the property as his own. That claim apparently the plaintiff himself did not think fit to contest and does not contest now. Instead of doing that, the plaintiff turns round upon the defendant, sues him for Rs. 300 actually paid for the property and for Rs. 200 damages on account of dispossession, etc. etc. The defendant admits having sold the property to the plaintiff but says that at the time when he sold the property to the plaintiff, he had a good title. He adds that the plaintiff by his own laches and stupidity and want of care has lost possession of the property and has, therefore, no right or ground for claim against the defendant. Upon these allegations, the issues between the parties simply are:—

(1) At the time of the purchase from the defendant, had the defendant a good title or if he had not, did he, in good faith and without any concealment of the facts or fraudulent intention, convey what he believed to be a good title to the plaintiff?

(2) If there was no fraud on the part of the defendant, has the plaintiff any right whatever to recover any money from him?

(3) If it is true that the plaintiff was induced by fraudulent representations on the part of the defendant deliberately made with intent to deceive, and which did in fact deceive, the plaintiff, to what relief is the plaintiff entitled?

Now it is clear that if the plaintiff can succeed, as to which I offer no opinion whatever, in proving that a sale which was made to him 14 years ago followed by

undisturbed possession for 11 or 12 years was in fact the result of fraudulent representations by the defendant which induced the plaintiff to make the purchase, which he would otherwise not have made, then the plaintiff would be entitled to a decree. It cannot, therefore, be said that the suit is barred by limitation under any of the Articles quoted by the lower Courts. It is quite clear that inasmuch as the defendant put the plaintiff into possession and the plaintiff was in full enjoyment of the property according to his own account, until within three years of the suit, that the consideration did not fail until he was dispossessed. Until that moment, the consideration held good and he had no cause of action. Consequently, upon that point of view, Article 97 would clearly apply. Also, seeing that the suit is based upon an accusation of fraud, the relief is sought on the ground of fraud and the period of limitation for that is what is laid down in Article 95. Apparently, the period of limitation is three years from the time when the fraud is discovered by the plaintiff. This the plaintiff alleges to have been at the time of his dispossession which is within three years of the suit.

I, therefore, hold that the suit is not barred by limitation as found by the lower Courts, and I accordingly return the case for decision on the merits according to law upon such issues as may be found proper and advisable with reference to the remarks made above.

Costs will be costs in the cause. Stamp on revision will be refunded.

Petition allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1368 OF 1909.
February 18, 1913.
[*Present*:—Mr. Justice Holmwood and Mr. Justice Chapman.
ANATH BANDHU SAHA AND OTHERS —DEFENDANTS—APPELLANTS
versus
BIPIN BEHARY PODDAR AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Family trade—Death of father—Inheritance by minor son—Liability of minor son for debts of trade—Liability limited to his share in assets of business.

A trade, like other property, will descend upon the members of a Hindu undivided family, and is often a valuable inheritance for the preservation of which it is essential that the family manager should be entitled to enter into trade transactions on behalf of all including the minor members of the family.

But a Hindu infant, who on the death of his father becomes entitled to an interest in a joint family business, does not necessarily become a partner in that business.

Petumdoss v. *Ram Dhone Doss*, (1848) Taylor 279 and *Lutchmanen Chetty* v. *Siva Prokasa Modeliar*, 26 C. 349; 3 C. W. N. 190, relied upon.

His liability, therefore, is not the same as that of an adult partner, but should be limited to his share in the assets of the business if any.

A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation.

Appeal from the decree of the District Judge of Jessore, dated March 23rd, 1909, reversing that of the Sub-Judge of that District, dated May 11th, 1903.

Babus *Hara Kumar Mitra* and *Satyendra Nath Mukherjee*, for the Appellants.

Babus *Dwarka Nath Chakravarti*, *Surendra Chandra Sen* and *Jadunath Kanjilal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for money. A business was started with the plaintiffs by two persons, named Prannath and Taraknath, who were cousins and members of an undivided family. Prannath died in 1899 leaving two minor sons. The surviving cousin, Taraknath, thereafter conducted the business until 1905 when the dealings with the plaintiffs came to an end. The suit was for money alleged to be due to the plaintiffs as the result of these transactions. Taraknath and the minor sons of Prannath were made defendants. The learned Sub-Judge, who tried the suit in the first instance, held that upon the death of Prannath the business started by the two cousins terminated and that the transactions which Taraknath conducted thereafter were on his own account alone. He also held that in fact nothing was due on the account and dismissed the plaintiffs' suit. The plaintiffs appealed. The learned District Judge held that the joint business did not cease upon the death of Prannath and that the transactions after Prannath's death were not upon Taraknath's own account only. They were conducted by Taraknath by way of superintendence of the joint business in which the

minor sons of Prannath had a joint interest. He further held that a sum of Rs. 2,300 odd was due to the plaintiffs on the account and gave a decree for that sum against Tarak Nath and the minor sons of Pran Nath jointly. The minor sons of Pran Nath appeal to this Court.

The first contention in appeal has been that the District Judge should have held that the minor sons were not in any way liable, the debt having been contracted after their father Pran Nath's death. We are, however, bound by the finding of the learned District Judge that the joint family business did not come to an end upon the death of the minor's father, Pran Nath, but continued to be carried on jointly under the superintendence of their cousin, Tarak Nath. A trade like other property will descend upon the the members of a Hindu undivided family and is often a valuable inheritance for the preservation of which it is essential that the family manager should be entitled to enter into trade transactions on behalf of all including the minor members of the family. The learned District Judge having held that the joint family business had continued, we must hold that the minors had an interest in it and it is not open to us to exempt them altogether from liability for debts incurred by the family manager in the course of the conduct of the business.

It remains to consider what the extent of the minor's liability should be: for while it is necessary that a minor member should be held bound by the acts of the joint manager necessary for the carrying on and consequent preservation of the family trade, this infringement of the rights of a minor to the special protection of the Court must not be carried beyond the actual necessities of each case [*Ramlal Thakursidas* v. *Lakhmichand Muniram* (1)]. A Hindu infant who, on the death of his father, becomes entitled to an interest in a joint family business does not necessarily become a partner in that business. He can only become a member of the partnership by a consentient act on the part of himself and the partners [*Petumdoss* v. *Ram Dhone Doss* (2) and *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (3)]. The liability of a minor member of the family is not, therefore, the same as that of an adult partner. In the present case, the minors were residing with their mother in the District of Jessore while the business was being conducted with the plaintiffs not by any immediate member of the family but by their father's cousin in the suburbs of Calcutta. The family is governed by the Dayabhaga system of law. We are of opinion that the liability of the minors should be limited to their share in the assets of the business if any. This has been accepted by the plaintiffs-respondents. The respondent, Tarak Nath, has attempted to enhance the liability of his minor cousins by arguing that they should be held answerable for their share of such debts of the firm as were contracted in their father's life-time. This is a new case made for the first time in this Court and it is without substance as all debts incurred during the life-time of the minor's father were barred by limitation when the plaintiffs instituted their suit.

The appellants next contend that the learned District Judge should have adopted the principle followed by the Court of first instance in dealing with the account. The period of limitation for the suit being three years, the Court of first instance looked at the accounts for those three years only and finding that the credits during those three years exceeded the debts held that nothing was due. The learned District Judge examined the accounts for several years and held that the sum credited in each of the three years prior to the suit must be treated as in discharge of outsandings due to the plaintiffs on account of previous years and not barred by limitation at the time that the credits were entered. We are of opinion that the principle adopted by the learned District Judge was correct. The plaintiffs were entitled to appropriate these payments to the discharge of prior dues then outsanding. This contention, therefore, fails.

In the form of the decree to be passed in this case, we propose to follow the case of *Joykisto Cowar* v. *Nittyanund Nundy* (4). The decree will remain unmodified so far as the respondent, Tarak Nath, (defendant No. 3), is concerned. As regards the minor appellants (defendants Nos. 1 and 2), the decree must be modified. The decree must

(1) 1 B. H. C. R. App. LI at p. LXXI.
(2) (1848) Taylor 279.
(3) 26 C. 349; 3 C. W. N. 190.

(4) 3 C. 738; 2 C. L. R. 440.

be the usual decree for an account of the partnership property and a direction that the amount due under the decree be paid out of that property. The minor appellants are entitled to the costs of this appeal.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 358 AND 359 OF 1910.

April 20, 1911.

Present:—Mr. Justice Ayling.

SRI RAJA V. N. APPA RAO BAHADUR —PLAINTIFF—PETITIONER (IN BOTH)

versus

IN PETITION NO. 358.

P. NAGANNA—DEFENDANT—RESPONDENT.

IN PETITION NO. 359.

P. GANNIAH—DEFENDANT—RESPONDENT.

Madras Estates Land Act (*I of* 1908), *ss.* 3 (10), 19, *and* 189—*Rent—Suit for private lands—Jurisdiction of Civil Court.*

A suit for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act, 1908, is cognizable by a Civil and not by a Revenue Court.

Petitions, under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the orders, dated the 19th day of April 1910, of the Subordinate Judge of Kistna at Ellore, in Small Cause Suit Nos. 139 and 140 of 1910.

Dr. *S. Swaminathan*, for the Petitioner.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—These are suits for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act, 1908; and the only question is whether they are cognizable by a Revenue or by a Civil Court. The exact scope and meaning of section 19 of the Act are not altogether free from doubt; but it appears to me that in the absence of any provision corresponding to section 134, it must be held to bar the application of section 189, under which jurisdiction is vested in the Revenue Courts.

The Subordinate Judge will restore the plaints to file and dispose of them according to law. Costs will follow the result.

Cases remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 646 OF 1912.

August 3, 1912.

Present:—Mr. Justice Chevis.

DAL SINGH—DEFENDANT—APPELLANT

versus

BAKHSHISH SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Widow's power to allow redemption of land inherited from her husband--Custom—Alienation—Reversioner's right.

A widow, who has succeeded to a life-estate under the Customary Law, is entitled to receive the mortgage money for the land held by her husband as mortgagee and to allow redemption. The redemption by the widow cannot be regarded as a voluntary alienation.

The mortgagor is not bound to see that the money paid to redeem the land is secured for the benefit of the estate or to associate the reversioners in the transaction.

Second appeal from the decree of the Additional Divisional Judge, Ambala Division, at Ludhiana, dated 4th October 1911.

Mr. *Tek Chand*, for the Appellant.

Messrs. *Nand Lal* and *Duni Chand*, for the Respondents.

JUDGMENT.--The land in dispute belonged to Nagina who mortgaged it with possession on the 24th of Septemder 1901 to Kahla Singh. Kahla Singh died, leaving two widows, *Musammat* Nihali and *Musammat* Bhagi. The two widows succeeded equally to his estate. Plaintiffs are nephews of Kahla Singh. *Musammat* Bhagi has surrendered her life interest in favour of the plaintiffs. Dal Singh, to whom the land in dispute was mortgaged by Nagina, subsequently to the mortgage in favour of Kahla Singh, redeemed half the land by payment to *Musammat* Nihali on the 2nd September 1908. The plaintiffs sue for a declaration that this redemption, which they designate as an alienation by *Musammat* Nihali, shall not affect their reversionary rights. The first Court dismissed the suit but the learned Divisional Judge on appeal has decreed the claim holding that a mortgagor is bound to see that the money paid to redeem the land is secured for the benefit of the estate and that it is his duty to associate the reversioners in the transaction and that a discharge by the widow, acting independently of the reversioners, is not a legal quittance. Against this order, Dal Singh has presented a petition to this

Court. The case has been admitted as an appeal under section 70 (1) (*b*).

I am totally unable to agree with the learned Divisional Judge. The widow holds the estate for the time being. She is the present owner of the estate although her rights as regards alienation are even less than those of a male owner and although her ownership is limited to a life-tenure, so that she cannot pass on the succession to her own heirs. The customary rule is that a widow can alienate only for necessity, but when a mortgagor or puisne mortgagee claims to redeem land held by the widow as mortgagee, the widow is unable to resist the claim. I am, therefore, quite unable to see how the redemption can be regarded as a voluntary alienation. For the plaintiffs-respondents, it is urged before me that Dal Singh was bound to satisfy himself that the money actually passed to the estate. My answer to this is that when the money was paid to the widow, who was the holder of the estate, it became an accretion to the estate in her hands. It is true that when the Divisional Judge called on her to pay the money into Court, she did not comply with the order and stated that she had spent the money. I fail to see what authority the Divisional Judge had to order the money to be paid into Court. I also fail to see that it was any part of the duty of the puisne mortgagee, when redeeming from the prior mortgagee, to take any steps to satisfy himself that *Musammat* Nihali would apply the money to the benefit of the estate. In fact, Dal Singh had no right whatever to demand from Nihali any security as regards the future use to which she might put the money. Had he required any such security, she would presumably have answered that if he wished to redeem his duty was simply to pay her the money and not to impose upon her any conditions as to the use which she might subsequently make thereof. She would have entirely been within her rights in making such a reply. As to Dal Singh associating the reversioners with himself in the transaction, I note that it was purely a transaction between Dal Singh and *Musammat* Nihali into which Dal Singh had no power to introduce any third party; *Musammat* Nihali for the time being was the sole owner of the estate.

It is also pleaded on behalf of the plaintiffs that Dal Singh had no right to effect redemption piece-meal. The answer to this is that the mortgage had become split up between the two widows. The plaintiffs' Counsel urges that there has been no partition of the land between the two widows. This may be correct, but even though the land itself has not been divided by metes and bounds, still the fact remains that the mortgage has been split up. Then it is urged on plaintiffs' behalf that as the mortgage in favour of Kahla Singh was for the period of ten years, *Musammat* Nihali had no right to allow redemption before the period of ten years had elapsed. Now if Nihali had died or re-married before the period of 10 years had elapsed, this plea would, I think, have had considerable force, but the said period of ten years has now elapsed and *Musammat* Nihali is still alive and has not re-married. I fail, therefore, to see that the plaintiffs are in any worse position now than that in which they would have been had Nihali kept Dal Singh waiting till the end of the ten years.

I accept the appeal and reversing the decree of the learned Divisional Judge, I restore the order of the first Court dismissing the suit. The plaintiffs will pay costs in all Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1667 AND 2173 OF 1910.

February 17, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

BABURAM BAG AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MADHAB CHANDRA PALLAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Notice—Transferee without notice of previous transfer or lease—Tenant's right—Occupation of property by tenant—No inquiry of tenant made by intending transferee—Notice of tenant's rights—Specific Relief Act (I of 1877), s. 27 cl. (b)—Agreement—Specific perfromance.

The occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses

to make no inquiry of the tenant, he cannot claim to be a transferee without notice.

A property was leased on March 2, 1901, to defendant No. 1 for seven years. On May 1, 1901, the lessors entered into an agreement with the lessees for renewal under certain conditions on the determination of the term of seven years mentioned in the lease. On July 11, 1906, the lessors purported to settle the property with the plaintiff for seven years from May 1, 1908. The plaintiff sought to recover possession of the property on the ground that the lease of March 2, 1901, had come to an end:

Held, that the agreement of May 1, 1901, was one which could be specifically enforced against the plaintiff who, though a transferee for value had not paid money without notice of the original contract within the meaning of section 27 clause (*b*) of the Specific Relief Act, 1877, and that, therefore, the plaintiff was not entitled to possession.

Appeals from the decree of the District Judge of 24 Pergunnahs, dated March 11th, 1910, modifying that of the Second Sub-Judge of that District, dated June 22nd, 1909.

In S. A. No. 1667.

Babus *Ram Chandra Majumdar* and *Atul Chandra Dutt*, for the Appellants.

Dr. *Rash Behary Ghose*, Babus *Amarendra Nath Bose*, *Probodh Chandra Roy* and *Hari Charan Ganguly*, for the Respondents.

In S. A. No. 2173.

Babus *Mohendra Nath Roy* and *Amarendra Nath Bose*, for the Appellants.

Babus *Ram Chandra Majumdar*, *Atul Chandra Dutt*, *Probodh Chandra Roy* and *Hari Charan Ganguly*, for the Respondents.

JUDGMENT.

In S. A. No. 1667 of 1910.

This special appeal arises out of a suit brought to recover possession of certain *Julkar* rights. This *Julkar* had been leased on the 2nd of March 1901 to the first defendant for a period of seven years. On the 1st of May 1901, the lessors entered into an agreement with the lessees for renewal under certain conditions, on the determination of this term. On the 11th of July 1906, the lessors purported to settle the *Julkar* with the plaintiffs for a term of seven years from the 1st of May 1908, and we are told that the plaintiffs in return of this paid a sum of Rs. 600. The plaintiffs now seek to recover possession of these *Julkar* rights on the ground that the lease of the 2nd of March 1901 in favour of defendant No. 1 has come to an end. In the Court of the Sub-Judge, a decree for possession was passed but on appeal it was reversed and as against the tenant defendant the suit was dismissed with costs. The plaintiffs appeal from this decree.

The position then is this; the plaintiffs never having obtained possession seek to eject the tenant defendant on the ground that his lease has determined.

The answer made by the tenant defendant is that though the lease of the 2nd of March 1901 may have come to an end, still he, the defendant, is in possession of the land and he holds it under agreement of the 1st of May 1901

The first question, therefore, we have to consider is, whether the agreement of 1901 is an agreement which can be specifically enforced. It is not suggested before us that it is incapable of enforcement against the lessors; all that can be argued is that the plaintiffs are persons against whom it cannot be enforced. Section 27 of the Specific Relief Act provides that "Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—(*a*) either party thereto; (*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract." The plaintiffs come within the description of any other person claiming under a party by a title arising subsequently to the contract of the 1st of May 1901 so that *prima facie* the contract can be specifically enforced against the plaintiffs. Do the plaintiffs bring themselves within the exception, that is to say, have they shown that they are transferees for value who have paid their money in good faith and without notice of the original contract? It is shown that they are transferees for value who have paid money. But can it be said that they did it without notice of the original contract? In determining that, we must have regard to the fact that the tenant defendant was, and has throughout remained, in possession and occupation. But the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice. The plaintiffs, therefore, are unable to predicate of themselves that they are persons who claim without notice of the contract of the 1st of May 1901.

That contract, therefore, is capable of specific performance against the plaintiffs and it furnishes a complete answer to their claim for possession.

The only question then is, whether it can fairly be said that the plaintiffs have been taken by surprise. It is quite true that the contract of 1st May 1901 is not specifically mentioned in the written statement; but it is equally true that the tenant defendant did plead the relationship of landlord and tenant and this was referable to that contract. Further than that, we have the fact that this particular agreement was filed prior to the trial, and I cannot read the judgment of the Munsif without feeling that the issue, though in very general terms, was settled in reference to the preceding statement in his judgment where there is an obvious allusion to this contract on which the tenant defendant now relies.

Therefore, we cannot give effect to the suggestion that the plaintiffs were taken by surprise. I accordingly think that the decree of the District Judge should be confirmed and this appeal dismissed with costs, one set payable to the tenant defendant.

IN S. A. No. 2173 OF 1910.

We dismiss this appeal with costs two sets.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 723 OF 1910.

July 17, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

TULSI RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHIB DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Son's right to separate share—Aroras.

In the Punjab, an *Arora* son has no right to compel partition during the life-time of his father or to have his share of the ancestral property separated and allotted to him.

Jowahir v. *Musammat Chandi*, 90 P. R. 1892; *Raja Ram* v. *Hansari*, 105 P. R. 1895 and *Nathe Rai* v. *Mannu Ram*, 113 P. R. 1886, followed.

Apaji Narhar Kulkarni v. *Ram Chandra Ravji*, 16 B. 29 (F. B.), relied upon.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 22nd March 1910.

Mr. *Duni Chand*, for the Appellants.

Khwajah *Zia-ud-din*, for the Respondents.

JUDGMENT.—The three plaintiffs-appellants and Jagat Ram defendant respondent are sons of Shib Das, chief defendant-respondent.

Shib Das is the son of Guran Das, deceased, and his mother *Musammat* Radhi, widow of Guran Das, is also a defendant-respondent.

The parties are *Aroras* of village Pasianwala, Tahsil Raya, District Sialkot, and in this suit, which relates to the ancestral land of the family, the plaintiffs-appellants claim a right under Hindu Law to have their share of the land separated and allotted to them.

The suit has been dismissed, both Courts finding that plaintiffs-appellants cannot take any separate share in the life-time of their father.

It is noteworthy that the suit is not for partition of any property other than agricultural land in an agricultural village. The land was held by Guran Das and on his death mutation took place in the usual way in favour of his son, Shib Das. The land, except a portion in possession of Jagat Ram, is in possession of Shib Das and appears to be his sole source of income and maintenance.

The portion in possession of Jagat Ram was not obtained by him as the result of a partition, but it was made over to Jagat Ram by way of maintenance under a compromise.

These circumstances indicate that this family, though *Arora* by caste, follow agricultural custom as regards their ancestral land and, if this is so, plaintiffs-appellants have no right to take a share in their father's life-time.

Assuming, however, that the family has not adopted agricultural custom, the plaintiffs have not been able to show that their personal law allows them to take a separate share.

In *Jowahir* v. *Musammat Chandi* (1), it was noted that in the Punjab at least, generally the *Mitakshara* doctrine of a son

(1) 90 P. R. 1892.

being born with a share is not known, nor has a son a right to compel partition.

This view was also taken in *Raja Ram* v. *Hansari*(2), and in earlier authorities, including *Nathe Rai* v. *Mannu Ram* (3), which related to *Brahmins*.

Though the High Courts are apparently not agreed as to the rule of the *Mitakshara* Law upon the point, the Bombay High Court in *Apaji Narhar Kulkarni* v. *Ram Chandra Ravji* (4) has taken a view of the law which accords with the decision of this Court.

We agree with the findings of the lower Courts, and maintaining the decree of the lower Appellate Court, we dismiss the appeal with costs.

Appeal dismissed.

(2) 105 P. R. 1895.
(3) 113 P. R. 1886.
(4) 16 B. 29 (F. B.).

MADRAS HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL No. 218 OF 1909.

February 14, 1913.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

MANNAVA ANNAPURNAMMA, LEGAL REPRESENTATIVE OF MANNAVA CHELAMARAZU—(DECEASED) LEGAL REPRESENTATIVE OF DEFENDANT No. 1—APPELLANT

versus

UPPALA AKKAYYA AND OTHERS—PLAINTIFFS NOS. 1 AND 2 AND DEFENDANT No. 2—RESPONDENTS.

Negotiable instrument—Joint promisees—Pro-note—Discharge by one of entire debt—Negotiable Instruments Act (XXVI of 1881), ss. 78, 82—Holder—Contract Act (IX of 1872), ss. 38, 45.

Per *Curiam*, (*White, C. J. dissentiente*): One of two or more payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees.

Barber Maran v. *Ramana Goundan*, 20 M. 461, followed.

Per *Sankaran Nair, J.*—English decisions are not precedents governing Indian Courts but are only referred to for the purpose of explaining Indian Statutes which are usually framed with reference to those decisions.

If the English decisions with reference to which any of the Indian Statutes are framed, are subsequently overruled, that fact ought not to affect the interpretation of the Indian Statutes.

Per *White, C. J.*—Section 38 of the Contract Act does not deal with the legal consequences of an accepted tender or offer of performance but only with the legal consequences of an offer which has been refused and hence no inference can be drawn from this section.

The 'holder' contemplated by sections 78 and 82 of the Negotiable Instruments Act of 1881 must be taken to mean all the payees jointly and not one or more of them.

Ramasawmy v. *Muniandi*, 20 M. L. J. 709; 5 Ind. Cas. 343; 7 M. L T. 253; (1910) M. W. N. 550 and *Steeds* v. *Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378, followed.

Wallace v. *Kelsall*, 7 M. and W. 264; 56 R. R. 707; 8 D. P. C. 841; 10 L. J. Ex. 12; 4 Jur. 1064, not followed.

Appeal against the decree of the District Court of Guntur, in Original Suit No. 42 of 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *T. Prakasam*, for the Respondents.

This appeal coming on for hearing the Court (Benson and Sankaran Nair, JJ.,) made the following Order of Reference to a Full Bench on 3rd October 1912.

ORDER OF REFERENCE TO A FULL BENCH.

The promissory-note, Exhibit B, was executed by the 1st defendant in favour of the two plaintiffs, described therein as minors and the 2nd defendant who was not a minor. The suit was brought by the two plaintiffs, one of whom, the 2nd plaintiff, is even now a minor. The question for decision is whether the suit is barred by limitation. It is contended on behalf of the 1st defendant that the 2nd defendant was entitled to receive the amounts due under the pro-note and give a full discharge of the entire debt without the concurrence of the two plaintiffs and time, therefore, ran against all the plaintiffs who were not accordingly entitled to any extension of time under section 7 of the Limitation Act. In support of this contention, the decision of *Barber Maran* v. *Ramana Goundan* (1) is relied upon. In that case, it was held that a payment made to one of two persons jointly entitled under a mortgage bond, who was not an agent of the other, is a valid discharge of the entire debt. That decision was followed in Second Appeal No. 1511 of 1902 and Second Appeal No. 469 of 1905. It was dissented from in *Ramaswamy* v. *Muniandy Servai* (2). In *Sheikh Ibrahim* v. *Rama Aiyar* (3), the

(1) 20 M. 461.
(2) (1910) M. W. N. 550; 5 Ind. Cas. 343; 7 M. L. T. 253; 20 M. L. J. 709.
(3) 21 M L. J. 508; 35 M. 685; (1911) 2 M. W. N. 422; 10 Ind. Cas. 874.

question was considered but not decided. We do not in this order of reference consider it necessary to refer to the cases decided by the other Courts which have been referred to in the arguments before us. The question is one of importance and considering the conflict of authorities, we refer to the Full Bench for decision the question:

"Whether one of three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees."

We may point out that no valid reason has been suggested before us for any distinction between the claims under a mortgage bond and a negotiable instrument.

Mr. *M. O. Parthasarathi Ayyangar*, with him Mr. *V. Ramesam*, for the Appellant:—*Barber Maran* v. *Ramana Goundan* (1) is correctly decided. It has been followed in Second Appeal No. 1511 of 1902 and Second Appeal No. 409 of 1905. The observation in *Ahinsa Bibi* v. *Abdul Kader Saheb* (4) is only *obiter*. I also refer to Halsbury's Laws of England, Vol. 7, section 863. The case in *Subramania Iyer* v. *Savitri Ammal* (5) is a case of partnership. The cases of *Jagat Tarini Dasi* v. *Nabagopal Chaki* (6) and *Abdul Rahman* v *Dulla Ram* (7) are all cases of rent. The case of *Ramaswamy* v. *Muniandi Servai* (2) is distinguishable. In the case of *Sheikh Ibrahim Tharagan* v. *Rama Iyer* (3), no final opinion has been expressed. I also refer to *Krishnarav Ramchandra* v. *Manaji* (8) and Mr. Shephard's article in 21 M. L. J. 55 (Journal). As regards the question of joint payees, there is authority for the position that one of them can endorse. See 7 American Cyclopædia, 1073. I also refer to section 7 of the Limitation Act.

Mr. *T. Prakasam*, for the Respondents:—I submit *Barber Maran* v. *Ramana Goundan* (1), as wrongly decided. The decision is based on the English decision of *Wallace* v. *Kelsall* (9), which has been considerably shaken by later decisions. See *Powell* v *Brodhurst* (10). The principle in *Steeds* v. *Steeds* (11) is the correct principle and is in perfect consonance with the law as laid down in the Indian Contract Act. Whatever might be the English Law, it is clear that the Indian law treats the joint obligees as tenants-in-common. I rely on the express terms of section 45 of the Indian Contract Act. See Shephard's Commentary on Indian Contract Act, 10th Edition, pp. 165, 183, 184. *Barber Maran* v. *Ramana Goundan* (1) has been rightly dissented form in *Ramaswamy* v. *Muniandi* (2), where the opinion of Mr. Justice Bhashyam Aiyangar in *Ahinsa Bibi* v. *Abdul Kadir Saheb* (4) has been followed. In *Sheikh Ibrahim Tharagan* v. *Rama Iyer* (3), the case in *Ramasawmy* v. *Muniandi* (2) has been approved though the case was decided on another point. All the other Indian High Courts have not approved *Barber Maran* v. *Ramana Goundan* (1). I refer to *Sita Ram* v. *Shridhar* (12); *Jagat Tarini Dasi* v. *Nabagopal Chaki* (6); *Husinara Begum* v. *Rahmannissa Begum* (13); *Baikunta Nath Chuckerbutty* v. *Hara Lal Pal Choudhry* (14), *Harihar Pershad* v. *Bholi Prosad* (15), *Mahomed Ishaq* v. *Sheikh Akarmul Haq* (16); *Manzur Ali* v. *Mahmud-un-Nissa* (17), *Ganga Dayal* v. *Mani Ram* (18); *Bholanand Jha* v. *Padmanand Singh* (19), *Gangadhar Sarkar* v. *Khaja Abdul Aziz Nawab Salimullah Bahadur* (20). See also Mitra on Limitation, Vol. II, pages 764, 765, where *Steeds* v. *Steeds* (11) and *Manzur Ali* v. *Mahmud-un-Nissa* (17) have been cited with approval. In *Manzur Ali* v. *Mahmud-un-Nissa* (17), the principle of *Steeds* v. *Steeds* (11) has been followed and it lays down the correct principle in stating that the presumption as regards joint obligees of a money bond is in favour of a tenancy-in-common. The

(4) 25 M. 26.
(5) 19 M. L. J. 228 at p. 229; 4 M. L. T. 354; 3 Ind. Cas. 321.
(6) 34 C. 305; 5 C. L. J. 270.
(7) 14 C. 348 at p. 350.
(8) 11 B. H. C. R. 106 at p. 110.
(9) 7 M. & W. 264; 56 R. R. 707; 8 D. P. C. 841; 10 L. J. Ex. 12; 4 Jur. 1064.
(10) (1901) 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501.
(11) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.
(12) 27 B. 292 at p. 293; 5 Bom. L. R. 91.
(13) 38 C. 342; 13 C. L. J. 3; 8 Ind. Cas. 837.
(14) 13 C. L. J. 234 at p. 236; 9 Ind. Cas. 116.
(15) 6 C. L. J. 383 at p. 384
(16) 6 C. L. J. 558 at pp. 567, 568; 12 C. W. N. 84.
(17) 25 A. 155; A. W. N. (1902) 216.
(18) 31 A. 156 at p. 160; 6 A. L. J. 62; 1 Ind. Cas. 824.
(19) 6 C. W. N. 348.
(20) 14 C. W. N. 128 at p. 131; 11 C. L. J. 34; 2 Ind. Cas. 77.

argument based on section 38 of the Indian Contract Act is sufficiently met by the decision in *Ramasawmy* v. *Muniandi* (2). The passage in Halsbury only shows that if the debt is joint, one of them can give valid discharge. But it has no application to the Indian law where the principle of jointness of the right which is the whole foundation of the rule at law has not been accepted and where the joint obligees take several interests under section 45 of the Indian Contract Act. I also refer to *Smith* v. *Sibthorpe* (21), *Vickers* v *Cowell* (22), *Morley* v. *Bird* (23). As regards the particular question before the Full Bench, the provisions of the Negotiable Instruments Act make it clear that one of the joint payees cannot give a valid discharge. See sections 78 and 82. Payment must be made to all the holders and all the holders jointly must give a valid discharge. Section 51 of the Negotiable Instruments Act is very clear in that it requires that all the several joint payees should negotiate the instrument. If all of them should negotiate, it follows that one of them alone cannot give a discharge as the law contemplates that they should all jointly act. The passage relied on in American Cyclopædia is not supported by the authorities on which it relies. One of the cases on which it relies is *Delano* v. *Jacoby* (24). The decision in that case was based on Civil Code, section 1475 and *Lyman* v. *Gedney* (25), which does not touch the point at all. The other cases which the passage cites are in support of *Bruce* v. *Bonney* (26) and *Frost* v. *Martin* (27), which do not decide the question at all. I also rely on the language of section 7 of the new Limitation Act, which clearly indicates the policy of the Indian law in treating joint obligees as tenants-in-common.

This appeal coming on for hearing, upon perusing the Order of Reference to a Full Bench, the Court expressed the following opinion on 13th December 1912.

OPINION.

WHITE, C. J.—The question raised in the Order of Reference was considered by this Court in the judgment to which I was a party in the case of *Ramasawmy* v. *Muniandi* (8). I adhere to the view expressed in that judgment. Section 38 of the Contract Act provides that, where the promisor has made an offer of performance and the offer has been refused, the promisor is not responsible for non-performance. The last paragraph of the section provides that an offer to one of several joint-promisees has the same legal consequences as an offer to all of them. It provides in effect that all the joint promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt, the last paragraph of the section is general and is not restricted to an offer which has not been accepted, but apparently the Legislature were not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which has been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication that the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. On the other hand, as it seems to me now, section 45, which deals with the devolution of rights, where a person has made a promise to two or more persons "jointly," throws very little, if any, light on the question we have to decide. The section prescribes the way in which the rights are to devolve, but says nothing as to how these rights are effected by a transaction between the promisor and one of the promisees. For the purpose of prescribing the way in which the rights are to devolve, it, of course, assumes that these rights exist, but that is all. I do not think that much assistance can be derived from a consideration of the provisions of analogous section of the Contract Act. If reliance can be placed on the provisions of section

(21) (1887) 34 Ch. D. 732; 56 L. J. Ch. 593; 56 L. T. 562; 35 W. R. 646.
(22) 1 Beav. 529; 48 E. R. 1046; 3 Jur. 864; 8 L. J. Ch. 371.
(23) (1798) 3 Ves. 628 at p. 631; 4 R.R. 106; 30 Eng Rep. 1192.
(24) 31 Am. State Rep. 201; 96 Cali. 275.
(25) 55 Am. Rep. 871; 114 Ill. 388.
(26) 71 Am. Dec. 739; 12 Gray 107.
(27) 59 Am. Dec. 353; 26 New Hampshire 422.

165, that a delivery to one of several joint bailees is good as against all in support of the contention that our answer to the question should be in the affirmative, reliance can equally be placed on the provisions of section 44 that a release by one of several joint promisees does not discharge the others, in support of the contention that our answer should be in the negative; and the maxim *expressio unius est exclusio alterius* applies with equal force to any argument founded on either section. If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law and to see whether the rule of law, as laid down in *Wallace* v. *Kelsall* (9), applies or whether the rule or rather the presumption of equity on which *Steeds* v. *Steeds* (11) was decided is to prevail.

I think the equitable presumption applies, and I do not think this presumption is negatived by the provisions of the Contract Act or rebutted by the facts stated in the order of reference.

As regards sections 78 and 82 of the Negotiable Instruments Act, 1881, it seems to me that for the purposes of the question we have to decide, the "holder" of the instrument must be taken to be the three payees, and not one or two of them. I would answer the question which has been referred to us in the negative.

SANKARAN NAIR, J.—A pro-note was executed by the 1st defendant in favour of the two plaintiffs who were minors and the 2nd defendant who was not a minor. The suit was brought by the two plaintiffs more than three years after the promissory-note became payable. The question for decision is whether the suit is barred.

It was admitted in argument before the Divisional Bench that section 7 of the Limitation Act did not apply to the case, because under the rulings of this Court, it applies only where there is a sole plaintiff or where all the claimants were minors at the time the cause of action arose. Here the second defendant was admittedly not a minor and, therefore, that section does not apply. See *Seshan* v. *Rajagopala* (28), *Vigneswara Sastrulu* v. *Bapayya* (29) and *Periasami* v. *Krishna Ayyan* (30). But it was argued that under section 8 of the Limitation Act of 1877 (section 7 of Act IX of 1908), time ran against all the plaintiffs as the second defendant was competent to give a discharge for the satisfaction of the joint claim of himself and the plaintiffs without the concurrence of those two creditors and that, therefore, the suit was barred against these plaintiffs. There is a conflict of decisions on this point, and the question whether the second defendant was entitled to give a valid discharge of the entire debt without the concurrence of the two plaintiffs was accordingly referred to the Full Bench for decision. It is conceded that if the case of *Barber Maran* v. *Ramana Goundan* (1) is rightly decided, then the plaintiff's claim is barred. In that case, it was held that a payment made to one of two persons jointly entitled under a mortgage bond, who was not an agent of the other, is a valid discharge of the entire debt and the decision in *Wallace* v. *Kelsall* (9) and section 38 of the Indian Contract Act were referred to in support of that conclusion. The decision of *Wallace* v. *Kelsall* (9) was based upon two grounds. The first was that if after payment of the debt to one of the payees, the others died and the only person surviving was the person who received the money, he could not have sued for the debt. The second ground was that if the payee who received the debt was barred, he could not be allowed to recover by joining the others in an action to undo his own act. Let us see how far the arguments apply to the case before us. The first ground obviously does not apply because under section 45 of the Contract Act, unless the contrary intention appears from the contract, the right to claim performance from the defendant rests, as between him and the payees, with them during their joint lives, and, after the death of any one of them, with the representative of such deceased person joint with the survivor or survivors, *i.e.*, if both the plaintiffs die, the right to claim the money does not survive solely to the benefit of the second defendant, but survives to the benefit of the second defendant and the representatives of the two plaintiffs. The first ground, therefore, has no application.

(28) 13 M. 236.
(29) 16 M. 436; 3 M. L. J. 216.
(30) 25 M. 431; 12 M. L. J. 166 (F. B.).

We have to consider whether the second ground applies. If the plaintiffs Nos. 1 and 2 are now entitled to recover their shares of the debt from the first defendant, then the second ground would not apply. If they are entitled to bring the suit against the first defendant to recover the entire debt on behalf of themselves and of the second defendant and for their joint benefit, and not their share only, then it is clear that the second ground would apply.

Now, it appears to me that under section 45 of the Contract Act, they are all bound to sue to recover the entire debt or, if any one of them refuses to join as plaintiff, he is to be made a defendant and the suit must be for the recovery of the entire debt. The section distinctly states that it is a joint claim and they must sue jointly. This is made clear also in the case of promissory-notes by sections 78 and 82 of the Negotiable Instruments Act. Section 78 prescribes that the debt should be paid to the holder of the promissory note and section 82, to the holder thereof to all the payees. I am, therefore, unable to agree with the decisions which hold that in India each payee must be considered to be entitled to bring a separate suit for the recovery of his own share.

Section 38 of the Contract Act also supports the same view. It says that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them;" and under the first clause, the promisor is not responsible for non-performance if his offer has not been accepted. It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment, therefore, must be treated as a complete discharge. The decision that one co-heir cannot give a discharge for the claim of the others does not apply to this case.

It is said that the authority of *Wallace* v. *Kelsall* (9) has been considerably shaken by later English decisions. It is unnecessary to inquire whether this is so or not as English decisions are not precedents which govern us, but are only referred to for the purpose of finding out the principle underlying those decisions and to explain the Indian Statutes which are usually framed with reference to those decisions. The cases cited are later than the Contract Act. It has also to be remembered that, while the English law as laid down in *Wallace* v. *Kelsall* (9) allowed one creditor to give a valid discharge, it did not generally allow him to sue alone. But the Roman Law and those Continental Systems, which followed it, allowed one creditor to sue alone for the *entire* debt. See Evans Pothier, I, s. 144, II, s. 55. The Contract Act, therefore, in allowing payment to be made to one creditor was in strict accordance with the Roman and the English law as then understood.

I am, therefore, of opinion that if payment of the debt had been made to the second defendant, he was entitled to receive such payment and it would be a valid discharge as against the plaintiffs. I answer the question in the affirmative.

SADASIVA AIYAR, J.—The short question referred to the Full Bench in this case is whether one of three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees. The learned Judges who referred this point themselves point out that no valid reason exists for any distinction between the claim under a mortgage bond and under a negotiable instrument, so far as the decision of the above question is concerned. I might go further and say that if in the case of a mortgage bond in favour of several joint mortgagees, one joint mortgagee can give a valid discharge binding on the others, the right of a joint promisee under a negotiable instrument to give such a valid discharge must stand on even a higher footing, the exigencies of trade requiring even greater protection to be given to those liable under a promissory-note than to those liable under a mortgage bond [see *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (31) and *Konethi Naicker* v. *Jutu Gopala Iyar* (32)].

(31) 30 M. 88; 1 M. L. T. 377; 16 M.L.J. 508 (F. B.).
(32) (1912) M. W. N. 984; 23 M. L. J. 417; 12 M. L. T. 367; 16 Ind. Cas. 869.

MANNAVA ANNAPURNAMMA v. UPPALA AKKAYYA.

There is the direct authority of the decision in *Barber Maran* v. *Ramana Goundan* (1) laying down the proposition that payment to one joint promisee is valid as against all the promisees. No doubt there are *obiter dicta* in *Jagat Tarani Dasi* v. *Nabagopal Chaki* (6), *Husainara Begum* v. *Rahmannessa Begum* (13), *Ahinsa Bibi* v. *Abdul Kader Saheb* (4), *Sita Ram* v. *Shridhar* (12), and *Sheik Ibrahim Tharagan* v. *Rama Iyer* (3), which express doubts about the soundness of the conclusion in *Barber Maran* v. *Ramana Goundan* (1). But in all those cases, the real question was whether the several heirs or legal representatives of a promisee themselves become joint promisees within the meaning of section 38 of the Contract Act, and it was held that they did not constitute in the eye of the law joint promisees so as to make the payment to one of them have the legal effect of payment to all. In *Ahinsa Bibi* v. *Abdul Kader Saheb* (4), itself, that learned Judge Sir V. Bhashyam Iyengar admits that there might be a distinction between payment to one of several joint promisees under the original contract and payment to one of the several heirs of a promisee under the original contract. At page 39, he says:—"It may be that when money is advanced to one by several persons jointly, each of them authorises the others by implication to act on his behalf *and a release or discharge, therefore, of the claim by one is binding upon the others.*" I think that this rule is a sound rule as it gives the requisite safety to the promisor. Supposing that the several joint promisees quarrel with one another and refuse to join in receiving the money, how is the debtor to make a tender to them jointly in order to prevent interest running or to bring them together to one place in order to put the money before all of them? Section 38 of the Contract Act seems to be clear upon the point. The argument that section 38 merely refers to an offer to one of several joint promisees and does not deal with the effect of a payment to one of several joint promisees seems to me, with the greatest respect, not to create any difficulty. Supposing that an offer to one of several joint promisees to pay the money is accepted by him, instead of being rejected by him, can the debtor who makes the offer withdraw from the offer on the ground that if he makes the payment it will not discharge him from liability to the others? What is the meaning of such an idle offer, which, when accepted, does not consummate in payment? I think that an offer with the intention of not completing it by performance cannot be called an offer at all (see clause 2 in section 38 which says that the person making the offer must be "able and willing there and then to do the whole of what he is bound by his promisee to do" and must even give the promisee an opportunity of ascertaining the promisor's said readiness). The considerations put forward in *Barber Maran* v. *Ramana Goundan* (1) and in the notes to section 84 of the Transfer of Property Act by Shephard, J., seem to me to have much cogency. [See also a critical note in 21 M. L. J. pp. 55-59 (Journal)]. *Wallace* v. *Kelsall* (9) was decided in 1340 and was good law when the Indian Contract Act was passed in 1872, the said Act following the principles of the said English decision. Section 165 of the Contract Act embodies the same principle for the protection of the obligor, *viz.*, that the bailee's delivery of goods to one joint owner out of the several joint bailors *even without the consent of the others* will release the bailee from his obligation. In fact, the debtor owing money to several joint promisees, a few of whom may die and a few of whom would be minors, would feel the greatest difficulty in discharging his obligation if he should not be allowed to make a *bona fide* payment to one of them. In the case of a mortgage, the debtor may not be in such a great difficulty because there is provision for tender through Court in the Transfer of Property Act itself. (See section 83). As Shephard, J., points out, *Wallace* v. *Kelsall* (9) was stated in *Powell* v. *Brodhurst* (10), to still remain good law and was not intended to be overruled. Anyhow, Indian Courts are bound by the Indian Contract Act and even if the authority of *Wallace* v. *Kelsall* (9) has been doubted by English Courts long after the Contract Act was passed in India, Indian Courts must, it seems to me, follow the rule of law laid down in that statute. The argument based on section 45 of the Contract Act, *viz.*, that all the joint promisees should join in claiming performance

and on sections 8, 51, 78 and 82 of the Negotiable Instruments Act which leads to the same conclusion, *viz.*, that one joint promisee alone cannot compel the promisor to perform the promise without joining the other promisees, these provisions seem to me to have little relevancy to the decision of the question why the provisions made in sections 38 and 165 of the Contract Act for the protection of the obligor, releasing him from further performance on his legally tendering (and paying as a necessary result if tender is accepted) to one of the several joint promisees, should not be given their full beneficial effect in favour of the obligor. The consideration whether it is not more equitable to treat joint promisees as joint and several promisees also seems to me to have no more force than the counteracting consideration whether it is equitable to make the debtor undergo the risk of inquiries as to the respective rights of the several promisees when he is ready to discharge the obligation in its entirety by payment to any of them, leaving them to decide their disputes among themselves. As Sir Bhashyam Iyengar, J., put it, the law laid down in section 38 of the Contract Act (and, I may add section 165 also) seems to treat each joint promisee as a partner or agent of the other joint promisees to accept tender, and, of course, payment and after tender is accepted. A payment to one should, therefore, be treated as having the legal effect of a payment to all. I would, therefore, answer the question referred to us in the affirmative.

This appeal coming on again for final hearing before Benson and Sankaran Nair, JJ., the Court delivered the following

JUDGMENT.—Following the opinion of the Full Bench, we reverse the decree of the lower Court and dismiss the suit as it is barred by limitation. The appellant is entited to his costs throughout.

Decree reversed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 593 OF 1912.

February 26, 1913.

Present:—Mr. Justice Banerji and Mr. Justice Tudball.

RAM KISHAN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAKIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Priority—Intention to keep priority alive—Presumption.

Unless there are circumstances from which an intention to abandon the prior mortgage can be gathered, it must be presumed that the mortgagee did not abandon the prior mortgage but kept it subsisting, since it is to the interest of the mortgagee to keep up his rights under the prior mortgage.

Second appeal from the decision of the District Judge of Meerut, dated the 13th of March 1912.

Dr. *S. C. Banerji*, (with him Mr. *Haribans Sahai*), for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This was a suit for sale upon a mortgage executed by one Ghisa in favour of Behari Lal, the predecessor-in-title of the appellants on January 19th, 1895. On January 20th, 1883, Ghisa executed a mortgage of a $2\frac{1}{2}$ *biswas* share in favour of Behari Lal for Rs. 453. On November 23rd, 1886, he mortgaged the same property to Bhawani Prasad and Fakir Chand for Rs. 400. This sum was paid to Behari Lal in partial discharge of his mortgage of January 20th, 1883, and a balance of Rs. 53 for principal remained due on that mortgage. Adding to this sum of Rs. 53 principal interest upto January 10th, 1895, Ghisa executed a mortgage in favour of Behari Lal for Rs. 177. In this mortgage, the same property was hypothecated as also some additional property. This is the mortgage which the plaintiffs seek to enforce. Fakir Chand, in whose favour the mortgage of November 25th, 1886, was executed, claimed priority over the plaintiff by reason of the date of his mortgage being earlier than the date of the mortgage on which the suit is based. The Court of first instance overruled his plea and decreed the plaintiffs' claim against all the defendants including Fakir Chand. On appeal by Fakir Chand, the learned District Judge modified the decree of the Court of first instance

and held that Fakir Chand had priority mainly on the ground that his mortgage was prior in date to the plaintiffs' mortgage of January 10th, 1895. We think that in so holding the learned Judge is in error. It is manifest that the mortgage of January 10th, 1895, was executed in renewal of the mortgage of January 20th, 1883, for the amount of balance due on that mortgage. In every case of this kind, we have to see what was the intention of the parties. In some cases the fact of the mortgage deed having been returned may be a circumstance which might justify a Court in holding that the intention was to abandon the prior mortgage and to supersede it by a later mortgage. But unless there are other circumstances from which an intention to abandon the prior mortgage can be gathered, since it is to the interests of the mortgagee to keep up his rights under the prior mortgage, it must be presumed that the mortgagee did not abandon the prior mortgage but kept it subsisting. In the present case, there is nothing to justify the inference that the mortgagee gave up his rights under the prior mortgage. When Fakir Chand took a mortgage of the property which was already mortgaged to the plaintiffs' predecessor, Behari Lal, he was aware that a mortgage of the amount secured by the deed of January 20th, 1883, still remained due. So that he clearly took a mortgage of the same property subject to the prior mortgage. It could not be the intention of Behari Lal, the prior mortgagee, to abandon his rights under that mortgage when after the mortgage of Fakir Chand and Bhawani Prasad the first mortgage was renewed by the mortgage of January 10th, 1895. The authority on which the learned Judge relies, when carefully read, so far from supporting his view, shows the contrary. We, therefore, allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts including fees in this Court on the higher scale. We extend the time for payment of the mortgage money for a period of four months from this date.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 4 OF 1913.
(CIVIL MISCELLANEOUS PETITION No. 149 OF 1913.)

February 4, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Wallis.

T. MAHOMED AYYAB SAHIB, RESIDING AT AMBUR, NORTH ARCOT DISTRICT—APPELLANT

versus

MESSRS. G. P. GUNNIS & Co., MERCHANTS, CARRYING ON BUSINESS AT KARACHI IN THE PRESIDENCY OF BOMBAY—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 9—Substantial compliance—Amendment of petition of petitioning creditor—When can be granted—Prejudice considered.

When there is no subsisting order of adjudication, there is no obstacle to granting leave to amend his petition to the petitioning creditor provided the amendment is made within three months from the date of the act of insolvency.

Quære:—Whether amendment could not be allowed even when there is a subsisting order of adjudication?

The omission to state the fact that the petitioning creditor is a secured creditor and the value of security is a defect which can be cured by amendment of the petition.

The act of insolvency under section 9 of the Presidency Towns Insolvency Act III of 1909 need not necessarily be verbatim in the words of that section; but it will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section and there is a substantial compliance with the requirements of that section.

Ex parte Fiddian In re, Fiddian, 9 Morrel's Bankruptcy Reports 95; 66 L. T. 203, followed.

Ex parte Coates; In re Skelton, 5 Ch. D. 979; 37 L. T. 43; 25 W. R. 800, distinguished.

Weldon v. *Neal*, 19 Q. B D. 394 at p. 395; 56 L. J. Q. B. 621; 35 W. R. 820; *In re Maund, Ex parte Maund*, (1895) 1 Q B. 194; 64 L. J. Q. B. 183; 15 R. 159; 72 L. T. 58; 43 W. R. 207 and *Ex parte Vanderlinden, In re Pogose*, 20 Ch. D. 289; 51 L. J. Ch. 760; 47 L. T. 138; 30 W. R. 930, referred to.

Appeal from the order of the Hon'ble Mr. Justice Bakewell, dated 19th December 1912, in Insolvency Jurisdiction of this Court, in Insolvency Petition No. 68 of 1912 and petition for stay of further proceedings in Insolvency Petition No. 68 of 1912, pending the disposal of O. S. Appeal No. 4 of 1913.

Mr. *D. Chamier*, instructed by Messrs *Rancontre* and *Tirumalai Pillai*, for the Appellant.

Mr. *N. Grant*, instructed by Messrs. *David Brightwell* and *Moresby*, for the Respondents.

MAHOMED AYYAB SAHIB *v.* G. P. GUNNIS & CO.

JUDGMENT.

WHITE, C. J.—This case comes before us, the appellant being one T. Mahomed Ayyab Sahib, by way of appeal from an order of Mr. Justice Bakewell, sitting in Insolvency, giving leave to the petitioning creditor to amend his petition. The petition was presented in March 1912 against four persons, of whom the appellant is one, and the petitioner alleges that the appellant and three other persons carried on business as partners under the names of T. Noordeen Sahib and Co., and T. Abdul Kareem Sahib and Co. On March 22nd, an order of adjudication was made against these four persons. This order was not served upon the appellant and no order for substituted service was applied for or made. On the 4th May, the petitioning creditor applied to the Court by motion for an order under rule 18 of the 2nd Schedule of the Insolvency Act.

That rule relates to the taking of accounts of mortgaged property and their sale. The next step in the proceedings was an application on August 22nd made by the appellant to annul the adjudication and the grounds on which he asked to have the adjudication annulled are stated in the affidavit filed in support of his application; one ground is that no notice of the adjudication had been served upon him. Another ground is that he was never a partner in either the firm of T. Noordeen Sahib and Co., or T. Abdul Kareen Sahib and Co., that he took no part in the management of the business and had no connection with the business. This application came before the learned Judge at the same time as the application made by the petitioning creditor asking for an order under rule 18 of the 2nd Schedule. As we are told, after the arguments were concluded and the Judge had taken time to consider, the learned Judge took the point that the petitioning creditors had failed to prove that there was any debt due to them upon which they were entitled to present a petition. That is how the Judge puts it in his judgment. Mr. Chamier, on behalf of the appellant, took a further point on his own behalf that the petition was bad, in that in relating the act of insolvency on which the petitioning creditor relied, there was no allegation of an intention to defeat or delay creditors. There can be no question that the petition is defective or perhaps, I should say, informal in two respects. It does not state that the petitioning creditor is a secured creditor. Section 12 (2) provides:—"If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor." Rule 21 says:—"If the petitioner is a secured creditor, he shall give full particulars of his security and value the same." I do not know whether that carries the matter any further. With regard to the statement of the debt, all that the petition says is "that at the time aforesaid (*i.e.*, at the time of the alleged act of insolvency on which the petitioning creditor relies), the insolvents were and are now indebted to your petitioners in the sum of seven lakhs and upwards for goods sold, and your petitioners are informed and believe that they are indebted to other creditors to the extent of about two *lakhs* of rupees or thereabouts." It is clear, therefore, that that statement in the petition with reference to the debts is not in accordance with the Act or rules. Mr. Justice Bakewell uses the expression "The petitioning creditor failed to prove his debt." By this I take it the learned Judge *means* he failed to prove the balance of the debt due to him after deducting the value of his security. Then the petition is also informal with regard to the statement of the act of insolvency upon which the petitioning creditor relies. Section 9 says:—"A debtor commits an act of insolvency in each of the following cases

(*a*).....
(*b*).....
(*c*).....
(*d*) if, with intent to defeat or delay his creditors,—
(*i*) he departs or remains out of British India,
(*ii*) he departs from his dwelling house

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or usual place of business or otherwise absents himself,

(*iii*) he secludes himself so as to deprive his creditors of the means of communicating with him."

The petitioning creditor relies on an act of insolvency within section 9 (*d*) (*i*) and the petitioner does not expressly allege an intent to defeat or delay creditors. I shall have to refer to the exact words of the petition and of the affidavit filed in support later on. I will content myself with saying now that having regard to the express provisions of section 9 and rule 20, it is clear that the petition is informal. As regards the omission to state the fact that the petitioning creditor is a secured creditor and the value of the security. Mr. Chamier has not seriously contended that it could not be cured by amendment, and, speaking for myself, I think that is a defect which could be cured by amendment at the time leave to amend was given. The other matter, is whether the learned Judge was right in giving leave to amend when the petitioning creditor did not ask for leave to amend. In fact his case was that no amendment was necessary. As regards the statement of the act of insolvency, it is one of greater difficulty. Mr. Chamier pressed us very strongly with the case of *Ex parte Coates, In re Skelton* (1). That was a case in which it was held by Bacon, V. C., sitting as Chief Judge in Bankruptcy, that a petition against a trader, which alleges an act of bankruptcy that he has departed from his dwelling house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditor; otherwise, the petition will be demurrable and must be dismissed; that such a defect was a matter of substance, not merely a formal defect and it could not be cured by amendment. This case came before the Registrar in the first instance who, I think, gave leave to amend. Bacon, V. C., took the view that the amendment could not be made, and his view was confirmed by Lord Justice James and Lord Justices Baggallay and Cotton, on appeal. We have also considered the case of *Ex parte Fiddian, In re Fiddian* (2), excepting in one very important particular which I shall have to refer to in a moment, and it seems to me that the present case comes nearer to *Ex parte Fiddian, In re Fiddian* (2) than it does to *Ex parte Coates, In re Skelton* (1) and for this reason. In *Ex parte Coates, In re Skelton* (1), there was a subsisting order of adjudication and the Chief Judge held that so long as there was a subsisting order of adjudication, an amendment could not be made by inserting in the petition the words "with intent to defeat or delay creditors." With regard to section 208 of the rules of 1869, which is reproduced in section 105 of the Act of 1883, the Chief Judge held that a petition, after an order of adjudication had been made, was not a proceeding within the meaning of the rule. Now, in the case before us, the order of adjudication has been set aside. It was set aside by the learned Judge before he made the order giving leave to amend, although it was all done in the same order. There is now, therefore, no subsisting order of adjudication in this case. That brings the case near to the case of *Ex parte Fiddian, In re Fiddian* (2), where leave to amend was given before the receiving order. I desire to express no opinion as to whether I should feel bound to follow the decision in *Ex parte Coates, In re Skelton* (1), if a case came before us in which the facts were the same as the facts in *Ex parte Coates, In re Skelton* (1). The case is cited in Williams on Bankruptcy under section 143 as an authority under the Act of 1883, when it came before a Divisional Court in the case of *Ex parte Fiddian, In re Fiddian* (2). It was not disapproved of, although apparently Mr. Justice Collins did not like it. But, for the reasons I have stated, I think the present case is distinguishable from *Ex parte Coates, In re Skelton* (1). I said that, in my opinion, the case came near *Ex parte Fiddian, In re Fiddian* (2) excepting one important respect. That is that the order of amendment in that case was made within three months of the act of bankruptcy upon which the petitioner relied. The order of amendment in this case was made more than three months after the date of the act of insolvency on which the petitioning creditor in this case relies; and that really is the crux of the case. Can we, in view of the well settled principle as to the

(1) (1877) 5 Ch. D. 979; 37 L. T. 43; 25 W. R. 800.
(2) 9 Morrell's Bankruptcy Rep. 95, 66 L. T. 203.

circumstances in which an amendment ought to be allowed, give the petitioning creditor, leave to amend in this case, the effect of which would be to give him rights which he would not have if he sought to file his petition in insolvency in the first instance on the date when the leave to amend was given. Lord Esher in *Weldon* v. *Neal* (3), says that "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust." I may also refer to the case of *In re Maund, Ex parte Maund* (4), which as a bankruptcy case is perhaps more in point. There it was held that the Court would not amend a bankruptcy petition by adding as petitioners, after three months had elapsed from the date of the act of bankruptcy upon which the petition was founded, creditors whose debts are other than those in respect of which the petition was presented. If the petition was bad in the form in which it originally stood, having regard to the fact that the alleged act of insolvency is now more than three months old, and the principle laid down in the decisions to which I have referred, I do not think it could, or ought to, be cured by amendment. Then the question is "was the petition bad in the first instance in that it did not comply with the requirements of section 9?" I have come to the conclusion that the petition was not bad with regard to this matter in the first instance. Although Mr. Chamier has strongly contended to the contrary, I think that, for the purposes of this question, we are entitled to take into consideration the language of the affidavit which is filed in support of the petition. The petition says that on or about the 20th March 1912, the appellant (and three other persons who the petitioner alleges are partners of the two firms) "being heavily indebted did depart from their business and residence and are secreting themselves so as to deprive their creditors of the means of communciating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." The affidavit in support of the petition alleges in paragraph (1) indebtedness of the appellant and three others. There is a further statement in paragraph 3 that on or about the 20th March 1912, these partners in the two firms, of whom the appellant is said to be one, "left Madras leaving no one in charge of their respective business and are secreting themselves for the purpose of evading their creditors." I think it is clear that the draftsman of the petition had before him the words of section 9 although he does not follow the words verbatim and adopts the word 'secreting' instead of 'secluding'. But I do not know whether that is very important for the question we have to consider. The question is, taking the petition and the affidavit together, are we able to say that there is a substantial compliance with the requirements of section 9? It is true that there is no express allegation that the act done was done with intent to defeat or delay creditors." But we have the words in the petition "secreting himself so as to deprive his creditors of the means of communicating whereby the petitioners are advised and believe that the insolvent is liable to be adjudged to have committed an act of insolvency" and we have in the affidavit the express words "for the purpose of evading their creditors." I think, the phrase "for the purpose of evading their creditors" which occurs in the affidavit may be read as a statement, in the affidavit at any rate, of an intention to defeat or delay creditors. I think *Ex parte Contes, In re Skelton* (1) on this point also is distinguishable on the facts. In *Ex parte Contes, In re Skelton* (1), it seems pretty clear, though I do not find it in the report (because the affidavit is not set out in the report), that there was no statement either

(3) (1887) 19 Q. B. D. 394 at p. 395; 56 L. J. Q. B. 621; 35 W. R. 820.

(4) (1895) 1 Q. B. 194; 64 L. J. Q. B. 183; 15 R. 159; 72 L. T. 58; 43 W. R. 207.

express or by implication of an intention to defeat or delay "either in the petition or in affidavit." The Chief Judge observes:—"No amendment of the petition can amend the affidavit upon which the adjudication has been made. That affidavit would still remain imperfect." That observation would seem to be meaningless unless it implies that the words "with intent to defeat or delay" did not occur either in the petition or in the affidavit. The present case is, I think, distinguishable at any rate upon the ground (may be on other grounds also) that in the affidavit we have words, though not the words which occur in the section, which may be taken to satisfy the requirements of the section. My view, therefore, is that the order which the learned Judge made, giving leave to amend the petition as regards the statement of the act of insolvency, was unnecessary and I think the proper course is to set that aside. The order that I would make in this case is that the order of the learned Judge giving leave to amend, be modified by setting aside so much of that order as gave leave to amend with reference to the statement of the act of insolvency, subject to this I would dismiss the appeal and make no order as to costs. As regards the question of partnership, we do not think it necessary to deal with it in this appeal. The memorandum of objections will be allowed, but we make no order as to costs. With regard to the application to stay, we make no order and no order as to costs.

WALLIS, J.—I agree and have very little to add. Section 9 clause (*ii*) makes it an act of bankruptcy if the debtor departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. The petition in this case charges that the partners did depart from their place of business and residence and that is a charge of an act of bankruptcy if it is accompanied by a charge that they did it with the intent already mentioned. But the petition goes on to say that they did "depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." It may be true that the language of this paragraph is taken from section 9 clause (*ii*) but reading it as a whole it seems to me that it does convey with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty, I quite agree that we are at liberty to look at the affidavit and after reading the petition with the affidavit, the act of insolvency is charged with sufficient certainty. The important thing in this matter seems to me is that there should be proper materials before the Court to justify the exercise of the serious jurisdiction of making an order of adjudication. For the reasons stated, I have come to the conclusion that this petition did not require any amendment in this respect. Therefore, the question whether it would be open to us to amend the petition does not really arise for decision. We have been referred to the case of *Ex parte Coates, In re Skelton* (1), which, as has been pointed out, is distinguishable from this seeing that there was nothing, apparently either in the petition or in the affidavit, to show with what intent the debtor left his place of residence. That was the decision in the first place of an eminent Judge whose experience lay very far in the past, the late Vice-Chancellor Bacon, and it seems to me that, though it was affirmed on appeal, it was treated by Lord Justice James rather as a matter of discretion and that the application refused on the ground that, to allow the amendment "would be an encouragement to slovenly procedure" rather than on the ground that the Court was incompetent to allow it on the pleadings.

I cannot help feeling some doubt as to whether Sir George Jessel would have taken the same course, having regard to his observations in the case of *Ex parte Vanderlinden, In re Pogose* (5), where the ground on which the dismissal of the petition was asked for, was the second ground of Mr. Chamier which he did not press before us *viz.*, that the petition did not state that the petitioner was a secured creditor. Sir George Jessel said:—"I am sorry, very sorry, to see this kind of thing. I thought the day had

(5) 20 Ch. D. 289; 51 L. J. Ch. 760; 47 L. T. 138; 30 W. R. 930.

passed for raising such technical objections. But I am satisfied that the Act enables us to do what is right." Now I may point out that to set aside an order of adjudication is comparatively small matter but to set aside a creditor's petition is a very serious thing indeed where there has actually been an act of insolvency. Because the effect of setting aside the petition is to render inapplicable all those safeguards which are enacted by the Insolvency Act against the frauds which so often accompany the commission of an act of insolvency. Although I feel the weight of the observations of Lord Esher in *Weldon* v. *Neal* (3) as to the inexpediency of making orders of amendment which would interfere with the rights of the parties, yet I cannot help feeling some doubt as to whether a case such as this, will not come within the last sentence in his judgment where he says that "under peculiar circumstances, the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." It is unnecessary to express any final opinion about this part of the case. It is quite sufficient to say that, in our opinion, the petition sufficiently charged an act of insolvency. I agree with the order proposed by the learned Chief Justice.

Appeal dismissed.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL NO. 46 OF 1910.
July 11, 1912.

Present:—Sir Asutosh Mookerjee, KT., Justice and Mr. Justice Beachcroft.

Sheik MUCHI OSTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

HORSMULL MARWARI—PLAINTIFF—RESPONDENT.

Burden of proof—Malicious prosecution, suit for—Plaintiff to prove his innocence—Finding in criminal case not conclusive.

In a suit for malicious prosecution, it is incumbent upon the plaintiff in the first place to prove his innocence, at least to justify the inference that the prosecution was commenced without reasonable and probable cause. The finding in the criminal case is not conclusive upon this matter in the civil suit.

Bishonath Neogy v. *Huro Gobind Neogy*, 5 W. R. 27 *Doorga Das Laha* v. *Doorga Charan Saha*, 6 W. R. Civ. Ref. 26; *Shumboo Chander* v. *Modhoo Kyburt*, 10 W. R. 56; *Ali Baksh* v. *Sheikh Samiruddin*, 12 W. R. 477; 4 B. L. R., A. C. 31; *Aghore Nath Roy* v. *Radhika Pershad*, 14 W. R 339 and *Corea* v. *Peiris*, (1909) A. C. 549; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631, relied upon.

Abrath v. *North-Eastern Railway Company*, 11 Q. B. D. 440 at p. 445; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692 and on appeal 11 App. Cas. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J P. 659 and *Cox* v. *English, Scottish and Australian Bank*, (1905) A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483, referred to.

Appeal from the decree of the Sub-Judge of Manbhum, dated September 8, 1909.

Babus *Jyoti Prosad Sarbodhikari* and *Biman Bihari Sarkar*, for the Appellants.

Babus *Mohendra Nath Roy* and *Sarat Chandra Ghose*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in an action for damages for malicious prosecution. The case for the plaintiff-respondent is that on the 19th May 1908, the second defendant (a servant of the first defendant), at the instigation of his master, lodged a false complaint at the Police Station at Purulia charging the plaintiff with murder and rioting with deadly weapons, that the plaintiff at the time was absent at Ranchi and was arrested on his arrival at Purulia and detained in Jail for three days before he was released on bail. The plaintiff asserts that the information was, maliciously and without reasonable and probable cause, given to the Police Authorities and that on the 1st August 1908, the Deputy Commissioner of Manbhum declared the charges against him to be false and ordered his release from bail. On the 11th August, the second defendant preferred a formal complaint and made a statement on oath before the Senior Deputy Magistrate at Purulia and charged the plaintiff with offences under sections 147, 148, 149 and 302, Indian Penal Code. This complaint was dismissed under section 203, Criminal Procedure Code. But the second defendant, again, at the instance and instigation of the first defendant, moved the Judicial Commissioner of Chota Nagpur; the application for further inquiry was, however, dismissed on the 23rd December 1908. On these allegations, the plaintiff claims Rs. 7,500 as damages for malicious prosecution. The claim has been resisted by both the defendants. The second defendant contends that

the allegations made by him were true in every particular, that there was a riot on the 19th May 1908, as stated by him, that the plaintiff was present on the scene of the riot with his men, and that by his order Bhuja Jolah, a servant of the first defendant, was killed on the spot. The first defendant asserts that he honestly believed the information given by the second defendant and that he helped the prosecution with funds, and was occasionally present and gave instructions to the Pleaders engaged for the prosecution, because he believed in good faith that his servant had been murdered by the order of the plaintiff. He further alleged that the story of the plaintiff that he was away at Ranchi was true: but that he had left for the place after the crime had been committed in his presence and by his order. Upon these allegations, several issues were raised of which two are material, namely, *first*, was the criminal case brought by the second defendant malicious and without reasonable and probable cause; and, *secondly*, did the first defendant instigate the second defendant to institute false charges against the plaintiff? The Subordinate Judge upon the evidence has answered both these issues in favour of the plaintiff. He has held that the plaintiff left his home at 2 o'clock in the morning of the 19th May 1908, that he came to the railway station at about 5 o'clock and left for Purulia by the train which was timed to leave the station shortly after 7 o'clock. The Subordinate Judge has further held that the statement of the second defendant that the plaintiff was present at the time of the riot and gave orders which were carried out and ultimately caused the death of Bhuja Jolah, is maliciously false and that the second defendant did this at the instance and instigation of his master (the first defendant) between whom and the plaintiff there was long standing enmity. Under these circumstances, the Subordinate Judge has decreed the suit but has allowed the plaintiff damages to the extent of Rs. 1,500 only. The defendants have now appealed to this Court, and, on their behalf, the decision of the Subordinate Judge upon the two issues mentioned has been challenged. It has been contended that the plaintiff has failed to discharge the burden which, undoubtedly, lay upon him to establish to the satisfaction of the Court that the prosecution was instituted maliciously and without reasonable and probable cause. On behalf of the respondent, this view has been controverted. But there is no cross-appeal on behalf of the plaintiff in so far as the amount of damages is concerned.

Before we proceed to deal with the evidence on the record, it is necessary to consider for a moment the elements which must be established before the plaintiff can succeed in a suit of this description. In the case of *Abrath* v. *North-Eastern Railway Company* (1), Lord Justice Bowen laid down the law on the subject in these terms: "In an action for malicious prosecution, the plaintiff has to prove, *first*, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; and, *secondly*, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the Judge, inconsistent with the existence of reasonable and probable cause; and, *lastly*, that the proceedings of which he complains were initiated in a malicious spirit; that is from an indirect and improper motive and not in furtherance of justice. All those three propositions, the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff." This statement of the law was substantially approved by the House of Lords when the case was taken on appeal before that tribunal, *Abrath* v. *North-Eastern Railway Company* (2), and subsequently by the Judicial Committee in *Cox* v. *English, Scottish, and Australian Bank* (3). There has been some discussion at the Bar as to the accuarcy of the first of the three propositions formulated by Lord Justice Bowen; and it has been suggested that, in so far as the Courts of this country are concerned, it is not necessary for the plaintiff to establish that he was innocent; but it is sufficient for him to prove that his innocence was pronounced by the tribunal before which the accusation was made. In support of this contention,

(1) (1883) 11 Q. B. D. 440 at p. 455; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

(2) (1886) 11 App. Cas. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659.

(3) (1905) App. Cas. 168; 74 L. J. P. C. 62; 92 L. T. 483.

reliance has been placed upon the decision of the Judicial Committee in the case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4). Before we consider the effect of the decision of the Judicial Committee to which our attention has been drawn, it may be pointed out that the law on the subject is stated in the following terms in the Laws of England edited by Lord Halsbury (Vol. XIX, section 1443): "To succeed in an action for malicious prosecution, the plaintiff must prove, *first*, the prosecution by the defendant of a criminal charge against the plaintiff before a tribunal into whose proceedings the Civil Courts are competent to inquire; *secondly*, that the proceedings complained of terminated in his favour, if from their nature they were capable of being so terminated; *thirdly*, that the defendant instituted or carried on such proceedings maliciously; *fourthly*, that there was an absence of reasonable and probable cause for such proceedings; *fifthly*, that the plaintiff has suffered damage; unless, indeed, the proceedings necessarily import damage to his fame or person." It will be observed that this statement of the essentials to an action for malicious prosecution does not explicitly require that the plaintiff must prove that he was innocent. But it is, in our opinion, clear upon an examination of the authorities that the plaintiff has to prove his innocence with a view to establish that the prosecution was commenced maliciously and without reasonable and probable cause. It has not been disputed on behalf of the respondent that in the investigation of this latter question, at any rate, the Court would have to determine the circumstances under which the prosecution was commenced; and in many, if not in all, instances this would involve an investigation of the question of the innocence of the plaintiff. This is well illustrated by the decision of the Judicial Committee in the case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4). In that case, the plaintiff in the suit for damages for malicious prosecution had been prosecuted on the allegation that he was present at an affray in which one of his opponents was killed and others were wounded. The Magistrate who heard the case dismissed it as against him for want of proof, and declined to commit him for trial. In the civil suit for damages for malicious prosecution, the plaintiff relied upon the judgment in the criminal case in support of his claim. The Judicial Committee observed that this was not sufficient, and added as follows:—"What evidence does he give to rebut them? He puts in the decision of the Magistrate which was neither more nor less than this, that the case is not proved against him in the opinion of the Magistrate. Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution on the bare proof (without more) of the dismissal of the charge might very injuriously affect the administration of criminal law. It was in the power of the plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence." It is clear, therefore, from the judgment of the Judicial Committee that in a case of this description, it is incumbent upon the plaintiff to prove his innocence, at least to justify the inference that the prosecution was commenced without reasonable and probable cause; and in order to enable him to establish that position satisfactorily, he was in substance to prove that he was innocent. It has not been suggested, and in view of the authorities which we shall presently mention, it cannot be suggested, that the finding in the criminal case is conclusive upon this matter in the civil suit for damages for malicious prosecution. *Bishonath Neogy* v. *Huro Gobind Neogy* (5); *Doorga Das Laha* v. *Doorga Charan Shah* (6); *Shumboo Chander Chowdry* v. *Modhoo Kyburt* (7); *Ali Buksh* v. *Sheik Simiruddin* (8) and *Aghore Nath Roy* v. *Radhika Pershad Bose* (9). The view we take is also supported by the judgment of the Judicial Committee in *Corea* v. *Peiris* (10). We now proceed to test the evidence

(4) 17 W. R. 283; 11 B. L. R. (P. C.) 321.

(5) 5 W. R. 27.
(6) 6 W. R. Civ. Ref. 26.
(7) 10 W. R. 56.
(8) 12 W. R. 477; 4 B. L. R. A. C. 31.
(9) 14 W. R. 339.
(10) (1909) App. Cas. 549; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631.

in this case from the point of view of the principles just reviewed.

The plaintiff asserts that on the 19th May 1909, he left his home at 2 o'clock in the morning in company with another person with whom he was to go to Ranchi. Here it is necessary to state that the plaintiff is the resident of a place named Dubra. About two miles towards the west of that place is Daria where the occurrence took place. On the way between the two places, there is a village known as Bamanbad. The railway station at Anara from which the plaintiff left that morning is about five miles towards the south-east of Dubra. There is also some evidence to show that it is possible to walk from Daria to Anara, a distance of about four miles across the fields, but it is also possible to go from Daria to Anara by a road which would cover about five miles. The case for the plaintiff is that he left from Daria and went directly to the railway station at Anara. In support of this story, he pledges his own oath and also relies upon a witness who, in the village of Dubra itself, gave him a piece of twig wherewith he intended to clean his teeth early in the morning on his arrival at the railway station. He also took a rope from a shopkeeper in order to enable him to raise water from a well. The shopkeeper inquired whether he would require a tub and offered to give him one, but the plaintiff informed him that he would prefer to take it from the Station Master himself. His story is that he drove in a cart from Dubra to Anara, arrived there before sunrise. He entered the station room, but it was so dark that he was not able to see the clock. He, therefore, roused the Assistant Station Master, whom he had known from before, and asked him what the time was. The Assistant Station Master was unable to tell him the time because the room was dark; but said that he had been to bed at 2 o'clock in the morning and that possibly it was about 5 o'clock. The plaintiff then took from him a tub, cleaned his teeth and had his breakfast. The train which was timed to arrive at 7 o'olock was late and the plaintiff left in it 20 minutes later. If this story is believed in all its details, the allegation of the plaintiff that he was not at the scene of the riot is conclusively proved. The story of the second defendant in that event must be deemed maliciously false, because he alleges that he saw the plaintiff on the spot and heard him give orders during the progress of the riot. We are unable, however, to believe this evidence in all its circumstantial details. At the outset, it is worthy of note that neither the cartman nor the person who is said to have accompanied the plaintiff is called to corroborate him; nor is any explanation offered for their absence. Besides this, the evidence produces the impression that it was manufactured with a view to establish a case of *alibi*. It was wholly unnecessary for the plaintiff to start from his home at 2 o'clock in the morning with a view to catch the train which was timed to leave at 7 o'clock. The distance which he had to cover was about 5 miles; whether he walked on foot or drove in a cart, the journey could not have taken him more than three hours. If, therefore, he had started at 4 o'clock, he could have reached the station amply in time to catch the train. Apart from this, his refusal to take the tub from the person who gave him the rope seems to indicate that he was anxious to have as many independent witnesses as possible to swear that he was in the neighbourhood of the railway station early on the morning of the 19th May 1909. We may further add that the object of his visit to Ranchi is not quite satisfactorily explained. It was not a business of any very special or particular importance which required his presence at Ranchi just that morning. He is himself an elderly man, 60 years old; and if his story is believed, he is a man of considerable means. Why he should undertake such an inconvenient journey at that particular time in the morning is not explained with any approach to plausibility. The position becomes worse for the plaintiff when we remember that the case at Ranchi for which he is supposed to have gone there, was not due for hearing till two days later. We have, further, the fact that the Subordinate Judge has not placed implicit reliance upon the plaintiff, and although we have not had the advantage of seeing him in the witness-box, a perusal of his deposition has not produced a particularly favourable impression upon our minds. The Subordinate Judge relies, on this part of the case, principally if not solely, upon the testimony of the Assistant Station

Master. That evidence, we do not hesitate to hold, must be pronounced unsatisfactory. The story which he narrates with an abundance of minute details, does not carry conviction. He cannot assign a good reason for remembering all the details, 18 months after the incident. He left the station on the day following the incident and went on leave. He was not present at the Police inquiry; if he had been, that might possibly have explained why he happened to remember the details after a considerable length of time. He denies in one place that he narrated the story to other people; but subsequently admits that he had spoken about it to people whose names he cannot recoilect. He alleges that on the very day the plaintiff left the station, he heard at 10 o'clock in the morning that a murder had been committed, and that the plaintiff was charged with complicity in the crime. He does not state definitely, though he makes the suggestion in one portion of his deposition, that he asserted at the time that the plaintiff was at the railway station early in the morning and could not possibly have been connected with the crime. His evidence, on the whole, does not carry conviction, and, in any view, it is not sufficient to justify an implicit reliance upon the story narrated by the plaintiff. We have finally to examine the assertion of the plaintiff that it was physically impossible for him to have been present at the riot and subsequently to have reached the Railway Station in time to catch the train. Upon this part of the case, implicit reliance must not be placed upon the accuracy of statements as to the precise time when the riot took place. One fact is established beyond all doubt, namely, that there was a riot that morning at the place alleged by the defendant and that a servant of the first defendant was killed on the spot. In the first information lodged at the Police station by the second defendant at about ten. o'clock, it was stated that the riot took place at 7 o'clock. The plaintiff asserts that if the riot did take place at 7 o'clock and if he was present on the scene at the time, it was impossible for him to be at the Railway Station in time to catch the train, which he could not anticipate would be late by 20 minutes that morning. But we are not satisfied that the riot did take place as late as 7 o'clock.

The evidence indicates that the riot took place about an hour after sunrise, that is to say, at about 6 o'clock. If the riot did take place at that hour, it would not be impossible for the plaintiff to be present at the riot and subsequently to arrive at the station in time to catch the train. Upon the question, however, whether the plaintiff was actually present at the scene of the riot and gave orders, as alleged by the second defendant, although we are not prepared to hold that the plaintiff has established that it was physically impossible for him to be present there that morning, we are also not prepared to accept the statement that the plaintiff was so prerent and issued the directions attributed to him. It is extremely improbable that a man of his age and station in life would undertake the grave risk involved in actual presence at the scene of the riot and issue orders for the murder of one of his opponents. On the other hand, it is not unlikely that the plaintiff might have been in the neighbourhood of the place and was seen by the second defendant who exaggerated the story and attributed to him orders which he never actually gave. Upon the evidence as it stands, it is impossible for us to pronounce a definte opinion as to what actually took place. But as the burden lies upon the plaintiff to prove that the prosecutian was commenced maliciously and without reasonable and probable cause, the difficulty which we feel leads us to the conclusion that the plaintiff cannot succeed in this litigation. He has wholly failed to prove to our satisfaction by his own evidence and by the evidence of witnesses he has called that he was not present at the scene of the riot as alleged by him and that the prosecution was commenced against him maliciously and without reasonable and probable cause.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged and the suit dismissed. Under the circumstances, we direct each party to pay his own costs throughout the litigation.

Appeal allowed.

BHAGVANDAS PARASHRAM *v.* BURJORJI RUSTOMJI.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 272 OF 1911.

October 24, 1912.

Present:—Mr. Justice Beaman.

BHAGVANDAS PARASHRAM—

PLAINTIFFS—APPELLANTS

versus

BURJORJI RUTTONJI BOMANJI—

DEFENDANTS—RESPONDENTS.

Wager—Wagering contract—Forward commercial contracts—Test—Proof—Pakka adatia—*Nature of agency—Principal and agent—Defence of wagering contract by client of* Pakka adatia.

Where a forward commercial contract, regular in every outward particular from first to last, is repudiated by one party on the ground that it is a wager, the Court should always incline and incline strongly to take the contract to be in reality what upon its face and form it appears to be.

It should be a matter of great difficulty, and always against the inclination of the Court, to convince it that the "apparent rectitude of the documents" is not as real as it is apparent.

A Court should not be eager to strain the judicial machinery to its utmost limits, to pry microscopically into the minds of men, to open up a hundred transactions in the hope of throwing light on one, to alarm great markets and unsettle commerce, in order that if at last this wide ranging quest succeeds, a dishonest gambler may be excused from paying what, whether legally or not, he is morally bound to pay.

A *pakka adatia* is very like an ordinary *del credere* agent. He is a commission agent and something more. He receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due dates. His peculiar feature is that he can allocate his principal's contracts to himself when it suits him to do so.

Where a *pukka adatia*, who has been compelled owing to default of his client on one side or the other either to find goods or money, seeks to recover from that defaulting client the amount he has thus been obliged to pay on his account, it becomes, on the face of it, almost impossible to say that as between him and his client any defence of wagering can succeed. When a client comes in with a large selling order and the *pukka adatia* immediately gives it out in the market to any number of different buyers, it cannot possibly be contended that not one of those buyers, any more than the sellers even, had the intention of taking delivery.

Obiter dictum.—A true wager is where two persons agree to pay and receive respectively money or money's worth, merely upon the happening or not happening of an uncertain future event, and for no other consideration whatever.

Mr. *Jinnah* (with him Mr. *Robertson*), for the Plaintiffs.

Mr. *Davar* (with him Mr. *Wadia*), for the Defendants.

JUDGMENT.—In this suit, the plaintiffs, a firm trading under the style of Bhagvandas Parashram, sue the defendant Burjorji Ruttonji Bomanji for the sum of roughly Rs. 90,000 odd on account of losses said to have been incurred by him to them in the sale and purchase of 4,000 tons of linseed.

The material facts, for the purpose of introducing the points chiefly in controversy, are that the plaintiff firm claimed to be Pukka Adatias doing business in the Bombay market on a very considerable scale. The defendant is a Parsi gentleman of twenty-nine years of age, who, according to his own statement, has never done any settled business but has frequently dabbled, as he calls it, in stocks and shares and occasionally in cotton. Until this disastrous venture of his in linseed, he never seems to have dealt in that staple. In September 1909, the defendant Burjorji won the St. Leger Sweep to the amount of a lakh-and-a-quarter and it was with the balance of this money, after paying off debts he owed at the time, that he entered the linseed market. He became acquainted with the plaintiffs' Munim, Hargopal, as far back as 1907 but it was not until after he had won this considerable sum of money in 1909 that he ever appears to have entered into commercial transactions with him. On the 30th of June 1910, the defendant, Burjorji bought 2,000 bales of fine Broach cotton forward for the March delivery 1911. At the same time, he sold 1,000 tons of linseed for the September delivery 1910. On the 6th of July, he sold 800 more tons of linseed for the same September delivery. These three contracts the defendant admits. On the 11th of July, the plaintiff contends and the defendant denies that he sold a further 2,200 tons of linseed for the September delivery. On the 30th of June or the 1st of July the defendant deposited a sum in two instalments of varying dates amounting in all to Rs. 61,000 with the plaintiff firm. This sum was to carry interest at the rate of 7 annas per cent. per mensem. The plaintiff contends that the money was deposited as margin-money in respect of the forward contracts into which the defendant had entered with the plaintiff firm for cotton and linseed on the 30th of June, 1st of July, 6th of July, and 11th of July. The defendant contends that Rs. 61,000 was a fixed deposit

BHAGVANDAS PARASHRAM *v.* BURJORJI RUSTOMJI.

with the plaintiff firm having no connection whatever with his speculative forward dealings in cotton and linseed, and he now counter-claims for that amount. The market went in the defendant's favour, so far as the forward cotton transaction was concerned, and it was settled by the plaintiff firm either on the 10th or 11th of July. The gross profit which the defendant made on that speculation would have been about Rs. 8,000 but after deduction for commission and interest on the sum paid, so many months in advance of due date, the defendant actually won some Rs. 5,000 odd on this transaction. But from the first the linseed market went against the defendant and by the 30th of September, which was the last date for giving delivery of the 4,000 tons he had sold, the market had risen so high that the loss on this transaction was somewhere about Rs. 1,50,000. The defendant has suggested in the course of his evidence here, although I do not think that it had entered into his mind before, that the plaintiff-firm closed the cotton contract without consulting him. It is interesting to note that had the defendant left the contract to be settled on due date, he would have won very nearly enough upon it to meet his loss on the linseed. However that may be, the plaintiff firm, who, as Pukka Adatias, contend that they had accepted the defendant's order to sell 4,000 tons of linseed forward for the September delivery and had in fact sold them, began to call upon the defendant as the month of September approached either to increase their margin-money or authorise them to buy ready for delivery to their buyers or to settle these forward sales by cross contracts. I shall have to say a few words upon what occurred about the end of August and until the contracts were finally settled on the 30th of September or 1st October when I deal with the evidence more in detail. The plaintiffs settled with the buyers by paying differences at the market rates of the day with the exception of 300 tons which they bought ready in the market for delivery; that is to say, the forward sales for 3,700 tons were settled by cross contracts and payment of differences to the amount which the plaintiff firm now claim from the defendant. The plaintiff firm have given the defendant credit for the amount of margin-money deposited and for the profits he made upon the 2,000 bales of Broach cotton which he bought forward for the delivery of March 1911.

[His Lordship gave his findings on facts] —I have arrived at these findings, *first*, that the plaintiffs are Pukka Adatias. Next, that the defendant sold through them 4,000 tons of linseed (of which he admits the sale of 1,800 tons) between the 30th of June and the 11th of July for delivery in September. I have also found that at the time of entering into these contracts, he deposited Rs. 61,000 as margin-money with the plaintiff firm. But for the very extraordinary rise in the linseed market, that margin-money should have been amply sufficient to cover all anticipated losses. Had it done so, we should have heard nothing more of this case. But owing to the rapid rise of the market, the defendant's losses not only swallowed up the whole of his margin-money, as well as his relatively small gains in the cotton transactions, but left him still indebted to the plaintiff firm in a very large sum. When they seek to recover this, the defendant meets the claim by a general defence that all these contracts were by way of wagering. He has said in his examination that but for the manner in which the plaintiff firm deceived him about the fixed deposit, he would have done his best to pay his losses and not fall back upon this technical defence. But he professes to have been so enraged and indignant at the manner in which he was duped and afterwards bullied by Hargopal that in the last resort he has taken the defence of wagering. Dealing with the main defence of wagering, I should like to make a few general observations. I have probably had more wagering defences to try, than any other Judge at present sitting in this Court. I am familiar with all the leading authorities and the passages which Counsel almost invariably quote from them in argument. Used as admonitions, definitions or suggestions, the commonest citations from the books break into two main divisions: (1) attempts to define what the law means by wager; (2) attempts to lay down general rules for the conduct of the inquiry when what has all the appearance of being an ordinary genuine commercial contract, is said to be a wager. The authorities are most prolific in the second part. It is possible that

Counsel engaged from time to time in this or that particular case of the kind, come to them fresh and cull liberally from them for their own purposes, without quite realizing that the Judge has heard them over and over again, from the lips of other Counsel engaged in other similar cases. It is rare indeed for a wagering defence to go through, without the Judge's attention being invited, as though to something new, striking and useful, to half a score of weightily worded and impressive dicta of eminent Judges, who have in this manner sought to afford guidance to those who come after them. Without meaning the least disparagement of these efforts, I own that, by now, I sometimes think it almost a pity, if for no other reason than that it swells the volume of argument, that so much labour and ingenuity has been spent on the Bench along this line. Many of the favourite and most famous passages are so sonorous and ample that Counsel, young Counsel especially, can hardly be expected to resist the temptation of repeating them *ore rotundo* on every possible occasion. Great Judges, who very likely sitting in appeal have but one or two at most of such cases to decide, and are, therefore, naturally anxious to expound as fully as possible what they conceive to be the true principles of all such inquiries, have generalized upon this topic with uncommon vigour. Courts are warned against trusting too readily the apparent rectitude of the documents; Courts are warned to probe the surrounding circumstances; Courts are asked to be astute in unearthing what may prove to be turpitude masquerading in the dress of probity; they are exhorted not to believe the written contracts nor the sworn testimony of the plaintiff in support of them, but to go behind and beyond in quest of the truth. And Counsel, as far as my experience, which is large, has yet gone, never tire, and never seem likely to tire, of these well rounded, sometimes a little exuberant, but always dignified and impressive periods. I have studied, analyzed, even, I fear, contributed to the total; and the result has been, as I am certain it always must be, to show that the whole collection of "familiar quotations" on this particular topic means just this and nothing more. When what appears from first to last to be a genuine commercial contract is said to be a wager, the trying Court should do the best it can to find out whether it really is so or not. That is what every Judge of first instance, trying every disputed question of fact, wishes to do. But this grave and formidable array of judicial dicta, the work of many great Judges, produces an impression that in trying a wagering defence, a Judge is faced with a very different and much more difficult task than in trying any other fact. It might indeed be thought that not only was a special attitude of mind enjoined, but virtually a special procedure. This is mainly due to the extremely elaborate diction in which many of these judicial utterances are clothed. But I say with all submission and complete confidence that this is not really so; that while a wagering defence to an ordinary forward contract is inevitably attended by certain difficulties, neither in principle nor in practice ought the trial to differ from the trial of any other legal defence. As to not being misled by the apparent rectitude of the documents, this seems to me to mean no more than this, that subject to the law of evidence, a party to a written contract may show if he can that it is not enforceable against him. As to the rest of the stock phrases, they yield, on analysis, nothing more than that a Court will have to decide on all the legal evidence available whether the repudiating party, really meant what he said or not, and whether the other party, supposing he did not mean what he said, knew that and assented to it. In other words, whether the contract sued upon was the real contract or whether an undisclosed and altogether different contract was the real contract. I may presently say a word or two upon the general spirit of all these judgments and submit with respect that the subject may perhaps advantageously be looked at in a different light. But before doing that, I own I wish some good and complete definition of a wager could be framed, or that none had been attempted. Those most in vogue, the definitions of Cockburn, C. J., of Cotton, L J., and of the acute text-book writer Anson, fit with nice exactitude about ninety per cent. of all forward speculative commercial business. Yet gains and losses in that business would probably be decreed by any English Court. A real wager, that which the law meant to repress and against which the Judges have spoken so strongly and consistently, is usually easy to recognize and ought to be easy to define,

But a definition of a wager, intended to cover everything which the law will not enforce, which fits thousands of contracts which it will enforce as well as one or two which it will not, is for its own purposes a bad definition. It is not perhaps so much the fault of the definitions as of the fact; for the truth is that a very large percentage of speculative commercial transactions are in essence as much wagers, as any book-maker's bets. But as they are a part of mercantile usage and custom, and the law merchant recognizes and approves them so long as they remain decently disguised in the right commercial dress, the Courts here take them all to be what in appearance they are, and are by no means astute to look round the corner, or pry into the minds of the parties. It is easy enough to define a wager, but where the applicability of the definition to any case or number of cases depends upon the ascertainment of a mental state, unexpressed or more often the direct opposite of what is expressed in the actual form of the agreement, the practical difficulties which beset the inquiry must always be formidable, and usually prove insurmountable. I am speaking now exclusively of cases of alleged wager which take the form of regular commercial forward buying and selling contracts. So far as the form goes, there is no wager discoverable. And if the proper formalities are observed from the beginning to the end of the transaction, it is almost impossible to say in a majority of cases, whatever the Court may suspect, that one at least of the parties, if not both, had not good honest trade intentions. Every attempt to embroider upon the definitions of wager, criteria for discriminating a genuine forward, or speculative contract from a pure wager, to be found in the case-law, has so far been defective or unsuccessful. I should suggest (if I thought that any definition were really of much use) that a true wager is where two persons agree to pay and receive respectively money or money's worth, merely upon the happening or not happening of an uncertain future event, and for no other consideration whatever. Unfortunately, even supposing that to be a valid definition, it does not remove the practical difficulty with which all Courts have to deal when a wagering defence is set up against the enforcement of a mercantile contract. For, as I have said, the form of the contract does not disclose any element of wagering at all. And it is only by getting rid of the form altogether and convincing the Court that the real contract or agreement between the parties was quite different and fulfils all the terms of the definition that a defendant can hope to succeed at all. A contract between *A.* and *B.*, dealers in cotton, may be identical from first to last in form, and, in fact, with a contract between *C.* and *D.*, a cobbler and clerk, yet the former is almost certain to be held not, while the latter may be held to be, a wager. And this shows the utter uselessness of attempts at definition, if those attempts are meant to help Courts in answering the single question of fact which, in all such cases, has to be tried.

Every Judge knows very well what he has to try and how; in each case he has a certain amount of evidence, and it is upon that evidence and the facts which it establishes that he has to say whether the parties to a forward commercial contracts were trading or gambling. No amount of generalization, no amount of definition, is really of any help. Criteria which occur to certain most eminent and learned Judges as of general applicablity and service, because they preponderate in that particular case, may be quite useless in another case. And when all is said and done, the question on each fresh trial is invariably *res integra*, was this defendant wagering? Did the plaintiff know he was wagering and accept the agreement on that basis? Were both wagering? And so on.

Passing from these comments upon definitions and criteria of wagers, to the attitude of the Courts towards such defences and the appropriate methods to be followed really as a consequence of that attitude, I think that it might be an improvement to shift the view point. Most of the judgments, to which Courts are commonly referred for guidance in these points, are strongly tinged with a moral sentiment. It can hardly be doubted reading some of the more impressive passages that their authors felt themselves to be doing a little more than coldly enunciating law, that they felt themselves to be carrying out a moral mission. Hence the energy, sometimes the vehemence, with which they exhort all Courts of Justice to be extraordinarily vigilant, extraordinarily keen on the scent of an alleged wager, wrapped up in the decent

garb of a forward contract. And as a corollary it must be supposed that all holding such views deem it a matter for congratulation when a Court is able to non-suit a plaintiff, and give a defendant relief on the ground of wagering. Regarded thus, in the light of public morality, I may be permitted to doubt, whether any such sentiments could really be justified. For reasons, possibly a little out of date, the English law set its face very sternly against enforcing wagering debts. Amongst honest men, the consequence has been not to rob these of their moral obligation, not in any way to lessen it, but rather to make them most scrupulous and exact in the payment of precisely those debts which the law will not enforce. That ought to be a clue, if no more, to the trend of public opinion; it might even suggest that restricted to the simple ethical ground, the law does not accurately reflect the common sense and the common morality of the people. But surely it ought to be plain, that when a gambler who would only too willingly take his winnings, asks the Court to absolve him from paying his losses, he is not taking any high moral ground. Nor do I see a single valid reason why Courts should be extra "astute," or spend more pains and feel more responsibility in trying to reach a conclusion which is neither salutary to public or private morals, than in any other ordinary inquiry into the facts. Rather I see many reasons to the contrary. It is not as though when Courts allow a wagering defence, they might, although condemning the individual who has benefited by it, console themselves by thinking that the decision contributed to reducing the public evil of gaming. For it does nothing of the kind; it does exactly the reverse. There is, always has been, and most certainly always will be, an immense amount of what I may call 'market gambling' all the world over. Honest people who indulge in it pay their losses, as well as collect their gains. Dishonest people take their gains, but refuse to pay their losses. It is, or ought to be, evident, that when a Court upholds them in doing so, it does an act calculated not to repress or diminish, but increase and encourage the very evil it strikes at. Nothing is more likely to stimulate gambling amongst the worst class of gamblers than to know that while there is at least a chance of being paid if they win, they will certainly not be compelled to pay if they lose. As soon as these considerations, the weight and soundness of which, I do not think, any Judge who has practical experience, or any moralist, would dispute, are fairly taken into account, it will be seen why I venture to suggest a re-consideration of much, rather hortatary than strictly legal, in the leading cases on this subject. So far from there being any need for Courts to be particularly astute or vigilant, or suspicious, or whatever term may please best, when confronted with a wagering defence, I should be inclined to say that were generalization desirable at all (in my opinion it rarely is), it might be much better expressed thus. When a forward commercial contract, regular in every outward particular from first to last, is repudiated by one party on the ground that it is a wager, the Court should always incline and incline strongly to take the contract to be in reality what upon its face and form it appears to be. It should be a matter of great difficulty, and always against the inclination of the Court, to convince it that the "apparent rectitude of the documents" is not as real as it is apparent. For why should a Court be so eager to strain the judicial machinery to its utmost limits, to pry microscopically into the minds of men, to open up a hundred transactions in the hope of throwing light on one, to alarm great markets and unsettle commerce, in order that if at last this wide ranging quest succeeds, a dishonest gambler may be excused from paying what, whether legally or not, he is morally bound to pay?

Rather might not the Courts turn to this feature of all such cases. Here is a party who admits and must admit that he has deliberately cloaked his dealings in lawful form for the sole purpose of concealing their true nature, and deceiving, (should it be desirable from his point of view to do so), the Courts of Justice. Things fall out differently, and this man comes clamouring into Court confessing his terpitude, and claiming much more than common indulgence and sympathy in the conduct of the inquiry, the result of which, he hopes, will be to show that he not only makes false documents but gambles and does not mean to pay his

losses. On what conceivable principle of law or ethics is such an one entitled to any special consideration at the hands of the Courts; or why for such an one should they work themselves up into any special heat of righteous indignation against the plaintiff, or fierce zeal of investigation, such as is suggested in all the stock passages from the cases? The defendant in fact says this to the Court:—"I very carefully and deliberately laid my plans to deceive you, should it have been to my interest to do so. It is not. I, therefore, beg you to accept my explanation, and relieve me against the ordinary legal consequences of my and the plaintiff's carefully planned imposition. I meant to deceive you whichever way things fell out, or at any rate I meant to be thoroughly dishonest from first to last. Surely so completely dishonest, such a radical rogue deserves the sympathy and full indulgence of every Court of Justice." I do not like that appeal myself, and I am always disposed and strongly disposed to turn a deaf ear to it. Another serious consideration is this, that while Courts so far are agreed to vie with each other in astuteness to unmask the small, they are content to be proportionately obtuse to the sins and shortcomings of the big, gambler. In two transactions, every single fact, the complete form, and the real intention may be identical, but in the one case the Courts turn away contemptuously from the defence of wagering, in the other they are indefatigable in trying to establish it. *A.* and *B.* are two great dealers in cotton; *C.* and *D.* are a cobbler and a carpenter. *A.* sells *B.* 500 bales of cotton in October for the March delivery; on due date the market has risen ten rupees a bale; *A.* does not want to give, nor *B.* to take delivery. *B.* sells 500 bales of cotton to *A.* at the due date price, and *A.* pays *B.* Rs. 5,000. That is trade. *C.* and *D.* do exactly the same thing in every smallest detail. That is a wager. It is presumed in the first case that *A.* and *B.* intended when the contract was made to give and take delivery. The result shows that if that was at any time part of, it was not the final predominant intention. But it saves the deal. *C* and *D.* are presumed never to have intended at any time either to give or take delivery, that condemns it. It is probably perfectly true that *C.* and *D.* were merely gambling in differences; it is as true that *A.* and *B.* were doing the same. But because *A.* and *B.* are dealers on a large scale in cotton, it becomes virtually impossible to prove in any given instance that they were wagering, or to use a more decent term 'speculating,' and intended no more than to settle by payment of differences. Each can say I was quite willing to give or take delivery. And that is usually enough. But the same is really as true of the cobbler and the carpenter, provided that the loser has margin enough to pay. A staple like cotton has its money value, and on due date the seller, if a loser, has only to call on the buyer to pay the price, add his margin-money, and deliver the goods. The buyer in turn can then sell them at once, and pocket his gains in the shape of differences. This, I believe, could always be done in a brisk market, were it actually necessary. It may be, as in this case, that the forward sellings of linseed far exceeded the supply. But that would hit genuine dealers just as much as mere gamblers. Where that happens, and it must often happen, a certain number of perfectly genuine contracts have to be settled by the payment of differences. Of course, it may be answered, no genuine dealer has any right to sell what he has not got and may never have. But the operations of large markets in large staples would not, I think, be found to conform to that very sound rule of small retail trade. And where there are goods enough in the market to go round on due date, every contract whether in essence trade or wager, could be, were it worth while, fulfilled in the manner I have described. But as a rule it is so much simpler and more convenient to settle by paying differences, that unless the buyer is badly in need of the stuff, or the seller actually has it on hand to sell and wants to sell it (though this is *ex hypothesi* unlikely if not absurd), that is the course commonly followed even between genuine dealers.

If the difficulty of making good a wagering defence is so great (and, in my opinion, ought to be so great) even in the most questionable forms of forward contracts between two persons, that difficulty is increased a hundred fold and made virtually insurmountable, where as here the defence is raised against a Pukka Adatia. As a legal entity, a Pukka Adatia was created by the

judgment of Chandavarkar, J., confirmed in appeal by Jenkins, C. J. Briefly and neglecting his one distinguishing characteristic, he is very like an ordinary *del credere* agent. But he is that and more. In the case of any broker or commission agent who is doing honest business, it may well be doubted whether a wagering defence could logically be set up against him. *A fortiori* is this so, where the party suing is a Pukka Adatia. I will not say that there might not be cases in which such a defence could be raised and could succeed. But they would be extremely rare. If, for instance, the defendant could satisfy the Court, that the plaintiff not only knew that he, the defendant, was a pure gambler, but also the party on the other side to whom he had passed on the defendant's order, then no doubt he, the Pukka Adatia, would fall within the provisions of the Bombay Gambling Act III of 1865. So also if, in exercise of his peculiar privilege, the Pukka Adatia appropriated a client's contract to himself. It might then be comparatively easy to show that he knew that his client was a pure gambler, and never meant either to give or take delivery, and a party who knowing that contracts in form either for the giving or taking of delivery must legically be held to know, and, therefore, to intend, that no actual delivery was to be given or taken under the formal contract. But in a vast majority of cases, having regard to the legal character of a Pukka Adatia, as defined in the judgments of Chandavarkar, J., and Jenkins, C. J., and adding thereto the numerous definitions of what amounts to a wagering agreement and what must be found before the Courts will allow that defence, it appears to me safe to say, generally, that a Pukka Adatia is virtually beyond the reach of that plea. This may be unfortunate, since there can be little doubt that Pukka Adatias in the Bombay market constitute themselves the channel of purely wagering agreements on a very large scale, and seem likely to be able to go on doing so with complete impunity.

But whether unfortunate or not, I think, it can easily be demonstrated that it is so. A Pukka Adatia, a creation as a legal entity as far as I know of the Bombay High Court, is a commission agent and something more. He recevies orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due date. His peculiar feature, and one which is, as far as I know, not shared by any other agent known to the law, is that he can allocate his principal's contracts to himself when it suits him to do so. Leaving that aside, it is evident that a commission agent, who receives an order from a constituent to sell 2,000 tons of any staple in the market and proceeds to sell those 2,000 tons to perhaps a hundred buyers himself guaranteeing the goods for the money and the money for the goods, is engaged in a transaction which, upon no view yet taken of any law of gambling nor under, any definition of gambling or wagering could possibly be exposed to that defence. In the present instance, the plaintiff firm have shown that they sold the whole of the defendant's 4,000 tons of linseed to various buyers numbering thirty-nine in all. None of those buyers knew who the seller was or for that matter whether any single individual was selling in the market more than the relatively small amount each himself bought. The contracts, both selling and buying, are made in the first instance as between the Pukka Adatia and his client. Thus, in form, the plaintiff was a purchaser from the defendant of the whole of the 4,000 tons, and in form it was the plaintiff who sold to these thirty-nine buyers that amount of linseed. Where these contracts are satisfactorily carried out on both sides, the Pukka Adatia is remunerated by commission at a slightly higher rate than that ordinarily paid to a common agent; and that is because he undertakes the responsibility of finding goods for the buyer and money for the seller. Where, therefore, a Pukka Adatia, who has been compelled owing to default of his client on one side or the other either to find goods or money, seeks to recover from that defaulting client the amount he has thus been obliged to pay on his account, it becomes, I think, on the face of it almost impossible to say that as between him and his client any defence of wagering could succeed. There may be very exceptional cases where the defendant could satisfy the Court that the Pukka

Adatia not only knew that he (the defendant) was merely gambling but that the client whom he found either to buy or sell with the defendant was gambling too; and if that could be satisfactorily proved, then doubtless the intermediary would be affected by the provisions of Act III of 1865 and could neither recover his commission nor any losses he had voluntarily incurred on account of his client. Such a case, I think, could only occur where the Pukka Adatia had handed over a complete order of one client to another and could be shown conclusively to have been fully aware of the intention of both those clients to do nothing more than gamble in differences. Where, however, a client comes in with a large selling order and the Pukka Adatia immediately gives it out in the market to any number of different buyers, it cannot possibly be contended that not one of those buyers, any more than the sellers, ever had the intention of taking delivery. From the evidence in this case, and to that extent I think it may be trusted, it seems that the whole of this last order for 2,200 tons was snapped up by eager bulls in the market within an hour and a half; so that it is almost out of reason even to suggest an inquiry into whether the plaintiff firm knew that all those twenty-two buyers were at that moment pure gamblers who had not the slightest wish or intention of taking delivery. As far as I can see, the plaintiff firm did not care in the least who the buyers were. The market was probably very brisk at that time and, as the result proved, buyers were having it all their own way. And from the evidence in this case I might adduce an additional reason in support of what I think is almost a self-evident conclusion for I am unable to distinguish in any single particular the ordinary business done by a reputable firm like Breul & Co. and described by Mr. Morris, from the like business done by the plaintiff firm. It is true that Breul & Co. disclaim all pretensions of being Pukka Adatias, very likely because they are not quite clear what might be involved in that character. But having regard to the transactions between the defendant and Breul & Co. immediately preceding these impugned transactions with the plaintiff firm, I confess, it appears to me, that the defendant was doing with Breul & Co. exactly what he immediately afterwards was doing with the plaintiff firm. Yet I do not suppose that any Court would be inclined to listen to a defence of wagering set up by Breul & Co.'s clients upon any such transactions if they happened to be losers thereby. Such a case indeed could hardly occur because Breul & Co., like all prudent commission agents, cover themselves amply before they put contracts of this kind through; and where a commission agent, whether Pukka Adatia or not, insists upon margin-money before putting a selling or buying order through in the market, I agree with Mr. Morris that it would be unreasonable on the part of any Court to expect him to trouble himself about what might or might not, have been passing in his client's mind at the time. All that such an agent has to do is to see that he is covered, and then to put his client's order through. If he were further to be exposed to inquisitorial examination concerning the character of his clients on either side and if he emerged from that without satisfying the Court that he knew they were honest dealers beyond any possibility of doubt and were then to be deprived of his remuneration as agent or even called upon to refund cover which he held against his own responsibilities to his other clients, the position of commission agents, however honest, would, of course, become immediately impossible. The mistake that the plaintiffs made in this matter was in not taking sufficient margin-money from the defendant. But when they found that the market had gone so far against him as to exceed the margin-money he had deposited, I think, they might have fairly compelled him to close or deposit further margin-money with them. That is, no doubt, what most business-firms would do. But the mere fact that the plaintiffs did not do this does not, in my opinion, create any solid difference between the character of the transaction between themselves and the defendant and the character of the transaction between the defendant and Breul & Co. In neither case, do I see how it is possible to ask any Court to hold that the commission agents are engaged in wagering transactions themselves or can be thought to be knowingly furthering

the wagering transactions of others.

I have not thought it necessary to go into a great deal of the evidence and the very elaborate arguments founded upon that evidence, because for the reasons I have stated the conclusion of the case seems to me to be necessitated and in reality simple. I cannot believe for a moment any part of the defendant's allegations that he was coerced into making written admissions which were substantially untrue, and at best that part of the evidence really belongs not so much to the defence of wagering as to the proof of the disputed fact whether 2,200 tons were actually sold on the 11th of July. There is, however, one point in the evidence which, I think, I ought not to pass altogether unnoticed because it certainly has a suspicious appearance. It is part of the defendant's case, and it is supported by the evidence of a witness taken on commission as well as by the notes of a local reporter who was concealed at the interview, that the plaintiff firm told the defendant that it would be a good thing to buy 300 bales at least *adalat ke karravai ke lie*, in other words, I suppose, "for the benefit of the Court." And in this connection Exhibit 4 in the case also requires to be noticed. When the defendant first went to the plaintiffs' Solicitors, the managing clerk, one Jamnadas, prepared a draft authorizing the plaintiffs to buy 250 tons of linseed on the defendant's behalf, and this is explained by the conversation reported in Exhibit 5 to be part of a deliberate scheme to give a colour of genuineness to the transaction which the plaintiffs well knew were wagering. The defendant, it may be observed, refused to sign Exhibit 4; but there can be no question that the draft was submitted to him and the plaintiffs wanted him to sign it; and I think it extremely likely that this purchase of 300 tons or so of linseed ready was made with the object of convincing the Court that the transactions of the whole 4,000 tons were genuine and not mere wagering. That would be exactly the kind of thing that a clever Marwari would be quite sure to do and with the usual result of jeopardising a case which, in every other respect, would have been almost unassailable. Still in view of the fact that the Pukka Adatias were at that time confronted with almost certain losses of over a *lakh* of rupees, while they only held margin-money to the extent of Rs. 61,000, it is no wonder that they should have set their wits to work after their customary fashion to impose upon the simplicity of the Courts of Justice. It is really the only point in the whole case out of which the defendant could make any capital at all, and it is significant that that point should have been made a free gift to him by the plaintiffs in their desire to create evidence where no evidence of that kind was really needed. Certainly had this been a transaction between the defendant and the plaintiff firm themselves, I should, in view of that little additional touch and the virtuál certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that they knew that the defendant was merely gambling, and, therefore, neither they nor he at any time had the intenton of either giving or taking delivery. But considering, as I have already said, that they immediately passed all these contracts on to numerous other purchasers, I do not think there is any room left for any such conclusion. Still I thought it as well to comment upon this characteristic feature of a Marwari case to point out that if the plaintiffs' claim were defeated, it would probably be defeated because of that silly attempt to be too clever.

I think now I have said enough to support the conclusion at which I have arrived, namely, that the defence of wagering as against the plaintiffs in this case must fail; and holding as I have done upon the other questions of fact, raised by the defendant, the result is that I must decree the plaintiffs' claim in full against the defendant with all costs, including costs reserved.

The counter-claim must be dismissed.

Suit decreed.

Attorneys for the Plaintiffs: Messrs. *Tyabji & Co.*

Attorneys for the Defendant: Messrs. *Mulla & Mulla.*

DEPUTY COMMISSIONER, FYZABAD *v.* UDIT SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 8 OF 1912.

June 19, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

DEPUTY COMMISSIONER, FYZABAD, FOR AJODHIA ESTATE—DECREE-HOLDER

versus

UDIT SINGH AND OTHERS—JUDGMENT-DEBTORS.

Oudh Rent Act (XXII of 1886), s. 61—Application for ejectment, whether an application for execution.

An application under section 61 of the Oudh Rent Act made by a landlord holding an unsatisfied decree for arrears of rent is an application for execution of the said decree.

Maharani of Dumraon v. *Buddha Kurmi*, 28 A. 131; A. W. N. (1905) 213; 2 A. L. J. 661, dissented from.

Appeal against an order of the District Judge of Gonda, dated 4th November 1911, upholding that of the Deputy Collector, Gonda, dated 19th August 1911,

The *Government Pleader*, for the Appellant.

Mr. *Wasim*, for the Respondents.

JUDGMENT.—The question involved in this appeal is one concerning the law of limitation applicable to the execution of decrees for arrears of rent, and the particular point to be decided is whether an application made under section 61 of the Oudh Rent Act by a landlord, who has obtained a decree for arrears of rent against a tenant, can be treated as an application for the execution of the decree or as a step-in-aid of execution. In the present case, a decree was passed in favour of the appellant on the 29th August 1906. An application under section 61 of the Oudh Rent Act was made by the decree holder on the 28th February 1908, and the present application for execution was made in January 1911.

Obviously, this latter application is time-barred unless the application made under section 61 in 1908 can be treated as an application for execution or as a step-in-aid of execution. The Courts below, on the authority of a ruling reported as *Maharani of Dumraon* v. *Buddha Kurmi* (1), have held that the application under section 61 is not a step-in-aid of execution and have dismissed the present application as barred by limitation: and the learned Judge of his Court, before whom this appeal came up for hearing has referred it to a Bench for consideration of the ruling just referred to.

We are unable to accept the view of the law propounded in the Allahabad ruling.

Section 61 of the Oudh Rent Act (which corresponds with section 35 of the former North-Western Provinces Rent Act XII of 1881) lays down that a landlord may by applying to the Deputy Commissioner have a tenant ejected from his holding. The application can only be made when there is outstanding against the tenant an unsatisfied decree for arrears of rent. Under sub-section (2), the Deputy Commissioner on receipt of the application has to serve a notice on the tenant informing him that he will be ejected unless he satisfies the decree within fifteen days, and under sub-section (3) it is declared that the tenant shall be ejected in default of payment within that period unless good cause is shown to the contrary.

It is plain, therefore, that section 61, while declaring the right of the landlord to apply for ejectment of a tenant in certain circumstances, provides at the same time a method by which a decree for arrears of rent can be enforced: and an application for ejectment under this section appears to be just as much an application for execution of the money decree held by the landlord as any other application which the landlord might make under the ordinary law as laid down in the Code of Civil Procedure for the same purpose, for example an application for execution by attachment and sale of the judgment-debtor's property or by arrest of his person.

The learned Judges of the Allahabad High Court say at page 133 of the report:—"The right of the landlord to eject the tenant under that section is a right supplemental to the right which he had to recover the arrears of rent. It is optional with him whether he will or will not eject his tenant who neglects to satisfy a decree for arrears of rent passed against him. In no way does an order of ejectment help the landlord to recover arrears of rent so decreed, and, therefore, the application under section 35 cannot be said to be in aid of execution of the decree for such arrears."

(1) 28 A. 131; A. W. N. (1905) 213; 2 A. L. J. 661.

We find ourselves unable to concur in these observations. An application for ejectment made under section 61, does, in our opinion, help a landlord to recover the money due to him under the decree. As the result of the application, pressure is applied to the judgment-debtor—he is called upon to pay the money or to submit, in default, to ejectment. The application assists the landlord to recover his debt just as much as an application for the arrest of his judgment-debtor would. No doubt, it is optional with the landlord to apply for ejectment: but it is difficult to see how this fact can affect the situation. It is optional with the decree-holder to resort to any of the coercive processes which the law recognises as a means of enforcing payment of money due under a decree. We agree that the right of the landlord to eject the tenant by application is supplemental to the right which he has to recover the arrears—that is to say, it is a right subsidiary to the right under the decree—a right by the exercise of which he can enforce the obligation which the decree creates in his favour. But so is the right to attach the judgment-debtor's property or to arrest his person.

We have no doubt that the effect of section 61 is to confer upon a landlord who holds a money decree for arrears of rent a right to enforce execution of his decree in a particular way—the section provides for a method of executing such decrees in addition to the ordinary methods of execution which are recognised in the Civil Procedure Code.

It has been argued that as the provisions of section 61 are to be found in a portion of the Act separate from that portion which relates to the execution of decrees, the inference is that the intention was not to treat applications under section 61 as applications for execution. We are not convinced that there is any substance in a contention of this kind. It is just as reasonable to infer that the arrangement of the Act by which all the provisions relating to the ejectment of tenants are collected together was made in the interests of convenience. And in any case we have to look at the substance rather than the form, and if section 61 does, as we hold it does, provide a method for execution for money decrees, then it does not matter that it is placed where it is in the Act instead of being grouped along with section 145 and the following sections.

Again, it has been said that by application of the provisions of section 135 of the Oudh Rent Act it follows that an application for execution of a decree for arrears of rent under the Act must take the form prescribed in Order XXI, rule 11 of the Code of Civil Procedure and the decree-holder can ask for execution only in one of the methods laid down in rule 11 (2) (*j*). Ejectment, it is said, is not one of the methods, by which a decree for money can be enforced. No doubt, this would be the case if it could be held that a person who holds a decree under the Rent Act was confined in execution to the methods which the Code of Civil Procedure recognises. But under section 135 of the Oudh Rent Act, the Code of Civil Procedure applies to all proceedings under the Rent Act only so far as its provisions are not inconsistent with the provisions of the Act and if the Act itself provides in section 61 an additional method of enforcing execution of a money decree, then it cannot be said that the decree-holder is confined to the particular methods of execution which the Code allows.

We hold that an application under section 61 of the Oudh Rent Act made by a landlord holding an unsatisfied decree for arrears of rent is an application for execution of his decree. And applying this rule to the case now before us, we are of opinion that the application for execution which is now before us is within time and was wrongly refused by the Courts below.

We allow the appeal, set aside the orders of the Courts below and direct that the application for execution filed by the appellant be entertained and disposed of according to law. The appellant to get his costs in all Courts.

Appeal allowed.

DUNI CHAND *v.* *Musammat* PADMAN.

PUNJAB CHIEF COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 646 OF 1911.
November 2, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, Mr. Justice Robertson, Mr. Justice Kensington, Mr. Justice Rattigan, Mr. Justice Chevis and Mr. Justice Beadon.

DUNI CHAND—DEFENDANT—APPELLANT
versus
Musammat PADMAN—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), *s.* 59 (1) *(a)—Succession—Occupancy rights—Formally adopted son under Hindu Law—Male lineal descendant—Appointed heir—Interpretation of statutes.*

A formally adopted son under Hindu Law is a 'male lineal descendant,' of his adoptive father within the meaning of section 59 (1) (*a*) of the Punjab Tenancy Act, XVI of 1887, and he is entitled to succeed to the occupancy holding of the latter.

A customary adoption or an appointment of an heir does not fall within this section.

Dad v. *Bhag Singh*, 34 P. R. 1883 (F. B).; *Maharaja Brij Indar Singh* v. *Bansi Lal*, 89 P. R. 1912; 230 P. W. R. 1912; 218 P. L. R. 1912; 17 Ind. Cas. 36, followed.

Lala v. *Nahar Singh*, 16 Ind. Cas. 181; 10 A.L.J. 299; 34 A. 658, referred to.

Chuni Lal v. *Imdad Ali*, 1 P. R. 1874 Rev.; *Gahya* v. *Jaswant Singh*, 69 P. R. 1879; *Fatteh Muhammad* v. *Jiwan*, 43 P. R. 1895; *Punjab Singh* v. *Sant Ram*, 22 P. R 1896 (F. B.); *Sher Singh* v. *Saya Ram Das*, 2 P. R. 1907 Rev., 5 P. W. R. 1907 Rev.; 36 P. L. R. 1907, explained and discussed.

Per *Johnstone* and *Chevis*, *JJ.*—The definition of words in an Act should never be stretched so as to cover other words.

Second appeal from the order of the Divisional Judge, Ferozepore Division, dated 1st December 1909, confirming that of the 1st class Munsif, Fazilka, dated 28th July 1909, decreeing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal* and Mr. *Harris*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondent.

ORDER OF REFERENCE.

JOHNSTONE AND CHEVIS, JJ.—(*2nd February, 1912.*)—The sole question for us in this further appeal is whether, under section 59 (1) (*a*), Punjab Tenancy Act, 1887, a formally adopted Hindu succeeds to his adoptive father's occupancy right. If this question is decided in the negative, as both the Courts below have decided it, the appeal must be simply dismissed; but if the opposite conclusion is arrived at, the case will perforce go back for decision of various questions of fact and inference from facts, such as whether the adoption ever took place and whether it amounted to a formal adoption as understood in Hindu Law, and so forth. We have heard arguments, and after much consideration, we think that the matter requires authoritative handling by a Full Bench of this Court. Two courses were open to us. We might have remanded at once for decision of the further questions indicated above, seeing that, if it should be finally found either that no adoption ever took place or that the adoption that did take place was a customary and not a formal one, it would be unecessary to decide what the effect of a formal adoption would be. But we have determined to have the question stated at the beginning of this judgment decided first, because, if it is decided, as we are inclined to think it should be, against the claims of the adopted son, the parties and the Courts will be saved the trouble and expenses of the decision of the said further questions. With this preamble, we proceed to explain our view of the matter.

The authorities we have consulted at the instance of the parties are these:—*Chuni Lal* v. *Imdad Ali* (1), *Gahya* v. *Jaswant Singh* (2), *Dad* v. *Bhag Singh* (3), under Act XXVIII of 1868; *Wir Bhan* v. *Suba*(4), *Fatteh Muhammad* v. *Jiwan* (5), *Punjab Singh* v. *Sant Ram* (6), *Sher Singh* v. *Saya Ram Das* (7), under Act XVI of 1887; and besides these authorities it is necessary to consider carefully section 5 (3) and section 59, Punjab Tenancy Act XVI of 1887, section 3 and section 36, Tenancy Act 1868, section 2 (19), General Clauses Act, I of 1868, and section 3, (18) and (53), General Clauses Act, 1897.

[The Punjab General Clauses Act, 1898, affords no assistance, for it applies only to Acts of the Local Legislature, and Act XVI of 1887 is, of course, an Imperial Act.] We will treat the case first as *res integra* and explain what our views are apart from authority.

(1) 1 P. R. 1874 Rev.
(2) 69 P. R. 1879.
(3) 34 P. R. 1883 (F. B.).
(4) 40 P R. 1894.
(5) 43 P. R. 1895 (F. B.).
(6) 22 P. R. 1896 (F. B.).
(7) 2 P. R. 1907 Rev.; 5 P. W. R. 1907 Rev.; 36 P. L. R. 1907.

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DUNI CHAND *v.* *Musammat* PADMAN.

Section 59, Act XVI of 1887, provides a special law of succession to occupancy rights. It says that when a tenant having a right of occupancy dies, the right shall devolve—

"(*a*) on his male lineal descendants, if any, in the male line of descent," and then it goes on to provide for the succession, in the absence of such descendants, of the widow and the collaterals of the deceased. This is sub-section (1). Sub-section (2) runs—

"As among descendants and collateral relatives claiming under sub-section (1), the rights shall, subject to the provisions of that sub-section, devolve as if it were land left by the deceased in the village in which the land subject to the right is situate."

So far, then, we have this that male lineal descendants in the male line of descent succeed, and if such do not exist, then the widow comes in, and if there is none, the collaterals, and that descendants or collaterals, as the case may be, take according to their ordinary law or custom applicable to succession to proprietary land. It seems to us clear that the second sub-section cannot rightly be held in any way to widen the scope of the terms "male lineal descendants" in sub-section 1 (*a*); it is only "among" the descendants designated in that clause that a rule is provided to settle disputes between them *inter se*. It follows that we have nothing to go upon but "male lineal descendants in the male line of descent," and this phrase in its dictionary meaning and in the meaning which we venture to think the ordinary educated English scholar would attach to it, is clear enough and does not include an "adopted" son, and we would deprecate any departure from the plain meaning of the term. Occupancy rights are an invasion of the bundle of rights called proprietary. *Prima facie* the owner of property has in himself all the rights possible in that property. Government, in its tenderness for certain classes of cultivators, has declared that they possess a certain portion of that totality of rights, and has attempted to define that portion both as regards the actual cultivators and as regards succession to them. We think that the landlords are entitled to insist that Government definitions shall be construed strictly, and that the portion aforesaid shall not be taken to include *more* than what the law, with absolute clearness, purports to declare or confer. But, on the strength of reference thereto in certain rulings, we have been asked to consider the effect of certain provisions of the General Clauses Acts I of 1868 and X of 1897. In the earlier Act, which was, however, wholly repealed by the later one and so cannot be used directly as providing definitions for words and phrases in Act XVI of 1887, we find at section 2 (19) the following:—

"And in the case of any one whose personal law permits adoption, 'son' shall include an adopted son and 'father' an adoptive father;"

While in Act X of 1897, we have the following sub sections under section 3:—

"(18) 'father,' in the case of any one whose personal law permits adoption, shall include an adoptive father;

"(53) 'son,' in the case of any one whose personal law permits adoption, shall include an adopted son."

The contention is that, inasmuch as the phrase "male lineal descendants" in section 59 (1) (*a*), Punjab Tenancy Act, includes and connotes sons, grandsons and so on, therefore, the sub-sections just quoted affect the meaning of the said phrase. In our opinion, this is a dangerous method of delaing with a General Clauses Act. Such acts should be interpreted with precision and strictness. There is, in our view, no ground whatever in the Act of 1897 itself for the idea that a definition in it of a definite word such as "son" is to be extended so as to cover or affect other words which are only to some extent synonymous with that word. If in the English language there were two words for "son" exactly synonymous, then perhaps it might be urged with some show of reason—though we by no means concede that the contention would or should prevail—that sub-section (53) above would apply wherever in an Act either of the two synonymous occurred; but "male lineal descendant is not a synonym for son," and we are confirmed in our view of the proper way of using this General Clauses Act by the circumstance that, where the Legislature did intend that a definition should cover something more than the *actual word* dealt with, it has been very careful to indicate its intention—*e.g.*, at section 3 (1) "abet," section 3 (52) "sign,"

section 3 (55) "swear." In short, it seems clear to us that defendant can obtain no assistance from the General Clauses Acts.

We will now turn to the old Tenancy Act of 1868 and see whether and to what extent the law of succession to occupancy rights has been altered by the Act of 1887. For our purpose, the only important sections are 3 and 36 of the earlier Act. In section 3, we find this—

"In this Act, unless there be something repugnant in the subject or context..... 'Grandfather,' includes the father of an adoptive father, 'uncle' the brother of an adoptive father, and 'grand uncle' the adoptive father of an uncle,"

and section 36 runs thus—

"When a tenant having a right of occupancy in any land dies, his rights shall devolve on his male lineal descendants (if any) and, failing such descendants, the right shall go to his male collateral relatives: provided that the common ancestor of the deceased and his said relatives shall have occupied such land.

"As among descendants and collateral relatives claiming under this section, such right shall devolve and go as if it were land left by the "deceased in the village in which such land is situate."

It is clear, then, that on the surface the only substantial change in the law has been the recognition in the later Act of the right of the widow of a sonless occupancy tenant to succeed to her husband subject to certain restrictions that need not be specified here but which may be seen in section 59 (1) (*b*) and section 59 (3) of the Act. The words "male lineal descendants" occur in both Acts, and, if we carefully study both the Acts and search for clues as to their meaning, we find that in the later Act much more than in the earlier is the idea negatived that the words include adopted son. In the earlier, as we have seen, in section 3, which governs the whole Act, and is in fact a sort of "general clauses" section for the Act, we have a sort of recognition that into certain words denoting natural relationships, the adoption ideas of Hindu Law should be read. But the Act of 1887 has no definition or explanation of a general kind corresponding to the part of section 3 of Act XXVIII of 1363 we have quoted above, and on the other hand it has a *new* sub-section in section 5, not to be found in section 5 of the older Act, which seems to us somewhat significant. That section simply defines a certain class of occupancy tenant and has nothing to do with *succession* to occupancy right; and is here alone in the Act of 1887 that we find any allusion to or recognition of the Hindu Law of adoption. The new sub-section (3) runs thus:—

"The words in that clause* denoting natural relationship denote also relationship by adoption, including therein the customary appointment of an heir and relationship by the usage of a religious community".

To us it seems fairly clear that these facts go to show that the Legislature intended to recognise adoption only with reference to what had *passed*, or in other words to concede that adoptive relationship should be put on a par with natural relationship only in connection with the original establishment under the Act of an occupancy tenancy†. We have, we conceive, nothing to do with the views held by individual members of the Council which passed the Act, or with expressions of intention or wish to be found in the record of their debates, but must confine ourselves to a strict interpretation according to the rules of interpretations of statutes of the provisions of law actually in force.

Were the matter *res integra*, we would adopt the above process of reasoning and would dismiss defendant's appeal but we are precluded from this course by reason of some of the rulings noted in the beginning of this judgment. Those cases comprise all that we need look at, and we now proceed to discuss them in chronological order.

The first three are under Act XXVIII of 1868. *Chuni Lal* v. *Imdad Ali* (1) contains the *dictum* that an adopted son does come within the phrase "male lineal descendants" used in section 36, and the opinion is based upon the second para. of the section, which, in our view, cannot be used to extend the meaning of that phrase, and upon the definitions of "grandfather" etc. in section 3. As regards the latter point, we reiterate our already expressed opinion that definitions of

*Clause (*a*) sub-section (1).

† *N. B.* The words "at the commencement of the Act" in sub-section (1) (*a*).

words in an Act should never be stretched so far as to cover other words: the phrase "male lineal descendants" is not identical with "grandfather," "uncle," "granduncle," "father" or "son".

Gahya v. *Jaswant Singh* (2) merely finds that the adoption in that case was valid and that "the adopted son under such circumstances succeeds to his adoptive father's rights". This rather begs the question, and indeed the right of a validly adopted son to succeed to occupancy rights was virtually taken for granted.

The next case, *Dad* v. *Bhag Singh* (3), is the one which leads to the present reference. It dealt with two cases, both heirs appointed under Punjab Custom, and all that the Bench really *had* to decide was whether such an heir came within the four corners of the term "male lineal descendants" as used in section 36 of the Act. The learned Bench, however, having decided this in the negative, also ruled that a formally adopted son did come within the term. We are, therefore, we venture to think, not altogether unjustified in holding that this *dictum* was merely *obiter*, but considering the importance of the question and the high authority of the four Judges—Plowden, Smyth, Elsmie, Barkley, JJ.—who sat on that Bench, we must deal with their judgments and explain why we, with all deference, are inclined to doubt the soundness of the *dictum*. We must also point out that, even if the *dictum* was sound as based on Act XXVIII of 1868, it by no means follows that a similar *dictum* based on Act XVI of 1887 would be so. We have already pointed out, and need not do so at length again, that, in our opinion, the reading of the definition of "son" and "father" into the expression "male lineal descendants" is less justifiable under the new than under the old Act.

One of the two cases came first before a Division Bench, consisting of Brandreth and Elsmie, JJ. These learned Judges, while being inclined to look upon a formally adopted son as a male lineal descendant, had grave doubts regarding an "appointed heir". They pointed out the injustice to the landlord involved in the pronouncement of 1879, that ruling virtually rendering any lapse of occupancy rights by failure of heirs impossible. The second case was referred to the Full Bench by Plowden and Elsmie, JJ., and the question for decision in each was thus stated:—

In the first case—

Whether a tenant with right of occupancy who has no power of alienation without the consent of the owner of the land, can by customary or *quasi*-adoption or appointment of an heir as distinct from a complete adoption of a son, valid by the personal law of the adopter, secure the succession of the person so appointed to the land held on a right of occupancy?

And in the second case—

Whether where it is found that by custom a Muhammadan agriculturist can make a valid appointment of an heir, the person so appointed by a tenant with a right of occupancy is a male lineal descendant of such tenant within the meaning of section 36 of the Punjab Tenancy Act?

In referring this second case to a Full Bench, no further discussion of the question now in hand was thought necessary, and the Full Bench contented itself with merely laying it down, without discussion that "male lineal descendants" includes "the sons of the tenant and the sons of such sons, without limit, and that in accordance with the provisions of Act I of 1868, where the personal law permits adoption, the word 'sons' as above used includes adopted sons. When there has merely been appointment of an heir, the person so appointed is not a male lineal descendant within the meaning of the section". The case was then sent back to the Division Bench. The second Full Bench—p. 105—dealt with a totally different question with which we are not now concerned. This *ratio decidendi*, based on Act I of 1868, we have already attempted to show is unsound.

We now come to the rulings under Act XVI of 1887. The first is *Wir Bhan* v. *Suba* (4), where Sir M. Plowden, sitting alone, who wrote the Full Bench judgment of 1883, himself expressed doubts regarding the question now before us. On the facts, he found one adoption proved, but in remarking on the legal question, he pointed out the difference between the law contained in Act XXVIII of 1868 and that enunciated in Act XVI of 1887, referred to the old General Clauses Act 1868, and section 5 (3), Act XVI of 1887, and wrote, without deciding the point, "it seems to me extremely doubtful whether

comparing the new Act with the old Act and section 59 with section 5 in the new Act, the expression 'lineal male descendants' can be extended under the new law so as to include an adopted son even in the case of a Hindu."

In the next case, *Fatteh Muhammad* v. *Jiwan* (5) the question again was merely whether an appointed heir came within the term "male lineal descendants." This was unanimously decided in the negative. Roe, S. J., also held that the Full Bench of 1883 was correct and that "there has been no real alteration of the law since then," thus endorsing the view that a formally adopted son would succeed. This was purely *obiter*, for the case was between Muhammadans and it had been definitely found that the adoption was a customary one. The learned Judge, as we respectfully venture to think and have already explained, rightly said that sub-section (2) of section 59 "does not really affect the case," "and that section 5 (3) covers only the persons named in section 5 (1) (*a*)." Frizelle, J., virtually contented himself with giving an opinion on the point really before the Bench, but Rivaz, J., after concurring as to that point, gave an opinion (at page 150) which we quote in full, as it is exactly in accordance with our present views;—

"I do not think that the Act of 1887 has, in any way, modified the old law in favour of the rights of the so-called 'adopted son' to succeed, though I am not clear that it has not rendered his position as an heir still more untenable. The special interpretation clause in section 5 of the Act of 1887, which recognises relationship by adoption including the customary appointment of an heir, as on the same footing as natural relationship, *is not only, by all the recognised rules of construction, inadmissible in interpreting section* 59, *but it suggests a deliberate intention by the Legislature to restrict the rule of succession, without regard to either adoption or* quasi *adoption.* See the remarks of Sir Meredyth Plowden, Chief Judge, in *Wir Bhan* v. *Suba* (4)." (The italics are ours.)

After Rivaz, J., Stogdon J., expressed concurrence with the learned Senior Judge, and then Chatterjee, J., dealt with the question. He began by quoting long passages from an unpublished judgment of his own (Civil Appeal No. 308 of 1893), after first saying that he agreed with the learned Senior Judge that a customary adoption gives no right of succession under section 59 of the Act of 1887 and that the law "in this respect" had not been altered by that Act as compared with the Act of 1868. In the unpublished judgment, the view taken was that the Full Bench ruling of 1883 was correct where it laid down that a formally adopted son is a "male lineal descendant," that the law has not been altered, that no importance need be attached "to the transfer of the words in favour of relationship by adoption from the general interpretation clause in Act XXVIII of 1868 to section 5 of the new Act," that the desire of the framers of both Acts was to bring the law "into harmony with the custom of the Province." The learned Judge then continues his remarks on the case before him, but merely discusses the question whether a real Hindu adoption ever takes place in the Punjab and reserves his final opinion on it. The judgment is, therefore, in favour of claims of the formally adopted son, and in this respect is *obiter*.

The next ruling, *Punjab Singh* v. *Sant Ram* (6), is only indirectly in point. In it, the Bench laid it down that the *chela* of a deceased *Bairagi Fakir* could not succeed under section 59 of the Tenancy Act. We venture to express our respectful concurrence in the remarks made by Rivaz, J., who wrote the judgment of the Full Bench. He said—

"In our opinion, section 59 of the present Tenancy Act *must be strictly construed*..... .....The words 'male lineal descendants in the male line of descent' are unambiguous, and perfectly clear in their plain literal meaning. Had the Legislature intended to extend the natural meaning of the expression in section 59 of the Act, it is reasonable to suppose that an explanation clause would have been attached to the section such as we find in clause (3) to section 5 of the Act. We—Roe, C. J., Rivaz and Stogdon, JJ.—are all agreed that that interpretation clause *must be strictly confined to the section upon which it is engrafted, and cannot possibly be called in aid in construing section* 59, *and further, that the omission to attach any such interpretation clause to section* 59 *is significant of the intention that the*

expression used in that section should bear its plain grammatical meaning." [Again the italics are ours.]

The last case, *Sher Singh* v. *Saya Ram Das* (7) affords us little or no assistance either way. There the *institution* was occupancy tenant, or at least the *Mahant* was the holder of occupancy rights belonging to it. It was held that, on the death of one *Mahant*, the rights passed on to his successor in the office. A case like this is really outside section 59 and has no bearing on the question we have to deal with.

We have been led into writing a very full referring order by the importance of the subject. For convenience' sake, we summarise our views as follows:

1. The plain grammatical meaning of "male lineal descendants in the male line of descent" does not cover even a formally adopted son.

2. There is nothing in the section (59) to warrant extension of that meaning: certainly sub-section (2) does not.

3. The addition of sub-section (3) in section 5 and the disappearance of section 3 (as regards "grandfather" etc.) of Act XXVIII of 1868 tend to show that no such extension of meaning was contemplated, and rather negatives any such intention.

4. Landlords have the right to insist upon strict contsruction of section 59 against all claimants.

5. The General Clauses Acts, 1868 and 1897, afford no ground for extending the meaning of the expression aforesaid.

6. *Chuni Lal* v. *Imdad Ali* (1) conflicts with 2 and 5 above.

7. *Gokya* v. *Jaswant Singh* (2) begs the whole question.

8 *Dad* v. *Bhag Singh* (3) is of doubtful correctness, even if the opinion regarding formally adopted sons was not *obiter*, and it is no conclusive authority for cases under Act XVI of 1887. Further, the *ratio decidendi* conflicts with 5 above.

9. In *Wir Bhan* v. *Suba* (4), Plowden, S. J., the writer of the Full Bench of 1883, doubted whether under the new Act even a formally adopted Hindu could succeed.

10. *Fatteh Muhammad* v. *Jiwan* (5)—Roe, S. J., Frizelle, Rivaz, Stogdon and Chatterji, JJ. Frizelle, J., confined himself to the matter of a customary adpotion which alone was strictly in question; Roe, S. J., (followed by Stogdon, J.), by way of pure *obiter dictum*, held that *Dad* v. *Bhag Singh*(3) was correct and still represented the true state of the law; Rivaz, J., offered weighty remarks showing that the new law was more against adopted sons than the old, and that there were indications of deliberate intention to exclude all adopted sons; and Chattarji, J., expressed himself in favour of Hindus fully adopted.

11. *Punjab Singh* v. *Sant Ram* (6)—Roe, C. J., Rivaz and Stogdon, JJ.,—while the actual question was whether a *chela* is a "male lineal descendant" of his *Mohant* or *Guru*, all the Judges agreed that that phrase must be strictly construed in its plain grammatical meaning, and that the existence of sub-section (3) of section 5 of the Act is a strong indication that all persons but literal male lineal descendants are excluded. It is noteworthy that Judges Roe and Stogdon had altered their views between *Fattah Muhammad* v. *Jiwan* (5) and *Punjab Singh* v. *Sant Ram* (6).

In these circumstances, we venture to think we have justified this reference. We have the opinions of four learned Judges of experience that, whether the Full Bench ruling of 1883 was sound or not, it is more than doubtful whether under Act XVI of 1887 even a formally adopted Hindu can succeed under section 59 of that Act; but an authoritative pronouncement is required because in the rulings of 1894, 1895 and 1896, there is no such pronouncement, and the final settlement of the controversy is urgently called for.

We, therefore, refer to a Full Bench, which perhaps had better be of five Judges, the question:—

Whether an adopted son, even if he has been formally adopted under Hindu Law, is a "male lineal descendant" of his adoptive father so as to be entitled to succeed to occupancy rights held by the latter?

JUDGMENTS OF THE FULL BENCH.

ROBERTSON, J.—(*30th October* 1912).—The question referred to the Full Bench is as follows:—

Whether an adopted son, even if he has been formally adopted under Hindu Law, is a "male lineal descendant" of his adoptive

father, so as to be entitled to succeed to occupancy rights held by the latter.

In other words, does the term "male lineal descendants . . . in the male line of descent" in section 59 (1) (*a*) of the Punjab Tenancy Act (Act XVI of 1887) include a person who has been formally adopted in accordance with the provisions of the Hindu Law? Looking at the case broadly, it appears to me that, in order to answer the question in the negative, it will have to be made very clear indeed that the expression "male lineal descendants" does not include a formally adopted son in accordance with the personal law of the Hindu community, the maintenance of which law has been specially guaranteed to them by the British Government. There can be no doubt that a son adopted with due formality, in accordance with the Hindu Law, by a person subject to that law, is, for all intents and purposes, legally, in precisely the same position as the legitimate natural born son; and in all ordinary cases it will probably be held without hesitation that amongst orthodox Hindus such an expression as "male lineal descendant" unquestionably includes an adopted son. This was a view taken in a recent judgment of the Allahabad High Court, *Lala* v. *Nahar Singh* (3) and in a judgment reported as *Maharaja Brij Indar Singh* v. *Bansi Lal* (9), it was admitted on all hands that if the adoption, which was in question in that case, was really a formal adoption in accordance with the Hindu Law, it certainly carried the right of succession to an occupancy tenancy. *A priori*, therefore, all the probability would, it appears to me, be in favour of the view that an adopted son is included in the term "male lineal descendant."

We must, however, consider the points put forward by the learned Judges of the Division Bench who thought it necessary to make this reference to us. The learned Judges of that Bench have noted that the authorities which they have consulted and which they afterwards proceeded to discuss are as follows:—

Chuni Lal v. *Imdad Ali* (1), *Gahya* v. *Jaswant Singh* (2), *Dad* v. *Bhag Singh* (3), under Act XXVIII of 1868; *Wir Bhan* v. *Suba* (4), *Fatieh Muhammad* v. *Jiwan* (5), *Punjab Singh* v. *Sant Ram* (6), *Sher Singh* v. *Sayi Ram Das* (7), under Act XVI of 1887.

They also thought it necessary to consider carefully section 5 (3) and section 59, Punjab Tenancy Act, XVI of 1887, section 30 and section 36, Punjab Tenancy Act, 1868, section 2 (19), General Clauses Act, I of 1868, and section 3 (18) and (53), General Clauses Act, 1897.

The judgment, however, to which it is most necessary for us to give our attention, is that reported as *Dad* v. *Bhag Singh* (3). Now the words which are interpreted in that judgment are precisely the same as the words now under discussion in section 59 of the Punjab Tenancy Act. It is true that there have been alterations in other portions of the Act, which the Division Bench referring this case consider to have a bearing on the interpretation to be put on section 59; but the words as they stand are the same as the words which we have to deal with now. The decision of the Full Bench in that case was as follows:—

"The answer to the question referred in each of these cases depends upon the meaning to be given to the expression 'male lineal descendants' in section 36 of Act XXVIII of 1868."

"We are of opinion that these words include the sons of the tenant and the sons of such sons, without limit and that in accordance with the provisions of Act I of 1868, where the personal law of the tenant permits adoption, the word 'sons' as above used includes adopted sons. When there has merely been an appointment of an heir, the person so appointed is not a male lineal descendant within the meaning of the section".

"The question whether a person has in a particular case been merely appointed an heir or been adopted, must be determined with reference to the circumstances of the case, and the personal law of the tenant who is said to have adopted".

And I am unable to see that anything has since occurred which materially supports the view that that interpretation is wrong. No doubt, in *Wir Bhan* v. *Suba* (4), Plowden, J., makes some remarks, which are pure *obiter dicta*, upon the possible meaning of "male lineal descendants" under section 59

(8) 16 Ind. Cas. 181; 10 A. L. J. 299; 34 A. 658.
(9) 88 P. R. 1912; 230 P. W. R. 1912; 218 P. L. R. 1912; 17 Ind. Cas. 36.

of the Act of 1887, but he himself remarks that it is not necessary to decide that point in the case before him, and I conclude that these remarks were not made after full consideration of the question. Mr. Justice Plowden was then sitting alone.

The next case quoted by the Division Bench is *Fatteh Muhammad* v. *Jiwan* (5). It was only a customary adoption which was before the Court in that case, but Mr. Justice Roe expressed his opinion that the interpretation given in *Dad* v. *Bhag Singh* (3), was clearly correct, and Mr. Justice Chatterji remarks:—"I hold with him (the learned Senior Judge) that the law in this respect as laid down by section 36, Act XXVIII of 1868, and explained in the Full Bench decision of this Court, in *Dad* v. *Bhag Singh* (3) has not been altered by the present Act," and I do not find that any of the five Judges who constituted that Bench actually differed from the decision in *Dad* v. *Bhag Singh* (3). One Judge (Rivaz, J.,) certainly reserved his opinion on that point.

The next ruling dealt with is *Punjab Singh* v. *Sant Singh* (6). This was a Full Bench ruling. In that case what was decided was that a *chela* was not a male lineal descendant of a *fakir* within the meaning of section 59 of the Punjab Tenancy Act. The judgment was written by Mr. Justice Rivaz and lays stress upon the necessity of strictly construing the present Tenancy Act. The point now before us was not touched upon; and while I agree fully with the judgments which lay down that neither an informally appointed heir, nor a *chela* can be held to come within the purview of section 59, I think the case is entirely different when we have to deal with a very well-known incident of social and religious life among our Hindu brethren; and I do not think that there is anything in the view expressed by the Full Bench in *Punjab Singh* v. *Sant Singh* (6) which militates against the view which I propose to take of the meaning of the term "male lineal descendant." It has been laid down in several of these Bench decisions that clause (3) of section 5 cannot be held to cover section 59. To this view I take no exception, and I would not for one moment propose to extend the interpretation of section 59 to be co-extensive with that of clause (1) (*a*) of section 5. Clause (1) (*a*) of section 5 deals with accomplished facts, while section 59 deals with the successions which is to be allowed to obtain for the future. My interpretation of the latter section depends upon the thoroughly well-known and recognized fact of adoption as a part of the personal law of Hindu communities.

The decision of the Financial Commissioner in *Sher Singh* v. *Saya Ram Das* (7) does not deal specifically with this point.

I may remark in passing that the number of cases in which formal Hindu adoptions, in strict accordance with the Hindu Law, occur amongst agriculturists is very rare, and such as do occur are probably confined entirely to the eastern Punjab; and the cases which occur among occupancy tenants would naturally form only a small portion of the total number. The urgency of this reference is, therefore, not very apparent.

To conclude, it appears to me that there is no good reason for supposing that the words "male lineal descendants" used in section 59 of the present Tenancy Act are used in any different sense from that placed upon them in section 33 of the old Act; and, in my opinion, the decision come to in *Dad* v. *Bhag Singh* (3) was quite correct, and I would answer the question referred to us in the affirmative.

REID, C. J.—(31*st October* 1912.)—I concur. The very wide distinction between the status of a son formally adopted under Hindu Law and of an heir appointed under Punjab Customary Law has been emphasized by the Full Bench in *Dad* v. *Bhag Singh* (3) and rulings dealing with the status of the appointed heir do not necessarily affect the status of the adopted son.

I have no hesitation in holding that the rule laid down by the Full Bench in the case cited is correct, and the question referred must, therefore, be answered in the affirmative.

KENSINGTON, J.—(1*st November* 1912.)—I agree that the question referred should be answered in the affirmative, there being no sufficient reason for holding either (1) that the Full Bench decision, *Dad* v. *Bhag Singh* (3), was incorrect, or (2) that the position is materially affected by such changes as were made by Act XVI of 1887 in the relevant portions of the Punjab Tenancy Act.

RATTIGAN, J.—(1*st November* 1912.)—I concur.

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CHEVIS, J.—(*2nd November* 1912).—I concur. On re-consideration, I am now of opinion that there is no sufficient reason for holding that the Full Bench decision, *Dad* v. *Bhag Singh* (3), was not sound or does not still hold good. I had formerly under-rated the strength of the position of a son, formally adopted under Hindu Law.

BEADON, J.—(*2nd November* 1912.)—I concur.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 66 OF 1911.

May 27, 1912.

Present:—Mr. Justice Parlett.

PETER VERTANNES—APPLICANT

versus

A. R. M. M. R. M. MUTIAH CHETTY —RESPONDENT.

Review—Contract if legally valid must be enforced—Court not to dictate terms to parties—Contract Act (IX of 1872*), ss.* 51 *to* 54.

A suit for work done for defendant was dismissed on the ground that owing to bad workmanship the work had proved ineffectual. On appeal, this finding was reversed but the decree was confirmed on the ground that the terms of the contract being vague, plaintiff was not entitled to relief though he had carried out the terms of the contract as it stood and that the plaintiff did his part of the work ahead of the work which was to be done by defendant along with it. Plaintiff asked for a review on the grounds, *inter alia*, that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal, that on the contract, as it stood, plaintiff would not have been justified in delaying his part of the work and that the contract, as it stood, being valid in law, the Court was bound to enforce it:

Held, reversing the order dismissing the appeal, that the decision in appeal proceeded on grounds not raised at the trial; that the Courts should not dictate to the parties what the terms of their contract, ought to have been but if it was a valid contract should enforce it; that the contract did not consist of reciprocal promises to which sections 51 to 54 of the Contract Act would apply, that time being of the essence of the contract, the plaintiff could not delay the work and the work being for a lump sum, plaintiff could not claim *quantum meruit*.

Application for review from the following decree and judgment of Mr. Justice Twomey in Special Civil First Appeal No. 65 of 1911.

Mr. *Bagram*, for the Appellant.

Mr. *Sivaya*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, Vertannes, contracted with the defendant-respondent, a Chetty firm owning a mill at Kyaiklat, to carry out certain work for the protection of the river bank near the mill from erosion. The plaintiff had to drive in piles and connect them with cross pieces. The defendants undertook on their part to fill in the timber frame work with earth. The plaintiff was to put a layer of laterite pitching on top of the earth work. Plaintiff has been paid Rs. 2,500 (out of Rs. 4,000) agreed upon for the work and deducting the sum of Rs. 440 for the laterite work which has not been done (owing, says the plaintiff, to the defendant's default) he sued for Rs. 1,060 the balance of the contract sum.

The defendants pleaded that the work was so badly done that the wooden posts driven in by the plaintiff were washed away and that the defendants could not do the earth work filling as there was no proper frame-work to hold it together.

The plaintiff, on the other hand, pleaded that the posts fell away because of the defendants' failure to do the earth work properly. He says that if the defendants had filled in the earth in the proper way and rammed it, the piles would have been protected, would have kept upright and would not have been washed away.

The learned Judge of the Small Cause Court found for the defendant and dismissed the plaintiff's suit because Vertannes was 'quite out of his depth," when he undertook the job and because having regard to Vertannes' want of skill "nothing was more natural" than the disappearance of the work. The Judge did not find that the work done was not is accordance with the plan furnished to the plaintiff by the defendants and remarked "it is quite possible that the work conforming strictly to designs failed to meet the necessities of the case and that it was not the builder but the designer who was at fault." The work may have been washed away because it was not properly designed (in which case, of course, the plaintiff would not be responsible). But the Judge thought that it may also have been washed away on account of bad workmanship.

Vertannes was supplied with a plan showing the dimensions and positions of all posts and cross pieces and it is not seriously

disputed that he carried out the work in accordance with this plan. It was a plan prepared for the defendants by a skilled Engineer. There is no suggestion in the pleadings or in the evidence that Vertannes had not the necessary skill for carrying out the work as shown in the plan and the Judge's remark that Vertannes was "quite out of his depth" in undertaking such a job appears to be unfounded. It is true that "Mr. Vertannes never for a moment suggested that he was a skilled professional man," but he had considerable experience in river work where (as in this case) all he had to do was to carry out a design drawn up by a skilled professional man.

It seems probable that the work was washed away because the defendants failed to do their part in filling in with earth and ramming. On 5th April, Vertannes suggested that the earth work should go on simultaneously with the pile driving. On the 3rd May, he wrote to the Rangoon Agent Muthia that the earth work was not being properly carried out. On 23rd May, he wrote again reporting that the pile driving work was finished and complaining of the delay in the earth work. That there was great delay is shown by the letter, Exhibit K, from the defendant's Advocate in which it is stated that the earth work was not commenced till after receipt of Vertannes's letter of 23rd May.

No complaint appears to have been made of Vertannes's work until the 1st June when the Rangoon Agent wrote that some of the piles had inclined to a certain extent instead of being upright and that in the circumstances, the earth filling could not be done. Vertannes replied that the inclination of the piles was due to the delay in carrying out the earth work. The defendants caused no survey to be made of the work but allowed it to be washed away and refused to pay the balance of the stipulated sum on the ground of bad workmanship.

Such being the facts, I think it cannot be assumed that the timber work was washed away because of bad workmanship or lack of skill on the part of Vertannes. I find, however, the same difficulty as the lower Court in decreeing payment for work which was entirely ineffectual for the purpose in view and which in the words of the Small Cause Court Judge "succumbed to the forces which it was intended to resist."

It is plain on the plaintiff's own showing that the success of the protection scheme depended on the earth work being done *pari passu* with the pile driving and other timber work. Unless the earth work was done promptly and properly, the piles would necessarily fall out of the perpendicular and the timber work would be washed away. Knowing this, I think, the plaintiff should not have gone ahead with his timber work when he saw that the defendants were not doing the earth work. It was clearly useless to drive in piles when no earth work was being done to protect them. I think the plaintiff was not justified in going on with the wooden frame work when he saw that the Chetties were not doing the earth work. The timber work was by Vertannes's own showing dependent on the earth work and I cannot hold that he was justified in going on with the former irrespective of the latter and without regard to the necessary consequence that the timber work would be washed away.

He would have been justified in stopping the timber work though I am not prepared to say that in that case he could claim compensation for non-performance of the contract as he made no stipulation at the outset that the timber work was dependent on the simultaneous performance of the earth filling and ramming. It seems to me that he has only himself to blame for not insisting on the earth work being done by himself or making a definite stipulation as to the time and manner in which the defendants were to do it. In my opinion, the result of leaving this essential part of the contract vague and undefined is that the plaintiff can recover nothing. He fails because of this inherent defect in the contract.

The appeal is dismissed with costs.

Following were the grounds of application for the Review:—

(1) For that the decision in the said appeal is not based on the pleadings in the case.

(2) For that the case made in the judgment for the respondent was never his case and was not in the contemplation of either party in the lower Court as also in the Appellate Court.

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(3) For that the points made in the judgment after the hearing of the appeal were decided without giving your petitioner's Advocate an opportunity of arguing on them.

(4) For that the petitioner is advised that if such an opportunity had been given, his Counsel would have satisfied the learned Judge that there was no authority in law to impose on him duties outside the specific terms of the contract and that the contract as it stood being a perfectly valid contract was enforceable in law.

(5) For that the judgment of this Honourable Court ought to have been based on the strictly legal rights of the parties as contained in the contract between them and not on an equitable construction distinct from its legal construction.

(6) For that the learned Judge, having found that the petitioner had carried out his part of the contract as reduced into writing, ought to have given full effect to the provisions of law and not read into such a contract new terms.

(7) For that the learned Judge in dismissing your petitioner's appeal overlooked the provisions of section 10 of the Contract Act inasmuch as the written agreement between the parties was a valid contract in law as it stood (*expressum facit cessare tacitum*).

(8) For that the learned Judge erred in law, in holding that your petitioner was not justified in going on with his timber work—when the Chetties were not doing the earth work for, such a condition of things could only arise when the contract consisted of reciprocal promises, as is provided by sections 51, 52, 53 and 54 of the Contract Act, and not otherwise.

(9) For that the learned Judge overlooked that time was of the essence of the contract and if your petitioner did not go on with the work and complete it within the stipulated period he would be in default and expose himself to have the contract rescinded by the promisee under section 39 and damages claimed under section 75 of the Contract Act and lose all benefits under it as provided by section 55 of the Contract Act as well as become liable in damages for a breach under the provisions of section 73 of the said Act.

The application came for hearing before Mr. Justice Parlett, who delivered the following

JUDGMENT.—Plaintiff sued for Rs 1,060 balance due for work done under a contract. The defence was bad workmanship. The Small Cause Court held the defence proved and dismissed the suit. On appeal, this Court held that the work was ineffectual not on account of plaintiff's bad workmanship but on account of defendant's failure to do the earth work *pari passu* with plaintiff's pile driving, but that plaintiff ought not to have gone on with the pile driving when he saw defendant was delaying the earth work, and further that as plaintiff did not insist on a stipulation for the simultaneous performance of the two descriptions of work being inserted in the contract, he could recover nothing. The appeal was, therefore, dismissed.

This is an application for review of the judgment in appeal on the grounds that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal; that on the contract as it stood plaintiff would not have been justified in delaying his pile driving work though the earth work was not being done; and that the contract, as it stood, being valid in law, the Court was bound to enforce it.

I have received very title assistance from the arguments for the defendant, they being confined to the point that both Courts have held the work done was ineffectual for the purpose for which it was intended, and, therefore, of no value to him. As to this the case of *Chanter* v. *Hopkins* (1) is in point. This Court has held in appeal that the failure of the work was not due to plaintiff's bad workmanship. He was merely employed to carry out work designed by a professional Engineer, and he carried it out according to the design and in the proper, workmanlike manner; and it was not on account of his workmanship that it failed to answer the purpose for which it was intended.

As to the first ground for review, it is clear that the decision in appeal proceeded on grounds not raised at the trial. Nor is it disputed that the Court should not dictate to the parties what the terms of their contract ought to have been, but, if it

(1) 4 M. & W. 399; 1 H. & H. 377; 8 L. J. Ex. 14; 3 Jur. 58.

is a valid contract, should enforce it. As to the plaintiff stopping his work when he said defendant was delaying his, it is pointed out that the contract did not consist of reciprocal promises to which sections 51 to 54 of the Contract Act would apply. Also that plaintiff had expressly agreed to complete his pile driving and timber work within $2\frac{1}{2}$ months from 5th April and that as is obvious from the note on the plan Exhibit A and from the admitted fact that, when the rains set in erosion would increase, time was of the essence of his contract and that failure on his part to complete it in time would render it voidable at the option of the defendant besides making him liable to the defendant in damages. Moreover, the contract being to do work for a lump sum, until the work was completed, the price of it could not be recovered, nor could anything be recovered by way of *quantum meruit* if part only of the work was done [*Sumpter* v. *Hedges* (2)].

In my opinion, these arguments are sound and if there had been an opportunity of advancing them at the hearing of the appeal, they would have been accepted. The defence of bad workmanship having been held not proved, I am of opinion plaintiff was entitled to a decree. I, therefore, reverse the order dismissing the appeal and grant plaintiff a decree for Rs. 1,060 and costs in both Courts together with the costs in this review.

Order reversed.

(2) (1898) 1 Q. B. D. 673; 67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 144 OF 1910.

January 27, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

SHAM LAL—DEFENDANT—APPELLLNT

versus

CHHAJJU MAL—PLAINTIFF—RESPONDENT.

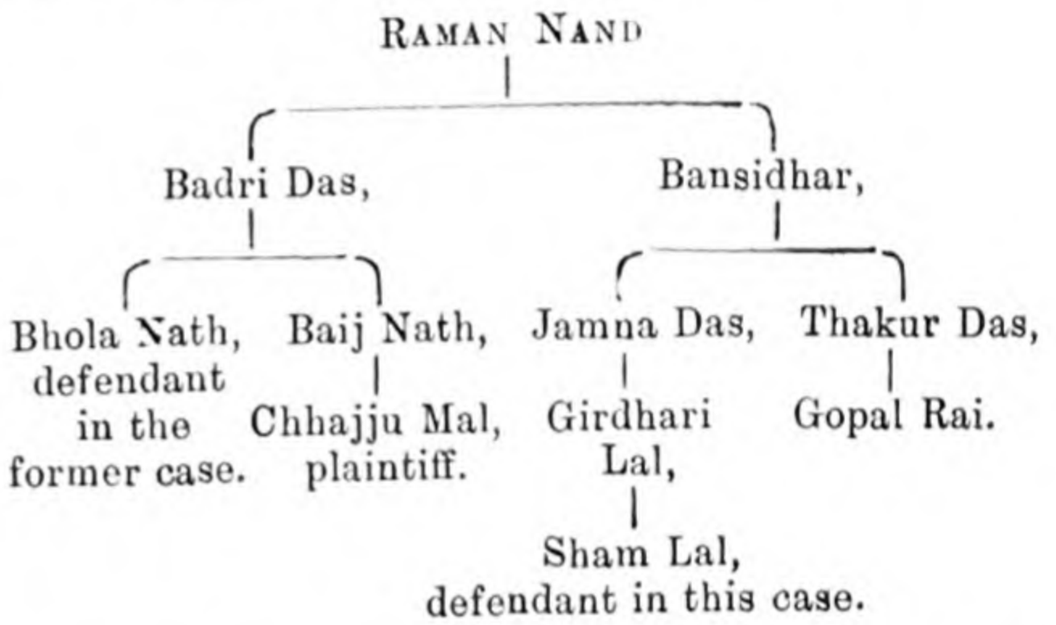
Hindu Law—Joint family—Succession—Survivorship—Presumption when rebutted—Will of joint property.

Where it is shown that for many years past two Hindu brothers had nothing in common except their ancestral house in which they had lived separately and had remained separate in food, income, expenditure and worship, the ordinary presumption of Hindu Law of every family being joint falls to the ground and the rule of survivorship does not apply in such a case. The Will by one brother of his share of the joint property in favour of his distant collateral is valid.

Gannu Singh v. *Bhagwati Koeri*, 3 Ind. Cas. 234, followed.

Second appeal from the order of the Divisional Judge, Delhi Division, dated the 17th January 1910, reversing that of the Additional District Judge, Delhi, dated the 6th December 1909, dismissing the claim.

FACTS.—The following pedigree-table will be found useful in this case.



The claim was for possession of half of two houses, or rather a house and a stable. The plaintiff alleged that he was the adopted son of Baij Nath; that Baij Nath and his brother, Bhola Nath, were members of a joint Hindu family; that the house and stable were their joint property; and that he was now entitled to the property by survivorship.

The plaintiff first sued Bhola Nath for partition of the property in the District Judge's Court. Bhola Nath denied the adoption and pleaded that the stable was his separate property. The District Judge found against him and passed a preliminary decree on the 10th May 1909 for possession of plaintiff's half share. Before the decree was passed, Bhola Nath died and the present defendant, Sham Lal, was brought on the record as his representative. The decree was upheld in appeal.

In the present case, the plaintiff claimed the other half of the property, to which he became entitled on Bhola Nath's death. The defendant raised the same pleas that were raised in the former case, denied that Bhola Nath and the plaintiff were members of a joint Hindu family, and claimed property in suit under Bhola Nath's Will.

The first Court decided that the findings as to plaintiff's adoption and as to the stable being joint property of Bhola Nath and Baij

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Nath are *res judicata* and could not be re-opened, but dismissed the suit on the ground that plaintiff was estopped from disputing the validity of the Will by Bhola Nath in favour of Sham Lal.

The lower Appellate Court did not agree with the first Court as regards incompetency of the plaintiff to contest the Will, and, declaring that Bhola Nath had no power to bequeath his share in the joint property, decreed the claim.

The Hon'ble R. B. Mr. *Shadi Lal*, for the Appellant.

Babu *Wazir Singh* and *Lala Rama Nand*, for the Respondent.

JUDGMENT.—The facts of this case are stated in our order of 27th April 1911, remanding the case to give the defendant-appellant a further opportunity of proving that Bhola Nath and Chhajju Mal were not a joint Hindu family.

Evidence has now been brought to show that Bhola Nath and Baij Nath in the lifetime of the latter and after Baij Nath's death, Bhola Nath and Chhajju Mal, were separate in food, residence, business, income and expenditure and in worship.

The evidence is clear and beyond all dispute. The family *prohit*, the family barber and many others have given evidence and there is the evidence of the plaintiff himself who admits that he and Bhola Nath were not joint in any thing. The sole thing which they held jointly was the ancestral house, *i. e.*, the property in dispute and in this they lived separately, one occupying one part and the other the other, though it had not been divided by metes and bounds. As to the stable, Bhola Nath seems to have realized the rent of this, and it is not shown that he ever rendered any accounts to Baij Nath or to Chhajju Mal, but this certainly does not prove the existence of a joint Hindu family.

So strong is the evidence as to separation in messing, worship, business and residence that plaintiff's Counsel does not attempt to contest it but owns that the only outward sign of the family still being joint was that the ancestral house was still held jointly. But he urges that separation in food, residence and worship is not incompatible with the existence of a joint Hindu family, and is not sufficient to upset the presumption that the family has never ceased to be joint.

We start, of course, with the usual presumption of a joint Hindu family, and the defendant has failed to show on what occasion the alleged disruption took place, but it is clear that for many years past, the brothers Bhola Nath and Baij Nath held nothing in common except the ancestral house, but were separate in food, living, business, income and expenditure. The ordinary presumption as to the family being joint falls to the ground in such a case as has been laid down in *Gannu Singh* v. *Bhagwati Koeri* (1). For a family after disruption to retain the ancestral house as joint property is by no means remarkable. Separation by metes and bounds of the ancestral house is generally the last act of partition and the ancestral house is generally the last thing to be divided even amongst parties not governed by Hindu Law, such a house being often kept joint when all else has been partitioned.

Then, it is urged that in the former suit Bhola Nath never spoke of any disruption having occurred. But the question of the family having ceased to be a joint Hindu family was not then in issue. Chhajju Mal's attitude in the matter is shown from the notice which he sent to Bhola Nath by Lala Girdhari Lal on 27th February 1901, in which he spoke of half the house belonging to him and half to Bhola Nath. If the family were still a joint Hindu family, there could be no definite shares. Other evidence also shows that the account of expenditure on the occasion of Chajju Mal's marriage stood in the name of Baij Nath's widow which surely could not have been expected had the family been a joint Hindu family. Reference to the record of the former suit also shows that Bhola Nath then stated:—"Baij Nath and I were separate except that we lived in the same house, it was never partitioned, it is an ancestral house." He also claimed the stable solely as his own.

Then it cannot be forgotten that, as described in our former order, the plaintiff was at first ready to divide the property with Sham Lal and requested the Court to make him a party as representative of Bhola Nath and to appoint a Commissioner to divide the property. Then he came to terms with Sham Lal and it was arranged that there should be an auction between the two,

(1) 3 Ind. Cas. 234.

the higher bidder to take the property and buy out the other. Only at the last minute did it occur to the plaintiff that he should set up a plea of survivorship and claim the whole property on the strength of being the survivor of a joint Hindu family.

We have no hesitation in holding that the plaintiff and Bhola Nath did not constitute a joint Hindu family. The plaintiff's plea of succession by survivorship, therefore, fails and the defendant succeeds under the provisions of Bhola Nath's Will.

We accept this appeal and reversing the decision of the learned Divisional Judge, we dismiss the suit with costs throughout.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 122 OF 1912.

February 3, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

G. J. BOWER—APPELLANT

versus

IMPERIAL BANK LTD,—RESPONDENT.

Companies Act (VI of 1882), s. 169—Notice of appeal—Power of Appellate Court to hear appeal where no notice given of intention to appeal in matter of winding-up of a Company.

Where no notice is given under section 169 of the Companies Act of the intention to appeal against an order which is given in the matter of winding-up of a Company, the Appellate Court cannot hear the appeal.

First appeal from an order of the Additional Judge of Meerut.

Mr *J. N. Chaudri*, for the Appellant.

Mr. *Durga Charan Banerji* (with him Mr. *Rama Kant Malaviya*), for the Respondent.

JUDGMENT.—This is an appeal from an order of the Court below passed under the following circumstances. The respondent Bank is being wound-up. The appellant is one of the contributories. The winding-up is in the Court of the Additional District Judge of Aligarh where, it appears, the appellant took an objection on the ground that the decree passed against him in favour of the Bank was time-barred. The objection was disallowed. The decree-holders applied to enforce the order of the Court under section 167 of the Companies Act and the

matter went to the Court of the second Additional Judge of Meerut. There the appellant raised further objections as well as the objection as to limitation; but they were disallowed. The appellant has come up in appeal to this Court.

A preliminary objection is taken that notice under section 167 of the Act has not been given and that, therefore, the appeal cannot be heard. It is argued on behalf of the appellant that the order which he seeks to have upset on appeal is not an order, which was made in the matter of the winding-up of the Company. With this we cannot agree. It is clearly and distinctly an order which was given in the matter of a winding-up of the Company. If it is not, we do not know under what law he comes to the Court on appeal. Under the last clause of section 169, it was obligatory on him to give notice within three weeks, which he has failed to do. Therefore, we cannot hear the appeal. On behalf of the appellant, Mr. Chaudhri asked for an extension of time. The order of the Court below was passed on the 28th of the June 1912 and this appeal was filed on the 7th of August 1912. No good cause is shown why we should extend the time and we see no reason to accede to the request. The preliminary objection prevails and this appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE NO. 7 OF 1912.

December 2, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond and Mr. Justice Twomey.

W. E. HARDINGE—APPELLANT

versus

H. E. HARDINGE AND ANOTHER—RESPONDENTS.

Divorce Act (IV of 1869), s. 55—Appeal from decree refusing to allow dissolution of marriage passed by District Judge in Upper Burma—Jurisdiction of Chief Court.

As the Upper Burma Civil Courts Regulation of 1896 does not provide for any appeal from a decree or order of a Divisional Court passed in the exercise

of original civil jurisdiction, there is no Court to which an appeal lies from a decree or order of such Court under the Indian Divorce Act and, therefore, no such appeal lies to the Chief Court Lower Burma.

Mr. *Villa*, for the Appellant.

Mr. *DeGlanville*, for 1st Respondent.

Mr. *Hancock*, for 2nd Respondent.

FACTS.—Appellant in this case filed a suit in the District Court of Mandalay for dissolution of marriage and that was dismissed. The case came on in appeal before their Honours, Mr. Justice Hartnoll and Mr. Justice Young, and the case was argued for several days. At the last moment, the point was raised as to whether this Court had jurisdiction to entertain an appeal from the District Court, Mandalay. The question was whether an appeal lay under the Indian Divorce Act to this Court from the Court of the District Judge, Mandalay. Section 55 of the Indian Divorce Act gave a right of appeal. It recited that "all decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from, under the laws, rules and orders for the time being in force; provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or nullity of marriage, nor from the order of the High Court confirming or refusing to confirm such decree; provided also that there shall be no appeal on the subject of costs only."

Mr. Justice Hartnoll and Mr. Justice Young made the following

ORDER OF REFERENCE.

The appellant presented a petition to the Judge of the Divisional Court, Mandalay, in his capacity as District Judge under the Indian Divorce Act (IV of 1869), praying that his marriage with the first respondent be dissolved and making the second respondent co-respondent and claiming damages from him by reason of his having committed adultery with the first respondent. The petition was dismissed. This appeal has accordingly been filed in this Court. No objection has been taken by the respondents that this Court has no jurisdiction to hear the appeal; but it seems to us that there are grave doubts as to whether we have jurisdiction looking at the wording of section 55 of the Act. We can only find one case in which the meaning of section 55 has been discussed—that of *Percy* v. *Percy* (1). Having in view the importance of the question raised, we have been asked to refer it to a Full Bench and we consider that we should do so. We, therefore, refer to a Full Bench the following question: "In the event of a Judge of a Divisional Court in Upper Burma acting in his capacity as District Judge under the Indian Divorce Act, dismissing a petition presented under section 10 of that Act, does an appeal from such order of dismissal lie to this Court?"

Mr. *Villa*, for the appellant, admitted that appeals in the ordinary course did not lie from the Divisional Court of Upper Burma to the Chief Court, Lower Burma, but submitted that the Divorce Act drew no distinction between Upper and Lower Burma. First of all, there is the definition of what was a High Court in Burma and that was the Chief Court of Lower Burma. The definition of a District Judge was that he was the Divisional Judge. In Lower Burma, there was provision for appeals from Divisional and District Courts but in Upper Burma there was no provision for an appeal from a Divisional Court. He argued that it cannot be the intention of the Legislature to have given a right of appeal to people living in Lower Burma and no right of appeal to people living in Upper Burma.

Mr. *DeGlanville*, for the 1st Respondent.—If the Indian Divorce Act gave no right of appeal expressly to this Court, no consideration of chaos or absurdity or any consequences had to be considered by the Court. That was a matter for legislation and not for the Court to consider. The principle that a right of appeal must be expressly given before it lay has been laid down quite recently in the Botatoung cases by their Lordships of the Privy Council, see *The Rangoon Botatoung Company Ld.* v. *Collector, Rangoon*.

(1) 18 A. 375; A. W. N. (1896) 110.

(2) 5 Bur. L. T. 205, 207; 16 C.W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276: 14 Bom. L. R. 833; 10 A. L. J. 271; 16 Ind. Cas. 188; 40 C. 21; 6 L. B. R. 150.

JUDGMENT.

FOX, C. J.—If an appeal lies, it must be by virtue of section 55 of the Indian Divorce Act. That section says,—

"All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from, under the laws, rules, and orders for the time being in force: Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage, or of nullity of marriage: nor from the orders of the High Court confirming or refusing to confirm such decree: Provided also that there shall be no appeal on the subject of costs only."

By section 3 of the Act, the Judges of Divisional Courts throughout Burma are District Judges under the Act.

In Lower Burma, an appeal lies to this Court from a decree or order of a Divisional Court exercising original jurisdiction by virtue of section 28 (1) (*d*) of the Lower Burma Courts Act.

In Upper Burma, Divisional Courts have jurisdiction to hear and determine suits and original proceedings by virtue of section 10 (*d*) of the Upper Burma Civil Courts Regulation 1896, but the Regulation does not provide for any appeal from a decree or order of a Divisional Court in any original case heard and determined by it.

Since section 55 of the Indian Divorce Act provides for an appeal only to the Court to which an appeal lies from a decree or order passed in the exercise of original civil jurisdiction and no appeal lies from a decree or order of a Divisional Court in Upper Burma passed in the exercise of such jurisdiction, the result is that there is no Court to which an appeal lies from a decree or order of such Court under the Indian Divorce Act and the answer to the question referred must be in the negative.

HARTNOLL, J.—I concur.

TWOMEY, J.—I concur.

ORMOND, J.—I concur.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 94 OF 1912.

February 3, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

DEBI DAS—DEFENDANT—APPELLANT

versus

TULSHI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel—Representation made by father or brother of minor—Minor not bound by such representation—Plea of minority not taken in pleadings—Plea not allowed in argument in second appeal—Practice.

A minor is not bound by any false representation made by his father, brother or cousin. Even if any of these persons acted as the natural guardian of the minor, it is doubtful if the minor would be bound.

A plea of minority, which was neither raised in the Courts below nor in the memorandum of appeal before the High Court, cannot be raised for the first time in argument in second appeal.

First appeal from an order of the Additional Judge of Moradabad.

Mr. *S. N. Sen*, for the Appellant.

Mr. *Vishnu Ram Mehta* (for The Hon'ble Dr. *Sunder Lal*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale brought on the basis of a mortgage-deed, dated the 7th of January 1885. The property involved in the suit is a house. The bond is executed by one Jaijai Ram ostensibly in the name of one Dalip Singh. The plaintiff sued on this bond, on the allegation that Dalip was only a *benami* for him and that he was the true owner of it. Debi Das, one of the defendants, is a transferee of at least a one-fourth share in the mortgaged property, under a sale-deed executed in his favour by one Ram Prasad, the plaintiff's cousin. The sale-deed was signed by the plaintiff's father and brother as witnesses. We note here that Debi Das also claimed to be the owner of the remaining three-fourths share, having acquired it by means of another transaction, but we are not concerned with this fact in deciding this appeal. Debi Das defended the suit and among numerous defences there were the following two:—(1) that the plaintiff is not the true owner and that Dalip is not *benamidar* for him, and (2) that in the sale-deed executed by Ram Prasad there was an allegation to the effect that at that time the property was free from incumbrance, that the plaintiff's father, brother and cousin assured him

(Debi Das) that the property was unincumbered and relying on that assurance he took the property and paid his money, that at that time the plaintiff was a minor, living joint with his father's cousin and brother and that, therefore, he was estopped now from saying that the property was incumbered by reason of the misrepresentation to the opposite effect by the adult members of the family. The plaintiff's reply was that he was separate from his father and brother, that he was not a minor at the time, and that the bond was taken in the name of Dalip to prevent the plaintiff's brother from claiming a share in it. The Court of first instance held that Dalip was not a *benamidar* for the plaintiff, *i.e.*, the plaintiff was not the owner, and *secondly*, that the plaintiff was estopped as pleaded by Debi Das. Having decided these two points, the Court dismissed the suit. On appeal, the Court below has held that the plaintiff is the owner of the bond and that Dalip Singh was his *benamidar*. On the question of estoppel, it has held that if the plaintiff was a minor at the time, there can be no estoppel against him and if he were a major at the time, the act of his relatives could not possibly estop him. On these findings, the Court below remanded the suit to the Court of first instance for decision on the merits.

Debi Das comes here on second appeal raising certain grounds. In his memorandum of appeal, at the commencement of the hearing, the learned Advocate for the appellant wished to raise a question of law to the effect that the plaintiff being a minor at the time of the execution of the mortgage-deed, the whole transaction was null and void. This is a point which was not raised in either of the Courts below, nor is it to be found in the memorandum of appeal to this Court and we do not think it right to entertain it at this stage of the case. On the question as to whether the plaintiff is the owner of the deed or not, we are bound by the finding of the Court below on this question of fact. It is urged that the plaintiff is barred by the principle of estoppel from bringing the present suit, because if he was a minor at the time of the transfer to Debi Das, he was bound by the act of the other members of the family who were the adult members. In deciding this question, it is necessary to keep clearly before one's mind that the lower Court has held most distinctly that the bond, ostensibly in the name of Dalip Singh, was really in favour of the plaintiff and that the plaintiff is the owner of the deed. If the plaintiff is the owner of the deed, then it could not have been the property of the joint family, consisting of his father, brother and cousin, assuming that such a family existed. Assuming, therefore, that the father, brother and cousin made a false representation, it is difficult to see how the bar of estoppel can operate against the plaintiff. It is urged that his father acted as a natural guardian and the minor would be bound by the act of the guardian. In the first place, there is nothing to show that the father at the time he made the false representation was acting in his capacity as a natural guardian of the minor. In the next place, it is doubtful whether the principle of estoppel can apply to the case of minor. Even granting that in certain circumstances, it might operate as an estoppel, it is going much further to hold that the minor is bound by the act of the other persons. In the circumstances of the present case, it is impossible to hold that the representation, on which Debi Das relies, made by the father, brother and cousin is one which would close the plaintiff's mouth and prevent him from realizing the debt due to him.

The next point pressed is that in view of the fact that the first Court came to the conclusion on the question of fact that Dalip Singh was not *benamidar* for the plaintiff, the suit was not dismissed on a preliminary point, and, therefore, the Court should not have remanded it under Order XLI, rule 23 of the Code of Civil Procedure. In our opinion, there is no force in this contention. Two points were decided and they were preliminary points, the merits of the case not having been touched. In our opinion, the order of the Court below is perfectly correct. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

R. D. SETHNA *v.* KALLIANJI SANGJIBHAI.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 925 OF 1910.

October 11, 1912.

Present:—Mr. Justice Beaman.

R. D. SETHNA—PLAINTIFF

versus

KALLIANJI SANGJIBHAI—DEFENDANT.

Insolvency Act (11 & 12 Vic. c. 21), s. 24—Presidency Towns Insolvency Act (III of 1909), s. 47—Fraudulent preference—Surety or guarantor of principal—Creditor—Acceptor or endorser of negotiable instrument—"Voluntary payment", meaning of—Adjudication under old Act—Applicability of new Act—Adjudication of principal partners of firm—Partnership—Act of manager.

Any surety or guarantor, who might, should a bankruptcy supervene before the debt of the principal were discharged, be entitled to claim among the other creditors in bankruptcy, is himself always regarded constructively as a creditor when the question is one of fraudulent transfer.

This legal position, with its attendant rights and disabilities, is not in the least affected by the fact that the principal has not been, even could not have been, called upon to discharge the debt at the time the payment to the surety was made.

The acceptor or endorser of a negotiable instrument, which has not yet reached maturity, is, for the purpose of section 24 of the Insolvency Act (11 & 12 Vic. c. 21), a creditor in regard to the maker or drawer. Any payment, made by the latter to the former, if otherwise fulfilling all the requirements of section 24, would be as much a case of fraudulent preference as though it were made to a creditor whose legal rights were at the time of the payment actually complete and enforceable at law.

In re Paine, Ex parte Read, (1897) 1 Q.B. 122; 66 L. J. Q. B. 71; 75 L. T. 316; 3 Manson 309, followed.

Where an insolvency occurs before the Presidency Towns Insolveney Act, 1909, came into force and the insolvent has been adjudicated under the old Insolvency Act, all questions, arising in the course of that insolvency, except questions of pure procedure, would have to be determined by reference to the terms and the provisions of the old Act.

Section 47 of the Presidency Towns Insolvency Act occurs in a chapter which deals with ways of proving in insolvency, and describes the methods, in which, in certain circumstances, mutual debtor and creditor accounts, as between the insolvent and a creditor claiming in insolvency or being pursued by the Official Assignee for a debt to the insolvent's estate, are to be handled and adjusted.

Where a suit is brought under section 24 of the old Insolvency Act, the allegation being that it is a case of fraudulent transfer, section 47 of the Presidency Towns Insolvency Act cannot be logically involved.

The meaning of 'voluntary payment,' discussed.

There is a common and current confusion between the use of the terms "voluntary" and "spontaneous". A payment made on demand, although it is not a spontaneous payment, may be a perfectly voluntary payment. A demand, unaccompanied by any threat or menace whatever, would not take a case out of the operation of section 24.

All that is necessary to be shown in order to bring section 24 into operation are two facts:—(1) that the payment was voluntary; (2) that it was made when the insolvent firm was in insolvent circumstances and within two months of its adjudication.

The act of the manager in a partnership firm must be taken to be the act of the firm.

A voluntary payment was made within two months before the adjudication of the principal partners of a firm. But two other partners were not adjudicated till some years after the payment. These partners were, however, obscure persons who did not contribute any capital and whose interests in profits were proportionate to the work they did as representatives of the firm in foreign territory:

Held, that the payment must be held to have been made within two months of the adjudication of the firm.

Mr. *Taraporewalla* with him Mr. *Desai*, for the Plaintiff.

Mr. *Wadia* (with him Messrs. *Bahadurji* and *Setalvad*), for Defendant No. 1.

JUDGMENT.—This is a suit by the Official Assignee to recover from the defendant No. 1 the sum of Rs 8,300, paid to him on the 27th of March 1908 by Ramji Monsey on behalf of insolvent firm of Laxman Rekhuji on the ground of fraudulent preference.

The material facts, none of which I think are disputed, are that on the 27th of March 1908, Ramji Monsey, the manager of the firm of Laxman Rekhuji, drew certain *hundis* on the Mandvi branch of the defendant No. 1's firm, sold them in the Bazaar and realised Rs. 7,200. Adding to this sum of Rs. 1,100 from the small cash balance he then had, Ramji Monsey paid Rs. 8,300 to the defendant No. 1 sometime in the afternoon of the 27th of March. By the evening of the 28th of March, the firm was known generally in the Bazaar to be, if not actually insolvent, on the very brink of insolvency. On the 29th, all the creditors appear to have come down upon the firm and as they could not be satisfied, it may be said that the firm stopped payment on that day. It was adjudicated at the instance of Virji on the 31st of March 1908. To understand the reason for the alleged fraudulent preference, it is necessary to say that there were three *hundis*, drawn by the insolvent firm upon itself, endorsed by the defendant No. 1, discounted at the Bank and paid over to the insolvent firm, which were shortly to mature. The first of these *hundis* actually matured on the 30th

of March 1903, the due dates of the other two being the 16th and 26th of May. It is evident that if the insolvent firm were unable to pay these *hundis*, the aggregate amount of which was Rs. 7,500, the defendant No. 1 would have been called upon to do so. The defendant No. 1 is the nephew of Ramji Monsey, the manager of the insolvent firm. It is the allegtion of the plaintiff that the insolvent firm, being fully aware that it was then in insolvent circumstances, deliberately paid over the sum of Rs. 8,300 to the defendant in order to fully indemnify the defendant in respect of these three *hundis*, principal, interest and brokerage. And it is suggested (though this is not in law necessary for the plaintiff's success) that the proceedings of the 27th of March were collusive between the insolvent and defendant No. 1, their common object being to obtain the money from innocent third parties to indemnify the defendant when called upon by the Bank to take up these *hundis*. In support of that view, it may be mentioned here that the defendant No. 1 telegraphed in the evening of the 28th of March at about 10-30 to his Mandvi firm not to accept any *hundis* drawn upon it by the insolvent firm. Thus if this suggestion be true, the defendant No. 1 and his uncle Ramji Monsey colluded together to defraud the purchasers of the three *hundis* drawn on the Mandvi branch of the defendant No. 1's firm, and no sooner had they by means of that fraud obtained the moneys than the defendant No. 1 promptly secured himself against any loss by telegraphing to Mandvi to stop acceptance. The defendant No. 1's case is that he was totally unaware of the precarious condition of Laxman Rekhuji when he received the Rs. 8,300 in the afternoon of the 27th of March. He says that there had been current dealings for about two years between himself and the insolvent firm and that this payment was made in the ordinary course of those dealings by the insolvent firm and placed to the credit of that firm's account. When I come to deal with and dispose of the principal questions of fact, I shall have something to say upon the rival accounts, I have just barely outlined, given by the plaintiff and defendant No. 1, of the payment of this sum of money.

These being the material facts, although others will be required to be introduced when I come to discuss the evidence, the defendant first raises one or two technical legal objections which may, I think, be conveniently disposed of here.

The plaintiff's claim is brought under section 24 of the Act for the relief of insolvent debtors, 11 & 12 Vic. c. 21. The defendant contends that at the time the payment was made, he was in no sense a creditor of the insolvent firm to the extent of that payment. The most that the insolvent firm actually owed him on the 27th of March was roughly Rs. 600. He, therefore, urges that the provisions of section 24 cannot be here applied. I cannot for a moment accede to any such argument. Any surety or guarantor, who might, should a bankruptcy supervene before the debt of the principal were discharged, be entitled to claim among the other creditors in bankruptcy, is himself always regarded constructively as a creditor when the question is one of fraudulent preference. Nor is that legal position, with its attendant rights and disabilities, in the least affected by the fact that the principal has not been, even could not have been, called upon to discharge the debt at the time the payment to the surety was made. I have no doubt whatever that the acceptor or indorser of negotiable instrument, which has not yet reached maturity, is, for the purpose of section 24, a creditor in regard to the maker or drawer, and that any payment made by the latter to the former, if otherwise fulfilling all the requirements of section 24, would be as much a case of fraudulent preference as though it were made to a creditor whose legal rights against the debtor were at the time of the payment actually complete and enforceable at law. Were any authority needed in support of a proposition so self-evident, I may point to *In re Paine, Ex parte Read* (1).

It is next contended on behalf of the defendant No. 1 that this case falls to be governed by section 47 of the new Insolvency Act and not section 39 of the old Act. There are two answers to that. *First*, that this insolvency occurred before the new Act had come into force and the firm of Laxman Rekhuji was adjudicated under the old Act.

(1) (1897) 1 Q. B. 122; 66 L. J. Q. B. 71; 75 L. T. 316; 3 Manson 309.

All questions, therefore, arising in the course of that insolvency, except questions of pure procedure, would have to be determined by reference to the terms and provisions of the Act of 11 & 12 Vic. c. 21. Next, even assuming that this insolvency had occurred since the passing of the new Act, section 47 of that Act has, in my opinion, no applicability to a case of this kind. The section occurs in a chapter which deals with ways of proving in insolvency, and describes the methods, in which, in certain circumstances, mutual debtor and creditor accounts, as between the insolvent and a creditor claiming in insolvency or being pursued by the Official Assignee for a debt to the insolvent's estate, are to be handled and adjusted. Here the case is altogether different; the defendant No. 1 not acknowledging the Official Assignee's rights to inquire into the manner in which he became possessed of the sum of money which the Official Assignee now sues to recover from him. Nor indeed do I think, where a suit is brought under section 24, the allegation being that it is a case of fraudulent preference, section 47 could ever in any circumstances be logically invoked.

The defendant No. 1 next relies, but rather vaguely, on section 57 of the Act. That general section, however, particularly excepts all cases falling under section 24, and that appears to me to be a sufficient answer to that objection.

Although the defendant No. 1 throughout the hearing of this case has never alleged that the payment of the 27th of March was not voluntary, in the course of his evidence he has stated that he sent one of his servants to demand the money, and it is possible, though I do not think it probable, were this case to be carried further, some capital might be made out of that circumstance and arguments founded upon it to show that the insolvent firm did not really pay voluntarily but under pressure, so that the payment would be made out to be not within the meaning and intention of section 24. At the close of the case, the defendant No. 1's learned Counsel did not allege that the payment had been procured by pressure, and indeed such an allegation would be entirely inconsistent with the whole ground-work of the defence, for in the first place, the defendant has, as I have just mentioned, contended that he was not even a creditor at the time the payment was made. Therefore, he would not have been in a position to put any pressure whatever upon the insolvent firm. That is one point. A second and more important point is that having an eye to some supposed advantage he could obtain from the provisions of section 47, he has from first to last contended that this was not a payment, in satisfaction of any debt, but merely as any person might voluntarily pay a sum lying idle in his hands into his banker's account in order that he might obtain interest thereon, and it was only after the defendant had incurred liability as surety to the plaintiff when he paid the three *hundis* on the 30th of March that he contends he became entitled on the footing of a mutual current and open account to appropriate against the money so paid the sum of Rs. 8,300 standing to the insolvent firm's credit in his books. I think, therefore, it is unnecessary to consider in any detail the authorities bearing upon the question: What is and what is not a voluntary payment within the meaning and intention of section 24? I would merely observe upon that that there is a common and current confusion between the use of the terms "voluntary" and "spontaneous." A payment upon demand, although it is not a spontaneous payment, may be a perfectly voluntary payment. The mere fact of making a demand or making an offer standing alone, leaves the will of a person, upon or to whom the demand or offer is made, free to accede, to accept or reject it. In cases of this kind, certain payments impeached under section 24 are really spontaneous. Such acts, of course, leave no room whatever for argument, but in a large majority of cases the impeached payments are said to be voluntary or not voluntary according to the amount of pressure which is shown to have been brought upon the insolvent before he paid. It must always be an extremely difficult question in such cases to decide what was the dominant determinant in the insolvent's mind. Certainly the mere fact of a demand made would not, in my opinion, even raise a presumption that the ordinary play of free will had been in any degree fettered or restricted. The English Courts have indeed gone very far in recent times against the too ready inclination to accept any pressure, even the most

honest pressure, as sufficient to warrant the conclusion that the payment was not voluntary. In earlier times, the Courts were very ready to accept any kind of pressure or importunity as a good ground for the presumption that the resultant payment was not voluntary. But there underlies the reasoning in some at least of those cases the confusion of thought between "spontaneous" and "voluntary" to which I have drawn attention. The observations of Vaughan Williams and Wright, JJ., in the case of *In re Bell, Ex parte Official Receiver* (2) show that the earlier doctrine is no longer good law as it certainly never was good psychology. And were it necessary to pursue this interesting topic further, I might have thought it desirable to refer to and quote portions of the judgments of Lords Halsbury and Macnaghten in the case of *Sharp* v. *Jackson* (3). In view, however, of the form taken by the defence here, I do not think that this question is likely to be seriously agitated, and perhaps I have already said enough upon it. I conclude with this remark that even supposing that the defendant's story were true that he was called upon by Hargowan Jagjiwandas to pay a sum which he had not by him and that, therefore, he sent to the insolvent firm to ask them to pay him Rs. 10,000, such a demand unaccompanied by any threat or menace whatever, would not, as far as I can see, even when the state of the law was most favourable to that kind of contention, have taken the case out of the operation of section 24.

I now come to consider the substantial question of fact involved, namely, whether the payment of Rs. 8,300 was made by the insolvent firm when in insolvent circumstances and with the intention of preferring the defendant No. 1. It is to be observed that under the section itself, all that is necessary to be shown to bring it into operation are two facts: (1) that the payment was voluntary, (2) that it was made when the insolvent firm was in insolvent circumstances and within two months of its adjudication. It is admitted, so far as the hearing before me has gone, that the payment was voluntary. It is likewise admitted that it was made within two months of the adjudication of the firm of Laxman Rekhuji, but the defendant denies, and in this he is supported by his uncle Ramji Monsey, that it was made when the firm was in insolvent circumstances. If the defendant No. 1 were able to convince the Court that the firm of Laxman Rekhuji was not in insolvent circumstances on the 27th of March 1908, it would be necessary to turn to the other provisions of section 24 and see whether the payment fell within the meaning and intention of any of them. But the two questions of fact to be answered are so simple that if they are sufficient, it is better, I think, to place the decision on that ground.

The firm of Laxman Rekhuji consisted of four persons in all; Ramji Monsey, the manager, Shivram Vithoba, the descendant of the founder and the only man who ever had, as far as I can see, a rupee of capital in the concern, and two others who were working agents in Cochin at the time of the insolvency. I omitted to mention in dealing with the technical points of law upon which the defendant relied that one of those points is that inasmuch as only Ramji Monsey and Shivram Vithoba were adjudicated insolvents in 1908, the furthest the present claim could go would be to recover their share of the sum of Rs. 8,300 paid on the 27th of March 1908. The other two members of the firm, who apparently were quite unkown to most of the creditors, certainly to the creditor who obtained the adjudication, were not adjudicated until March 1911, and the defendant, I cannot help thinking, rather fancifully contends that if this be a case of fraudulent preference as between him and the first two partners of the firm who were adjudicated on the 31st March 1908, it cannot be so held as between him and the other two who were not adjudicated until March 1911, because in their case the payment was not made within two months of their insolvency.

Now, I suppose that is thought to be rather an ingenious point of law. I confess that it appears to me essentially trivial and foolish, no better in fact than a mere quibble. There are certainly no merits whatever in it. What actually happened was that as the firm put up its shutters on the 29th of March and was adjudicated on the 31st, all the available assets of the firm, its books and its outstandings were imme-

(2) (1892) 10 Morrell 15.
(3) (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson 264; 15 T. L. R. 418.

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diately seized by the Official Assignee. The two partners, who were not adjudicated, were obscure persons who do not appear to have contributed any capital whatever and whose interests in such profits as the firm made were proportionate to the work they did for it as its representatives in Cochin. It is not pretended that either of them could have assisted the firm with a ten-rupee-note in its extremities. Had it been known, they would certainly have been adjudicated along with the other two partners, and, as far as I can see, the only practical effect of their non-adjudication would have been to leave them exposed to arrest at the hands of the creditors of the firm until they, like their two other partners, had obtained the protection of the Act. As a matter of fact, they have been since adjudicated as members of the firm, and were it necessary to find a technical reason to refute this technical objection, I think it can be found easily enough in the words of section 24, for the act of the manager in a partnership of this kind must be taken to be the act of the firm, and there can, I think, as will appear when my discussion of the question of fact is complete, be no doubt whatever but that this payment to the defendant No. 1 was in direct contemplation of an act of insolvency. So that then it will make no difference whether it had occurred within two months or two years of the adjudication of these two partners.

I now take up the discussion, where I left it for the purpose of this digression, of the question of fact. The firm of Laxman Rekhuji was a very small concern dealing in ropes, ginger, and cocoanuts. It appears to have had no substantial capital of any kind but to have gone on, as firms of this kind do, living from hand to mouth upon such credit as it had by means of a constant series of *hundi*-transactions. The firm of the defendant No. 1, on the other hand, is fairly strong going concern with a solid capital of five lakhs of rupees under its Bombay establishment alone. The dealings between these two firms commenced about two years before the insolvency by the insolvent firm borrowing a sum of money from the defendant No. 1 and although the account here and there shows nominal indebtedness of the defendant No. 1 to the insolvent firm, it is perfectly absurd to suggest, as the defendant No. 1 has suggested here, that he actually used to borrow from the insolvent firm when in need of money. The real truth of the matter is only too apparent. The small firm of Laxman Rekhuji used to draw *hundis* on itself in favour of the defendant No. 1, who endorsed and discounted them at the Bank holding the money to the credit of Laxman Rekhuji, and Laxman Rekhuji would draw against moneys so appearing to their credit in the defendant No. 1's books. Of course, immediately after the negotiation of any *hundi* or set of *hundis* in this manner, there might appear a nominal credit in favour of Laxman Rekhuji. I wonder much that the defendant did not elect to fight this case on the ground that he was a banker and had a banker's lien on the sums in his hands at the date of the insolvency which he might retain and apply against his depositor's indebtedness to him. However, from first to last whenever the Court suggested to him that the relations between himself and Laxman Rekhuji were very like those of banker and client, he stoutly and emphatically repudiated anything of the kind. He has denied right up to the end of the case that he was in any sense whatever Laxman Rekhuji's banker. So whatever use (I am not now expressing any opinion upon the serviceableness of that use) he might have made of the doctrine, banker's lien, who has deliberately renounced it for the purposes of this case.

Now, the evidence is that as early as the 23rd of March, Virji, the first witness for the plaintiff, who got the firm adjudicated on the 31st of March, began to press for his money. He was put off with a small-payment of Rs. 600. But according to his own evidence, he continued to dun Laxman Rekhuji to no purpose. Haridas Cooverji was a creditor of the firm to the extent of Rs. 12,000, of which Rs. 1,500 belonged to his sister. Ramji Monsey, the manager of the firm, who gave evidence at great length here with the obstinate determination of doing everything he could to favour the defence of his nephew, went every length he dared to convince the Court that Haridas Cooverji only became pressing and importunate on the 28th of March. The reason for this is perfectly obvious, for if he admitted that a creditor to so large an extent was pressing hard for payment on the 27th of March,

he could have hardly had the effrontery to say that he voluntarily paid away Rs. 8,300, of which he stood himself in so urgent need on that day, to his kinsman the defendant No. 1, on current account. But the truth is that this creditor, Haridas Cooverji, was pressing the firm not only on the 27th but certainly before that date. This is clear from the evidence of the other partner Shivram Vithoba. Shivram Vithoba was out of Bombay and was sent for by the manager, Ramji Monsey, in order to meet the heavy claim of this creditor. Now observe how the claim was met. The firm was quite incapable of paying in the ordinary course of business. But for this act of fraudulent preference they could have at least stayed off this creditor with a very large payment on account. But Ramji Monsey must have known that that would be only an extremely temporary alleviation and postponement of the inevitable end. So that he preferred to pay Rs. 8,300 (as he himself has said before the Official Assignee) to indemnify his kinsman against the *hundis* which he knew would be presented by the Bank for payment, the moment the firm was known to be insolvent, and so deprive himself of the means of carrying on even for two or three days longer. For without this money, he was obliged to satisfy Haridas Cooverji by giving him the goods of the firm not yet transhipped and inducing his partner Shivram Vithoba to give him a mortgage of his house. In this way, Haridas Cooverji obtained the whole of his demand for Rs. 12,000. Now, the mortgage was actually registered early in the morning of 28th. Stamp-paper was admittedly bought in the evening of the 27th. The goods were assigned in the evening of the 27th. And as Shivram Vithoba had been summoned from up-country to execute that mortgage, it is beyond all reasonable doubt that Haridas Cooverji was pressing the firm even before the 27th March 1908. It is equally certain, and Ramji Monsey must have known this perfectly well, that as soon as the manner in which the firm had been obliged to make shift to silence this importunate creditor became known, all the creditors would be down upon it and it would have no other recourse but instantly to stop payment. If the defendant No. 1 had not already known the desperate state of the firm on the 27th (I have myself not the least doubt but that he did), he was given a timely warning of the manner in which the moneys had been raised to put him in fund against the *hundis*. So by the evening of the 28th, long before those *hundis* could have been presented for endorsement at Mandvi, he was able to telegraph and warn his branch there.

The evidence of Ramji Monsey from first to last seems to me to have been a tissue of impudent lies and characteristic attempts at what witnesses of that class consider to be clever ways of throwing dust in the eyes of the Court. Nothing would induce him to admit that his financial position was not perfectly sound on the 27th of March 1908. Yet, although as a result of the manner in which he was compelled to satisfy Haridas Cooverji, the firm was hopelessly bankrupt within forty-eight hours, he stubbornly stated that it never occurred to him to draw upon the Rs. 8,300, which, according to his story, stood to his credit with the defendant No. 1, in order to put off the evil hour. Had the transaction been of the kind so vehemently sworn to both by Ramji Monsey and defendant No. 1, there is no conceivable reason why the insolvents should not have called in that money to pay off the greater part of Haridas Cooverji's claim on Saturday the 28th. The defendant No. 1, who upon this part of his case is as hardy a liar as his kinsman, has invented what, no doubt, he believed to be an ingenious and plausible story which no Court would dream of doubting. He has even fortified it by a little scrap of paper said to have been sent to him by the firm of Hargowan Jiwandas on the 27th of March 1908. His learned Counsel, making the most of a wretched case, was very vehement on the absurdity of supposing that such great men as Hargowan Jiwandas and defendant No. 1 would condescend to forge a chit of that sort merely to support a false story. This chit is Exhibit 8. The defendant's story about it is that he owed the firm of Hargowan Jiwandas between Rs. 3,000 and Rs. 4,000 on that day. A client of Hargowan Jiwandas, named Imamuddin, came in from up country requiring payment and apparently these two wealthy houses, the joint capital of which is probably no less than ten or twenty *lakhs* of rupees, were put to great strain to pay off this humble client. Hargowan Jiwandas had

no money, so he wrote to defendant No. 1, whose cash balance on that day showed that he had at least Rs. 12,000 in hand, to send him Rs. 4,000 or as much more as he could spare. That is the purport of the note Exhibit 8. The defendant No 1, to oblige his wealthy correspondent, immediately sends off his man to get Rs. 10,000 from the tottering firm of Laxman Rekhuji and receives back Rs. 8,500. Rupees 6,000 of these, he says, he sent to Hargowan Jiwandas, but most unfortunately the up-country client Imamuddin had got tired of waiting; so that the money was refused. All this urgency then setting in motion the resources of these two large firms, seems to have been quite supererogatory and illusory. Nor is it very apparent why, even if the story were true, the defendant No. 1 should not have sent Rs. 6,000 out of his cash balance of Rs 12,000, nor is it very apparent why, when the money was returned after five o'clock in the evening, he on his part did not at once return it to his very obliging uncle, Ramji Monsey. Least of all, in my opinion, is it apparent why he should have so carefully treasured up this perfectly useless letter from the year 1908 to the present day. Nothing was effected upon it. It could not have been evidence in any subsequent transaction between the firm of Hargowan Jiwandas and defendant No. 1, and I confess that I entirely fail to understand under what particular guidance of providence defendant No. I was induced to preserve it so carefully. I have my own suspicions as to how and why that paper was opportunely produced in the course of these proceedings. The whole story, however, is so transparently false from first to last that it is a mere waste of time to pick it to pieces in greater detail. There can be not the least doubt that the story told by Ramji Monsey before the Official Assignee is the plain and simple truth, namely, that he wanted to protect his kinsman, the defendant No. 1, in respect of the *hundis* which the Bank held and which Ramji Monsey knew very well his firm was not going to, because it could not, meet. If we add the interest and brokerage, we shall find that the sum thus thoughtfully remitted on the 21st of March by the crumbling firm of Laxman Rekhuji just covers that firm's indebtedness to the defendant No. 1. There is a small surplus in favour of the firm of Laxman Rekhuji which the defendant No. 1 admits. If in these circumstances a payment of this kind is not a case of fraudulent preference, I confess I do not know what is. The firm was not only in insolvent circumstances but actually insolvent to all intents and purposes when by a fraud upon innocent people in the Bazaar it made this last desperate effort to put the defendant No. 1 in funds before it finally went crash. Twenty-four hours later the firm of Laxman Rekhuji could not possibly raise the money to pay the defendant No. 1. That money had come out of the pockets of innocent people. I have not in my own mind the very slightest doubt but that the defendant No. 1 was himself a party to that fraud. It is not necessary to find so in order to make good the plaintiff's present claim. But the facts are such, and the evidence given both by Ramji Monsey and defendant No. 1 is such, that I think it right to state that that very emphatically is my conclusion.

Entertaining this opinion, I must decree the plaintiff's claim with interest at 6 per cent. per annum from the date of the adjudication up to judgment.

Costs and interest on judgment at 6 per cent. per annum.

Suit decreed.

Attorneys for the Plaintiff: Messrs. *Madhowji, Kamdar* and *Chhotubhai.*

Attorneys for the Defendants: Messrs. *Bhaishankar, Kanga* and *Girdharlal.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO 245 OF 1911.

February 4, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.

SHAIDA ALI—PLAINTIFF—APPELLANT

versus

PHULLO AND ANOTHER—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 132—*Suit for* malikana *allowance as chargeable on property—Limitation.*

Where the plaintiff sued to recover *malikana* allowance for 11 years and asked for a decree against the property on which that allowance was chargeable:

Held, that Article 132 of the Limitation Act would apply.

CHINTAMONI DUTT *v.* JOGESHUR BHATTACHARYA.

Kallar Roy v. *Ganga Pershad Singh*, 33 C. 998, distinguished.

First appeal from a decree of the Additional Judge of Moradabad.

Mr. *A. Haidar*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This is plaintiff's appeal arising out of a suit to recover eleven years' arrears of *malikana*. The plaintiff asked for a decree against the property on which he says the *malikana* allowance was chargeable. The Court below has given him a decree for Rs. 57-3-4 only. In appeal to this Court, it is pointed out, on behalf of the appellant, that the Court below, in making its calculation, has made an obvious mistake and that the sum due to the plaintiff-appellant on the basis adopted by the Court below should be Rs. 262-12-5, to which should be added Rs. 18-0-0 on account of *bhent*. The defendants-respondents have filed objections and it is contended on their behalf that the suit is barred by time. Reliance is placed on *Kallar Roy* v. *Ganga Pershad Singh* (1). In that case, the learned Judges refused to apply the provisions of Article 132 of the Limitation Act, the reason being that in the particular case before them the plaintiff had not asked for a decree against the property chargeable with *malikana*. In the present case, the plaintiff asked for a decree against the property, although the Court below has not granted it. The explanation to Article 132 leaves no doubt as to the period of limitation applicable to suits of this nature. We allow the appeal so far that in lieu of the decree for Rs. 57-3-4 passed by the Court below, we substitute a decree for Rs. 280-12-5. Parties will pay and receive costs in proportion to failure and success in both Courts. The cross-objections are dismissed with costs.

Appeal allowed.

(1) 33 C. 998.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS Nos. 1609, 1623 AND 1624 OF 1910.

February 5, 1913.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

CHINTAMONI DUTT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JOGESHUR BHATTACHARYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Patni—*Suit for possession of land included in* patni—*Defence that land in suit is* lakhiraj—Onus *of proof*—*Limitation*—*Adverse possession*—*Want of possession*—*Non-payment of rent*—*Setting up* lakhiraj *title necessary.*

In a suit by a *patnidar* for possession of lands contained in the ambit of the *patni*, the *onus* of showing that the lands are *lakhiraj* and not *mal* lands, lies upon the defendant. The plea of limitation in such a suit depends upon the doctrine of adverse possession and not upon want of possession by the plaintiffs.

Sashi Bhusan Bakshi v. *Mahomed Matain*, 4 C. L. J. 548, followed.

Abhoy Churn Pal v. *Kally Pershad Chatterjee*, 5 C. 949; 6 C. L. R. 260, distinguished.

The mere non-payment of rent would not constitute adverse possession. The defendant must show that he set up a *lakhiraj* title adverse to the *zemindar* and the *patnidar* for more than 12 years before the institution of the suit and that he has been holding adversely since, and he must show that in respect of each plot in suit.

Appeal from the decree of the Sub Judge of Hooghly, dated January 31st, 1910, affirming that of the Munsif of Arambag, dated April 27th, 1909.

Babus *Dwarka Nath Chakravarti* and *Tarak Chandra Chakravarti*, for the Appellants.

Babus *Soroshi Charan Mitra*, and *Sarat Kumar Mitra*, for the Respondents.

JUDGMENT.—It is perfectly clear that the onus of proof in this case has been wrongly placed in both the Courts below. Their attention does not appear to have been called to the case of *Sashi Bhusan Bakshi* v. *Mahomed Matain* (1), which is precisely in point. The case relied on by the learned Munsif, *Abhoy Churn Pal* v. *Kally Pershad Chatterjee* (2), was a case of a very particular nature, where resumption proceedings had been taken in respect of all the land in suit, and notwithstanding those proceedings, the defendant had continued to hold possession, which possession was held to be adverse.

(1) 4 C. L. J. 548.
(2) 5 C. 949; 6 C. L. R. 260.

But in this case, the case has been decided upon the finding that the plaintiff has failed to prove his title and that there is absolutely nothing to show that the plaintiffs or their lessor ever held possession of the land in suit in any way within 12 years prior to the suit. Now this is not a sound basis for decision. The onus of showing that the lands which are contained in the ambit of the *patni* are *lakhiraj* and not *mal* lands lies upon the defendant, and this is a case in which the plaintiffs have not as in an ordinary suit for ejectment to establish their title. *Secondly*, the plea of limitation depends upon the doctrine of adverse possession and not upon want of possession by the plaintiff. This also is a matter which under the circumstances of this case it is incumbent upon the defendant to prove affirmatively in respect of every plot which is claimed by the plaintiff. The judgments of the lower Courts show that these plots vary as regards their incidents. There are tanks, there are waste lands, there are cultivated lands, there are homestead lands, there are lands of many descriptions; and it is quite possible that the defendants during the time of their *patni* got into possession of this land without payment of rent and have not been paying any rent since. The mere non-payment of rent would not constitute adverse possession. They must show that they set up a *lakhiraj* adverse to the *zemindar* and the *patnidar* 12 years or more than 12 years before the institution of this suit and that they have been holding adversely since and they must show it in respect of each of these different plots.

It has been strenuously urged that although the onus may have been wrongly placed, the learned Judge in the Court below has fully considered the evidence and has set out the facts which show that the defendants sufficiently discharged the onus that lay upon them. Particular stress is laid on his finding in connection with the Record of Rights but we do not find that he is at all clear as to whether every one of these plots was entered in the Record of Rights as *lakhiraj* or claimed in the Settlement proceedings as such to the knowledge of the Maharaja of Burdwan. The finding, "further the Record of Rights in connection with this *mahal* was prepared at the time the Maharaja was in *khas* possession and even then the defendants set up their *lakhirai* right to all the disputed lands which they were proved to be in occupation of" is a vague and unsatisfactory finding. We do not know whether they were found in occupation by the Settlement Officer; we do not know what he recorded against each plot.

The case must go back for re-consideration on the evidence now on the record, bearing in mind that the onus on both these points is on the defendants, and that a separate finding must be come to with respect to each of the plots claimed in the plaint The appeal is decreed in these terms: the judgment and decree of the lower Appellate Court are set aside and the case is remanded for decision according to the directions contained in this judgment.

The costs will abide the result.

This judgment will govern Appeals Nos. 1623 and 1624 of 1910.

Appeals allowed; Cases remanded.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 146 OF 1912.

February 4, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

GANGA NARAIN—OPPOSITE SIDE—APPELLANT

versus

KAUNSILLA—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s 26—Removal of father from guardianship—Neglect of education of minor—Grounds for removal.

A father was appointed guardian of the person and the property of his minor sons.

He had precarious means of living, laid claim to his minor sons' money, neglected their education, and took another wife:

Held, that from the point of view of minor's welfare, the father was not a fit person to act as guardian and should be removed.

First appeal from an order of the District Judge of Allahabad.

Mr. *A. P. Dube*, for the Appellant.

The Hon'ble Dr. *Tej Bahadar Sapru*, for the Respondent.

JUDGMENT.—The appellant, Ganga Narain, is a man who used to reside in this District even in his youth in the house of his father-in-law. During the

life-time of his wife, his father-in-law used to deposit money either in the name of the appellant's wife or her children. On the death of the wife, appellant applied to be appointed guardian of the person and property of his minor children. His object was to deal with the money, which was in deposit in the Bank of Bengal and the Post Office in the name of his wife. There was another deposit in the Post Office in the name of his minor son. In his application for guardianship, he made no mention of this. He was appointed guardian of the person and property. His mother-in-law applied to the District Judge to have him removed from the post on the ground that he was attempting to take possession of the minor's property, that he had neglected his children, all of whom had died except one son, that the latter's education was totally neglected and lastly that the guardian had removed himself and the minor out of the jurisdiction of the Court. In reply the appellant asserted a title in himself to all the property, which stood in the name of the children. In the course of hearing, he expressed a wish that the property might be deemed to belong to his son. To the question as to what steps he took to educate his son, he gave a reply which shows most clearly that he has totally neglected his child in this matter. He admits that he removed himself and the child from the limits of the jurisdiction of the Court and it is clear that he is a man whose means of livelihood are precarious. He has taken a second wife. On these grounds, the Court below has removed him and has appointed the grandmother as guardian of the remaining son. *Musammat* Kaunsilla is possessed of ample means and is quite willing to undertake the costs of education and bringing up without touching any money that belongs to the minor. From the point of view of the minor's welfare, there can be no two opinions that the appellant is not a fit person to act as a guardian whereas *Musammat* Kaunsilla is. In our opinion, the order of the Court below is a proper one. We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1503 OF 1911.

March 18, 1913.

Present:—Mr. Justice Beachcroft and Mr. Justice Chapman.

RAMESHUR MITRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

NUT BEHARI GUIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement—User as of right—Onus *on plaintiff—Presumption from user—Question of fact.*

In a suit under section 26 of the Limitation Act, the onus is on the plaintiff to prove that the user was as of right. But the presumption to be drawn from user must always be a question of fact depending on the circumstances of each case.

Shaikh Khoda Buksh v. *Shaikh Tajuddin*, 8 C. W. N. 359, followed.

Appeal from the decree of the Sub-Judge of Burdwan, dated March 8th, 1911, confirming that of the Munsif of Katwa, dated September 27th, 1909.

Babu *Naresh Chandra Sinha*, for the Appellants.

Babu *Bipin Behari Ghosh*, (Junior), for the Respondents.

JUDGMENT.—The parties to this litigation are neighbours. The defendants own a tank at the edge of which the plaintiffs' house is situated. The plaintiffs brought two suits, one for recovery of possession of a strip of land on the bank of the tank and the second for a declaration that they had a right of easement to use the water of the tank by a *ghat* situated at the south-east corner. Both the suits were decreed by the first Court and the decision of the first Court was upheld by the Appellate Court.

In the present appeal, we are concerned only with the suit which asked for the declaration as to the right of easement, the other suit being concluded by the findings of fact. The Subordinate Judge has found as a fact that the use of the *ghat* in question was enjoyed openly as of right for a period of over 20 years.

The first ground taken on appeal is that the learned Subordinate Judge has misplaced the onus. The passage objected to is this:—"The *ghat* was enjoyed openly and there is no evidence on the other side to show that there was any interruption and as their possession is not said to be permissive, it must have been out of right." It is objected that here the Subordinate Judge has placed

the onus on the defendants of proving that the use of the *ghat* was permissive, and reliance has been placed on the case of *Shaikh Khoda Buksh* v. *Shaikh Tajuddin* (1). No doubt, that case is an authority for the proposition that in a suit under section 26 of the Limitation Act, the onus would be on the plaintiff to prove that the user was as of right. But, as the case quoted shows, the presumption to be drawn from user must always be a question of fact depending on the circumstances of each case. In the case before us, the defendants in their written statement said that the plaintiffs had never used this *ghat*. Now that user for 20 years has been found against them. They wish to take up the inconsistent position that this user has been permissive. In the circumstances, we are of opinion that the Subordinate Judge was perfectly justified in saying that the user of this *ghat* must have been as of right. The first ground taken, therefore, fails.

The second objection urged is that the effect of the decree is to prevent the defendants from filling up the tank. As to the right of filling up the tank, we express no opinion; for it appears that the issue which dealt with the question of filling up or obstructing the *ghat* was not pressed, as there had been no obstruction. The decree of the Munsif as it stands goes beyond the relief that was asked for, and the findings of the lower Court. On behalf of the respondents, the request that there should be an amendment of the decree is not opposed.

The decree will, therefore, be amended in this way, namely, that the plaintiffs will be declared to have a right of easement to use the *ghat* for the purpose of drawing water from the tank for the purposes mentioned in the plaint. A decree to this effect will be substituted for the decree of the lower Court. Subject to this modification, the appeal is dismissed.

The respondents are entitled to their costs in all Courts.

Decree modified.

(1) 8 C. W. N. 359.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1207 OF 1911.

January 4, 1913.

Present:—Mr. Justice Chamier.

SRI THAKURJI MAHARAJ AND OTHERS —DEFENDANTS—APPELLANTS

versus

LACHMI NARAIN—PLAINTIFF—RESPONDENT.

Land Revenue—Covenant running with land—Vendor and purchaser—Agreement to reserve land revenue free—Enforcement of agreement.

In 1833, the owner of a certain *zemindari* transferred it with an agreement that the transferor should retain 50 *bighas* out of it and the transferee should pay the whole of the land revenue including that of 50 *bighas* reserved. Both the *zemindari* and the transferred portion passed through a number of hands:

Held, (1) that the agreement did not run with the land and the transferees of the vendee were not bound by the agreement for all time to come;

(2) that the reservation of the land could not be treated as a revenue free grant which would remain in force until resumed.

Naubat Singh v. *Narain Singh*, 4 A. L. J. 807; A. W. N. (1908) 27, distinguished.

Second appeal from a decree of the Additional Judge of Bareilly.

Mr. *Sawhny*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by the respondent against the appellants under section 159 of the Agra Tenancy Act. The respondent is *lambadar* of a *mahal* which includes 50 *bighas* held by the appellants and he has paid to Government the revenue assessed upon those 50 *bighas*. The appellants' defence was that they are entitled to hold the land free of revenue under an agreement made in 1833. It appears that in 1833, one Debi Prasad, who was then owner of the *zemindari*, transferred the whole of it to one Dalganjan, except the 50 *bighas* which he retained for himself, it being agreed that Debi Prasad was to pay no revenue for the land and further that he was to receive Rs. 12 per annum from the transferee. Both the *zemindari* and the 50 *bighas* have passed through various hands and there has been a partition under which part of the 50 *bighas* fell into one *mahal* and the *zemindari* into another *mahal* of which the respondent is *lambardar*. Respondent occupies the position of Dalganjan, as regards that portion of the 50 *bighas* which is his in the *mahal*. The question for decision is whether the agreement of

1833 is still in force between the parties to this suit. In a suit between the appellants and the *lambardar* of the other *mahal*, it has been decided that the agreement is still binding as between the appellants and that *lambardar* and it is contended that that decision renders the question *res judicata*. It is obvious that the question is not *res judicata* in the present case, for the respondent was not a party to the case in which the decision was pronounced. Apart from the decision which is that of a Subordinate Court, it appears to me that the question is free from doubt. It is argued that the agreement of 1833 runs with the land and can be enforced for all time by the owner of any portion of the 50 *bighas* against the owners of the *zemindari*. At common law in cases other than those between landlord and tenant which are treated differently, the right to take advantage of covenants made with the owner of the land to which they relate runs with the land in certain circumstances, but the burden of covenants made by the owner of land to which they relate does not run with the land at law. This seems to be the law in India under section 55 (2) of the Transfer of Property Act, which nowhere provides that the burden of a convenant shall run with the land except as between landlord and tenant (see sections 108 and 109). In equity, a covenant is not said to run with the land. The equitable doctrine is that a person who takes with notice of a covenant is bound by it but this applies only to restrictive not to affirmative covenants, and this seems to be the law in India, see proviso to section 11 and section 40 of the Transfer of Property Act.

Here we have in effect a personal undertaking by a transferee of land that he will pay the revenue on certain other land and there is no stronger reason for holding that the undertaking is annexed to the land transferred than for treating it as annexed to any other land bolonging to the transferee at the time of the transfer. It seems to me impossible to hold that the owners, however numerous they may be, of the land transferred in 1833, are for all time burdened with the liability to pay the revenue of the 50 *bighas*. The case is clearly distinguishable from that of *Naubat Singh* v. *Narain Singh* (1), where the agreement was one between a superior and an inferior proprietor and was held binding upon them. Nor can the case be treated as if a revenue-free grant had been made by Dalganjan to Debi Prasad, which could be resumed by the latter or his representative and should be treated as being in force until resumed by proceedings taken under the Tenancy Act. The point has been decided more than once in Oudh. I am not aware of any decision on the point in this Court but it seems clear to me that the appellants cannot treat the undertaking of Dalganjan made in 1833 as a covenant annexed to the *zemindari* and enforceable against the owners of it for all time. It is not suggested that the respondent is the heir of Dalganjan. The appeal is dismissed.

Appeal dismissed.

(1) 4 A. L. J. 807; A. W. N. (1908) 27.

MADRAS HIGH COURT.

FIRST APPEAL No. 199 OF 1910.

February 10, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Tyabji.

MUTHAMMAL—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF TINNEVELLY—DEFENDANT—RESPONDENT.

Madras Revenue Recovery Act (II of 1864*)*, *s.* 58*—Jurisdiction of Civil Court—Interpretation of statutes—"Divided estate"—Portion of* mitta *acquired by Government—Suit against Government for contribution towards assessment—Maintainability—Madras Permanent Settlement Regulation (XXV of* 1802*)*, *ss.* 2, 3*—Madras Land Revenue Assessment Act (I of* 1876*)*.

Certain land, acquired by Government by adverse possession against the owner thereof, was alleged by the plaintiff to have formed part of his *mitta*, paying assessment to Government. In a suit by the plaintiff *mittadar*, for the refund of a proportionate portion of the amount paid by him as one year's *peishcush* on the entire *mitta* and a declaration that he is only liable to pay *peishcush* proportionately to the extent of the *mitta* now in his possession:

Held, (Per *White, C. J., affirming the order of the lower Court*), that a Civil Court had no jurisdiction to fix the proportionate *peishcush* payable by the plaintiff to Government.

Section 58 of Act II of 1864 is a bar to such a suit and this enactment is a general one and not restricted to questions arising in proceedings under that Act.

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The words 'divided estate' in that section ought not to be construed to have a restricted or technical meaning.

Though the Courts may apportion the assessment as between co-sharers, yet the Courts cannot have jurisdiction, by severing the capacities of Government, to apportion the assessment as between the *mittadar* and Government since the effect of that would be to exercise a right which the Legislature has taken away from the Courts by section 58.

Maharajah of Vizianagaram v. *Rajah Setrucharla Somasekhararaz*, 26 M. 686; 13 M. L. J. 83 (F. B.), distinguished.

Per *Tyabji, J.*—The prayer for declaration in respect of future *peishcush* cannot be granted even as a declaration for contribution by Government towards that liability as that would directly alter the assessment fixed on the land which the Courts have no jurisdiction to do.

The claim for refund of a proportionate portion of the amount already paid by the *mittadar* stands on a different footing and can be maintained in a Civil Court.

Such a claim is in effect a claim for contribution from joint owner and arises after payment of the assessment and recognises the propriety and validity of such payments and, consequently, there is no interference with the rights of Government.

If the Secretary of State can acquire land by adverse possession like a private individual, he must hold the land with the same incidents as a private individual.

In construing a particular section of an Act, we must look at the whole Act and it is necessary to consider the context in which such section occurs.

Maharajah of Vizianagaram v. *Rajah Setrucharla Somasekhararaj*, 26 M. 686; 13 M. L. J. 83 (F. B.), followed.

Section 58 of Act II of 1864 has no application to such a claim and the words 'divided estate' have a special meaning under that section.

The words "in the portions of a divided estate" in section 58 of Act II of 1864 qualify the words land revenue payable to Government.

The words "divided estate" in section 58 must be construed so as to have reference to such a division of the estate alone as is contemplated in the rest of the Act. The words have no reference where the estate has become divided by one portion of it having been acquired by a third person through adverse possession.

Enactments which take away the jurisdiction of Civil Court must be strictly construed.

Section 58 can be no bar to a Civil Court apportioning the assessment which is admittedly due to the Government on the whole of a particular *mitta*, when such apportioning is made for the purpose of deciding in what portions that total assessment has to be borne by two or more persons, who have become owners of portions of such a *mitta*. The section can have no application to the rights of joint holders of land amongst themselves as distinguished from the liability of each of them jointly and severally to pay the whole assessment to the Government.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 57 of 1908.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.

WHITE, C. J.,—The Subordinate Judge has held that the plaintiff's claim to recover possession of the land, which the plaintiff says, forms part of the *Vallam Mitta* sold to his predecessor-in-title in about 1867, is barred by limitation. On appeal, Mr. Govindaraghava Iyer has not contested this finding.

The only question we have to consider is whether, in the events which have happened, the plaintiff is entitled to a refund of a portion of the amount paid by him as one year's *peishcush*, and a declaration that he is only liable to pay *peishcush* to the amount of Rs. 535 odd and not Rs. 823 odd.

The plaintiff's case is that Rs. 823 is the assessment on the *mitta* sold to his predecessor-in-title, which included certain lands which are now in the possession of Government. The defendant's case is that these lands were not included in the *mitta* and that the assessment was fixed with reference only to the lands now in the possession of the plaintiff.

In the view taken by the learned Judge, it was not necessary for him to record any finding on the question raised in the first part of the 4th issue, *i. e.*,—Whether the land in question forms part of the plaintiff's *Vallam Mitta*? He held that he had no jurisdiction to decide the latter part of the 4th issue, *viz.*, what is the proportionate *peishcush* on the plaintiff's *Vallam Mitta*? There is no specific plea as to the jurisdiction of a Civil Court—and the question does not seem to have been raised in the issues. This, however, was not made a ground of appeal and the question was fully argued before us.

For the purposes of this question, I assume that the land in question originally formed part of the *Vallam Mitta* and that the assessment was fixed with reference to this land as well as with reference to the land which is now in the possession of the plaintiff. The Government have acquired a title by prescription to the land in question. In these circumstances, has a Civil Court jurisdiction to fix the proportionate *peishcush* payable by the plaintiff? I think not.

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We have been referred to section 8 of Regulation XXV of 1802, a Regulation which imposes restriction on alienations in the interests of the public revenue. [See *Vizianagram Maharajah* v. *Suryanarayana* (1)]. The last paragraph of section 3 of the Regulation has apparently no application to this case. Section 8, except in so far as it indicates the general policy of the law, does not seem to have much bearing on the question.

Section 58 of Act II of 1864 enacts that "no Court of Civil Judicature shall have authority to take into consideration or decide any question as to the rate of land revenue payable to Government, or as to the amount of assessment fixed, or to be hereafter fixed, on the portions of a divided estate."

I am of opinion that this is a general enactment and is not restricted to questions arising in proceedings under the Act of 1864.

As regards the construction of the section, my learned brother, whose judgment I have had the advantage of reading, takes the view that the words, "on the portion of a divided estate" qualify the words "land revenue payable to Government." I doubt if the Legislature intended to draw any distinction between "rate" and "amount." If they did not and if the words "on the portions of a divided estate" are to be read as qualifying the words "land revenue payable to Government," the latter part of the section would seem to be redundant. But even if these words do qualify, the words "land revenue payable to Government," I do not think we ought to give the words "divided estate" a restricted or technical meaning.

Act I of 1876 makes provision for separate assessment when a portion of an estate has been alienated. Under this Act, the Collector is to apportion the assessment of the alienated portion. A person aggrieved by the apportionment may appeal to the Board of Revenue and the order of the Board is to be final. A person aggrieved by the fact of separate registration being made, or not made, may sue in a Civil Court for a declaration, but as I read the Act, this does not give a Civil Court jurisdiction to deal with any question of apportionment.

(1) 9 M. 307; 13 I. A. 32.

Mr. Govindaraghava Aiyar has contended that the equitable doctrine of contribution applies and that the plaintiff can call on Government, in their capacity of owner of land on which he has paid assessment, to contribute their proportionate share. In setting out the grounds on which the case of *Maharajah of Vizianagaram* v. *Raja Setrucharla Somasekhararaz* (2) was referred to a Full Bench, Bhashyam Iyengar, J., observed that the doctrine of contribution applied when the arrears of revenue had not been paid to Government by the plaintiff but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate. It may be that this would involve the apportionment of the assessment as between two co-sharers, but in that case there was no question as to the amount of the assessment as fixed by Government, which is the question now raised before us. I do not think we can sever the capacities of Government and say that we have jurisdiction to apportion the assessment as between the plaintiff and Government in their capacity of owner of the land, since the effect of so doing would be to exercise a right which I think the Legislature has taken away, *viz.*, the right to fix the land revenue or apportion the assessment payable to Government.

I think the Judge was right in his conclusion and I would dismiss this appeal with costs.

TYABJI, J.—For the purposes of the present appeal, the facts of the case may be stated as follows:—

The plaintiff alleges that she has for several years past been paying *peishcush* in respect of lands described in the schedule to the plaint, which, she alleges, formed part of an estate described as the *Vallam Mitta* standing in her name, and which land the Subordinate Judge has held to have been out of her possession for over twelve years and to have passed by adverse possession into the ownership of the defendant, the Secretary of State. The plaintiff does not contest now the right of the defendant to the ownership of the said lands, but asks that it should be declared that inasmuch as she has been paying *peishcush* in

(2) 26 M. 686; 13 M. L. J. 83 (F. B.)

respect of the whole of the *Vallam Mitta* estate, such payment is in excess of the amount validly leviable from her, and that, in future, a smaller amount of *peishcush* should be levied than has been levied in the past, *viz.*, that the amount of the *peishcush* levied from her, in respect of the said lands, should be deducted from the total amount of the *peishcush* levied in respect of the *Vallam Mitta* estate and that she should be charged with *peishcush* in proportion to the lands held to be actually in her possession.

It is argued on behalf of the defendant that no Civil Court has jurisdiction to consider the questions which must be adjudicated upon as a necessary preliminary before the plaintiff can be given the reliefs she seeks. The learned Subordinate Judge has upheld this contention of the defendant, and dismissed the suit, without recording any finding on the point whether or not the said lands originally formed part or were included within the limits of the *Vallam Mitta* estate, which stands in the name of the plaintiff, and in respect of which she has been paying *peishcush*. The question argued before us, therefore, has reference entirely to the point whether, assuming that the said lands did form part of the *Vallam Mitta* estate, the suit will lie.

For the purposes of making out that there is jurisdiction in Civil Courts to entertain this suit, the learned Pleader for the appellant stated that his case is that the plaintiff is entitled to have a finding on the question whether, as a matter of fact, the said lands originally formed part of the *Vallam Mitta* estate or not, for this reason, that if this Court should come to the conclusion that the plaintiff is paying *peishcush* in respect of lands which she has not been holding, and which she is not any more entitled to hold, then such a finding, though not in itself binding upon the Executive Authorities, will strengthen her claim before them if she applies for a proportionate reduction of the *peishcush* payable by her. For the purposes of this part of his argument, the appellant's Pleader admits that, even if the facts were proved to be as alleged by the plaintiff, this Court would have no power to grant the relief claimed on the basis of their existence. Under these circumstances, there seems to be little doubt that the question cannot be litigated in the Civil Courts. Indeed the appellant's Pleader himself did not press this point. He, however, contended that even if he is not permitted to prove the fact that the said lands formed part of the *Vallam Mitta* estate solely in order that he may be able to base on such a finding an application to the Revenue Authorities for reduction of the assessment, nevertheless admittedly there is jurisdiction in the Court to order that one of two or more persons, who were joint holders of the same *mitta*, should contribute proportionately towards the *peishcush* the whole of which has been levied from the other joint holder or holders and it is argued that one of the reliefs that the appellant seeks, [*viz.*, under prayer (2) of the plaint] is in effect a prayer that the defendant should be ordered to contribute towards the *peishcush* that is due on the *Vallam Mitta* estate, which, for the purposes of this appeal, must be assumed to be owned partly by the defendant and partly by the plaintiff. That the Court has power to order one of several joint owners to contribute towards the payment of the assessment which has been discharged by another joint owner was decided in *Maharajah of Vizianagaram* v. *Rajah Setrucharla Somasekhararaz* (2) and we have been referred in particular to the remarks of Mr. Justice Bhashyam Iyengar on page 693 to the effect that the right to contribution is "bottomed and fixed on general principles of justice and does not necessarily spring from contract." Those remarks were made when he was considering whether the claim to contribution was in any manner affected by the fact that the claimant had not himself paid the principal sum in respect of which contribution was claimed, but that such sum had been realized by the Collector from the income of the claimant's share after it had been registered as a separate estate, and the Court came to the conclusion that the said fact did not affect the claim. It was assumed that the right to contribution existed where the whole sum had been voluntarily paid by the claimant.

For the appellant, it is also argued that, if a claim can be made for contribution in respect of *peishcush* already paid, the Court

may make a declaration in accordance with prayer (3) of the plaint, *viz.*, that in future the *peishcush* payable by the plaintiff should only be Rs. 537-7-6, which is the sum that remains over after deducting from the whole of the yearly *peishcush* the amount claimed by the plaintiff by way of contribution in each year.

The respondent meets these arguments by referring to the Madras Permanent Settlement Regulation, 1802, sections 2 and 3 and the Madras Revenue Recovery Act, 1864, section 58, which, he contends, take away the jurisdiction of this Court to deal with the matters involved in this suit.

It is admitted by the learned Pleader for the appellant that the Madras Permanent Settlement Regulation is a bar to this Court altering the amount of assessment fixed thereunder on any land. It is also admitted that the assessment so fixed is leviable from every portion of the land in respect of which it is fixed. On the other hand, it is clear that prayer (3) may in some respects have effects similar to that of a claim for contribution. The point was not taken before us whether a claim for contribution can validly be made in respect of sums not actually paid but for which there is merely a liability that will arise in future. I, therefore, express no opinion on that point. It is unnecessary for me to do so, for, assuming that a claim for contribution could lie in respect of a liability, it seems to me to be clear that to grant such a declaration as is claimed in prayer (3) would, in its direct effect, be to alter the assessment fixed on the land, and to declare that in future the assessment payable shall be not Rs. 823-3-0 but Rs. 535-7-6. It was never contended on behalf of the appellant that this Court could pass such an order and I agree with the learned Chief Justice that the appeal must fail so far as the claim under prayer (3) is concerned.

It remains, therefore, only to be considered whether the claim under prayer (2) of the plaint can be sustained as a claim for contribution, and if so, whether section 58 of the Madras Revenue Recovery Act, 1864, is a bar to such a suit.

For the respondent, it is contended that the claim under prayer (2) is no less a claim for altering the assessment than the claim under prayer (3). The two prayers are, however, in their nature, essentially distinguishable in the particulars above referred to, *viz.*, that prayer (2) is in respect of a sum of money already paid, and prayer (3) has reference to future payments to be made to the Government. That distinction not merely removes the doubt whether the claim for contribution can arise in respect of a future liability, but it also affects the very nature of the claim. For, where the so called contribution is claimed in respect of a sum to be paid as *peishcush* in future, it must necessarily have reference to a claim by the Government as Collectors of Revenue, and any interference with that claim must contravene the provisions of the Madras Permanent Settlement Regulation, where, on the other hand, the claim arises only after the assessment has already been paid [as in the case with prayer (2)], it seems to me to be clear (subject to two questions which I shall next consider) that there is no interference with the right of the Government to levy the full assessment: the claim for contribution in the latter case arises after the assessment has already been fully paid, and is in fact based upon such payment, and on a recognition of such payment having been valid and proper.

The learned Subordinate Judge has dealt with both prayers in the 14th paragraph of his judgment; and he holds that one who acquires title to property by adverse possession is in the same position as an alienee and that the Madras Land Revenue Assessment Act of 1876 (Act I of 1876) is a bar to the Civil Courts apportioning the assessment in this case as in any other case. But this argument could equally prevent the Court from apportioning the revenue as between co-owners of property even for the purpose of deciding how much one of several joint holders has to contribute towards the payment of the assessment as between himself and the other joint holders of the lands—which it is admitted that the Court has jurisdiction to do. It, therefore, seems to me that the reasoning of the Subordinate Judge is faulty, owing to a failure on his part to distinguish between an apportionment of the amount of the revenue where on the one hand such apportionment refers to the right of the Government to levy the assessment, and where, on the other hand, such an

apportionment is for a purpose not affecting the right of the Government as Collector of Revenue, as for instance for apportioning it between joint owners.

The first of the matters which I have above referred to as being necessary to be considered before the conclusion can be reached, that prayer (2) must be taken to be in effect a claim for contribution from a joint owner and must be adjudicated upon as such, is, whether the fact that the defendant in this suit is the Secretary of State affects this point:—whether, in other words, the distinction between a claim for the alteration of the amount of revenue to be paid in future to the Government and a claim for payment back of a portion of the revenue already paid to the Government, disappears where the person from whom the payment back is sought is the Government. It may well be argued, as it has been before us, that the result of the two claims, so far as the parties are concerned, is exactly the same. For, applying the reasoning to the present fact, in the one case the Government never recovers more than Rs. 535-7-6 and in the other case it pays back whatever has been recovered in excess of that sum. It seems to me, however, that the fact that the two claims have similar effects in the end is an accident, and that the claim against the Government as the holder of land must be considered in the same light as if it were any private individual holding lands; the claim must not be affected by the fact that the joint owner in this case is also the Collector of Revenue. If the Secretary of State can acquire land by adverse possession like a private individual, he must hold such land with many of the same incidents as a private individual, and amongst such incidents it seems to me that one must be the liability to contribute towards the payment of the *peishcush* where the portion of the land held by him forms part of a *mittu* which contains also other land held by another owner who has paid the whole of the *peishcush*.

The other point to which I have above alluded as requiring to be considered before it can be determined if this suit can be entertained is, whether a claim for contribution to the assessment against the Secretary of State does not involve the adjudication of questions which we are prevented from considering by the Madras Revenue Recovery Act 1864, section 58. The contention of the respondent is that such a claim requires the Court to fix the rate of revenue payable to the Government and that there is no jurisdiction to do so.

The section is as follows:—

"58. No Court of Civil Judicature shall have authority to take into consideration or decide any question as to rate of land revenue payable to Government, or as to the amount of assessment fixed, or to be hereafter fixed on the portions of a divided estate."

Had it not been for the remarks which have fallen from the learned Chief Justice, I should have been inclined to doubt whether the words "rate of land revenue payable to Government" can be held, even in an Act so inartistically drafted as the present one, to have the same meaning as the words "amount of assessment fixed;" the former expression ought, it would have seemed to me, to be interpreted as having reference to the standard according to which revenue is payable and the latter to the total sum at which the assessment is fixed, the one serving as a basis for calculating assessment and the other indicating the total arrived at, on such a basis.

But, whether the two expressions are to have the same meaning or different meanings in either case, it is to be determined whether the words "on the portions of a divided estate" qualify the clause "land revenue payable to Government." If they qualify the said clause, the meaning of the section would seem to be that, in the case of portions of divided estate, neither the rate of land revenue nor the amount of assessment shall be fixed by a Civil Court, and this interpretation seems to me to be most likely to give full effect to every word in the section and to do least violence to any portion of it. It will be observed that the doubt as regards the interpretation of the section centres round two points, *first*, whether the two expressions 'rate of land revenue payable to Government', and 'the amount of assessment fixed' have identical meanings, and *secondly*, whether the former of these expressions has to be taken in its unrestricted sense, or to be read as qualified by the words 'in the case of portions of divided estate.' As regards the first

point, I have already said that, in my view, the two expressions ought to have different meanings attached to them. As to the second point, I think that the words, "in the case of portions of a divided estate" must be taken to qualify the first clause also, and my reasons for so holding are as follows. If we give an interpretation to the first clause which would not restrict it to cases where a divided estate is concerned, it would imply that this particular clause has reference to matters falling beyond the scope of every other provision contained in the Act. When I come to deal with the meaning of the words "divided estate," it will be necessary for me to consider the question how far, in construing a particular section which comes up for interpretation, the Court ought to take into consideration the provisions in an Act preceding or following that particular section, and it is, therefore, unnecessary for me to dwell further on this point at the present stage, the more so, as it was assumed before us that the clause in question does refer to a divided estate, the argument of the respondent's Counsel being rather to the effect that, under the circumstances of this case, the *Vallam Mitta* estate must be considered to be "a divided estate," and in order to decide what will be the proper contribution payable to the plaintiff in accordance with his claim, this Court would have to "take into consideration" the "rate of land revenue payable to Government on the portions of a divided estate" as well as the amount of assessment fixed or to be hereafter fixed on the portions of divided estate. Hence for the purpose of this appeal, it has to be considered whether in the circumstances stated above, the *Vallam Mitta* estate can fall within the description of "a divided estate." There is no definition of a "divided estate" either in the interpretation clause to the Act, or in any other section to which our attention has been drawn. It seems to me that, had there been nothing beyond the words of section 58 to serve as a guide to us in giving a meaning to the words "a divided estate," it might still have been a very doubtful question whether an estate could be considered to be a divided estate, part of which had passed out of the ownership of the person originally entitled to it, by his having been out of possession for over twelve years. But I agree that it might have been held in that case that, though the draftsman did not perhaps have such a state of circumstances, as we are dealing with, distinctly present to his mind, and though the words employed are not very apt to refer to such circumstances, yet he must be taken to have meant to refer to all cases in which the estate ceases to form a whole, and wherever there is any division of them into two or more portions. It is well established, however, that in construing a particular section of an enactment, it is necessary to consider the context in which such section occurs. Thus Lord Blackburn remarks in *Turquand* v. *Board of Trade* (3): "In construing this Act, of course, like every other Act, we must take the whole of the Act together, and as this is a very long Act, containing, I think, about sixty pages of very closely printed matter, it requires, in order that we may be certain that we omit nothing, that we should look carefully at it altogether and consider all the clauses." Again in *Shuttleworth* v. *Le Fleming* (4), I find that Montague Smith, J., delivering the judgment of the Court of Common Pleas consisting of himself, Earl, C. J., Willes and Byles, JJ., said:—"The language of the 1st section may be sufficiently large to include some rights in gross. The subjects of claim are, right of common or other profit or benefit to be taken and enjoyed from or upon any land. The first and governing subject of claim referred to, is 'right of common.' This general phrase, which defines no species of common, is, no doubt, wide enough to include a right of common in gross, as common of pasture; but it is not an apt or proper phrase to designate a several right to the exclusive pasturage of land, or any other several and exclusive right to take any particular profit of the land.....We think, however, the first section ought not to be read alone but must be construed by reference to the other provisions of the Act." Similarly in *Lord Auckland* v. *Westminster Board of Works* (6), James, L. J., observes that he arrives at the meaning of the words of the section he was construing, "having regard

(3) 11 A. C. 286 at p. 291; 55 L. J. Q. B. 417; 55 L. J. 30.
(4) (1865) 19 C. B. (N. S.) 687 at pp. 709, 711; 34 L. J. C. P. 209; 11 Jur. (N. S.) 840; 14 W. R. 13.
(5) (1872) 7 Ch. 597 at p. 604; 41 L. J. Ch. 723; 26 L. T. 961; 20 W. R. 845.

to the old clauses in lieu of which this 75th section was enacted, and having regard to the 74th section which immediately precedes it, and to the whole context of the Act and the whole spirit of recent legislation with regard to dealing with private persons' property, that the 75th section was only meant to apply to the case of a new building, structure, or erection being built on land which, for the purposes of the Act, would properly have been described by Mr. Vulliamy as vacant ground." The decision in the last cited case being that the words of a later section of the Act which were wide enough to cover alterations in existing buildings were to be confined so as to refer only to buildings erected on lands which had, until then, been vacant. So also in *Hanfstaengl* v. *Empire Palace* (6), the Court cut down the meaning of a later section so as to harmonise with the other section of this Act, and A. L. Smith, L. J., observed:—"In construing a section in an Act of Parliament, it is important to look at the whole Act, and not merely at the one section which has to be construed."

In accordance with the principles above referred to, if I turn to the rest of the Madras Revenue Recovery Act, 1864, in order to see if there is any other portion of it, which may throw light on the meaning of section 58, I find that the words "divided estate," the meaning of which has to be determined, occur in section 46, and that section 45 refers to the division of a landed estate. In these sections it is clear that a divided estate refers to a "part of a landed estate held under a *Sanad-i-Milkiyat i-Istimrar* or otherwise subject to the payment of lump assessment" that has been sold "in discharge of arrear of revenue" under section 44. The sections intervening between sections 46 and 58 deal with the postponement of such a sale on security being tendered, with powers of arresting a defaulter in case of non-payment of arrears of rent, and similar matters. The learned Counsel, who appeared for the respondent, was unable to refer us to any other provision of the Act which has reference to a divided estate, or to any sale or alienation or division other than a sale for the purpose of recovering arrears of revenue. These considerations lead me to the view that the words "divided estate" in section 58 must also be construed so as to have reference to such a division of the estate alone as is contemplated in the rest of the Act and that it can have no reference where the estate has become "divided" by one portion of it having been acquired by a third person through adverse possession. The result at which I have arrived as to the meaning of this section is in accordance with the general principle that sections of this nature which take away the jurisdiction of Civil Courts must be strictly construed. In my opinion, therefore, this section has no application to the present case, inasmuch as in the present case, we have no "divided estate" coming within its terms. For reasons similar to those that I have above stated, I am also of opinion that this section can be no bar to a Civil Court apportioning the assessment which is admittedly due to the Government on the whole of a particultar *mitta*, when such apportioning is made for the purpose of deciding in what portions that total assessment has to be borne by two or more persons, who have become owners of portions of such a *mitta* and that this section can have no application to the rights of joint holders of lands amongst themselves as distinguished from the liability of each of them jointly and severally to pay the whole assessment to the Government.

Another argument which was taken before us on behalf of the appellants was that the Madras Act I of 1876 indicates that Act II of 1864 could not have been intended to apply to estates which had become divided otherwise than on a sale for the recovery of arrears of revenue. It was argued that the later Act provides for the apportionment of assessment by the Collector, and takes away the jurisdiction of Civil Courts to apportion it in the cases of estates which have become divided by voluntary alienation, and that this shows that the earlier Act could not have governed cases of voluntary alienations. For, had it done so, the later Act would have been

(6) (1894) 2 Ch. 1; 63 L. J. Ch. 417; 7 R. 375; 70 L. T. 459; 42 W. R. 454.

unnecessary. For the purpose of considering this argument, it becomes necessary to refer to the provisions of the Act. It was passed for the purpose (as indicated in its preamble) of making better provision for the separate assessment of land revenue of portions of permanently settled estates alienated by sale or otherwise. It permits an application to the Collector for the apportionment of land revenue and lays down the procedure on such an application being made. The Civil Courts' jurisdiction to decide the question whether separate registration ought to be made or not is saved, but their jurisdiction for the actual apportionment of the assessment is taken away.

Having given to the matter careful consideration, I agree with the learned Chief Justice that though the later Act may throw light on the general scope of the earlier Act, the former does not help us in arriving at a decision on the particluar question with which we have to deal.

I need not, for the purposes of the present appeal, consider the question whether any of the provisions of Regulation XXV of 1802, or any other rule of law will prevent the plaintiff in this case from being able to establish in a Court that portions of the *Vallam Mitta* estate are no more held by her, and that they have passed into the ownership of another person. When that question has to be determined, the Court may have to decide whether it can take any cognisance of transfers of property, voluntary or involuntary, which are not registered under section 8 of Regulation XXV of 1802. That question does not arise in the present proceeding before us.

For the reasons above stated, I am of opinion that this case should be sent back to the learned Subordinate Judge for a finding on the fourth issue, *viz.*, "whether the land forms part of the plaintiff's *Vallam Mitta*, and what is the proportionate *peishcush* thereon."

I need hardly say that I feel unable to be confident in my judgment on those points on which I find that the learned Chief Justice has taken a different view. I feel, however, that the considerations to which I have alluded above must outweigh this reason for distrusting my own judgment.

WHITE, C. J.—Tyabji, J. differs; the result is the appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 131 OF 1911.

February 7, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

ANANT DAS—DEFENDANT—APPELLANT

versus

UDAIBHAN PARGAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Two appeals raising same question of title—One appeal abating—Other appeal barred.

A. instituted two suits, one against *B.* and the other against *B.* and *C.* on the same day. Both the suits involved the same questions of title and were disposed of by one and the same judgment; separate decrees were passed in the two suits allowing *A.*'s claims. Appeals were preferred against both the decrees.

From the decree in which there were two defendants, only *C.* appealed; from the other decree *B.* preferred an appeal. Before the appeal by *B.* was heard, *C.* died and the appeal preferred by him abated and the decision of the Court in that case became final:

Held, that the decision in the case against *B.* and *C.* operated as *res judicata* for the purpose of the case against *B.* alone and that the appeal of *B.* was, consequently, barred.

Zaharia v. *Debi*, 33 A. 51 (F. B.); 7 A. L. J. 861; 7 Ind. Cas. 156, followed.

First appeal from the decree of the Additional Subordinate Judge of Gorakhpur.

The Hon'ble Dr. *Sunder Lal*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken to the hearing of this appeal on the ground of *res judicata*. It is necessary shortly to state the facts in order that it may be understood how the question arises. Two suits were instituted in the Court of Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both the suits was Mahant Udaibhan Pargas *alias* Angan Das. In the present suit, Anant Das was the only defendant. In the other suit, the defendants were (1) Sundar Das and (2) Anant Das, the appellant in this appeal. In both suits, the plaintiff claimed a declara-

tion that he was the Mahant of a certain *mat*. In the suit in which both Sundar Das and Anant Das were defendants, the claim was as follows:—

"The plaintiff's title and the defendants' want of title may be established and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff."

In the earlier part of the plaint, the plaintiff stated " but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents etc. * * * * * * * and which Sundar Das, the defendant, has taken back after the institution of this suit without the plaintiff's knowledge."

Both the suits were tried together in the Court below and amongst the issues framed were the following: "Is the plaintiff *chela* of Karan Das and was he appointed Mahant? Has the plaintiff a right to sue? What is the custom relating to the Mahantship, and was the plaintiff appointed Mahant according to that custom?" These issues were decided in favour of the plaintiff. The result was that in the suit in which both Sundar Das and Anant Das were defendants, there was a decree against both the defendants, declaring the plaintiff's title, after the issues to which we have referred had been decided. From the decree in that suit, Sundar Das alone appealed but Anant Das did not prefer an appeal. The appeal of Sundar Das abated by reason of the fact that after his death no steps were taken to bring his representatives on the record within the time allowed by law. Anant Das, however, did appeal in the suit out of which the present appeal arises which, as we have already mentioned, was decided at the same time as the other suit, and by one and the same judgment. We must here mention that although both suits were disposed of by the same judgment, separate decrees were drawn up in each case.

The respondent now, by way of a preliminary objection, contends that the appeal of Sundar Das having abated and Anant Das not having appealed from the decree in that suit, there is now a binding decree against him unappealed from. The appellant Anant Das, on the other hand, contends that section 11 of the Code of Civil Procedure, which deals with "*res judicata*," does not apply to the present case, because the two suits were tried together and disposed of by one judgment on the same day, and *secondly*, because in any event in the suit in which both Sundar Das and Anant Das were defendants, the real question was the title to the particular property mentioned in the plaint in that suit, and that, therefore, the decree which was given in that suit cannot be said to operate as *res judicata* on the question of the title to the property in dispute in the suit out of which the present appeal arises.

Section 11 of the Code is as follows:— "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

In explanation (1), "former suit" is defined as denoting, a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. It cannot for one moment be contended that the decree in the suit in which both Sundar Das and Anant Das were defendants has not now become final as against Anant Das. Beyond all question the issue as to whether the plaintiff was or was not the Mahant was decided in that suit and we are now called upon to decide the same issue in the present appeal. The result might be that if we were now to hear the appeal, there would be one binding decree declaring that Udaibhan was the Mahant, and another equally binding decree declaring that he was not, both decrees being in suits to which Anant Das was a party. It seems to us that it was to prevent anomalies of this description (amongst other reasons) that section 11 was enacted. No doubt, it is somewhat unfortunate in the present case that the appellant is unable to have the question decided by this Court by reason merely of the fact that he did not appeal against the decree in the other suit. This

view of the rule of *res judicata* was taken in the Full Bench case of *Zaharia* v. *Debi* (1), a decision which is, of course, binding on us.

We accordingly dismisse the appeal with costs.

Appeal dismissed.

(1) 33 A. 51; 7 A. L. J. 861; 7 Ind. Cas. 156.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 32 OF 1911.
February 26, 1913.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
SARBESWAR HALDAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAI CHARAN BHADURI—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment—Homestead—Part of agricultural holding—Incidents of tenancy—Bengal Tenancy Act (VIII of 1885), ss. 3 (3), 4, 49, 182.

Where the defendant holds a piece of homestead land under the plaintiffs, and the land forms part of the plaintiffs' agricultural holding, the incidents of the defendant's tenancy are governed by the Bengal Tenancy Act, and a notice to quit, under the Bengal Tenancy Act, must be served in order to bring a suit for ejectment of the defendant.

Babu Ram Roy v. *Mahendra Nath Samanta*, 8 C. W. N. 454, relied upon.

The opinion of Mitra, J., in *Syed Hassan Ali* v. *Gobinda Lal Basak*, 9 C. W. N. 141 at p. 143, explained.

Appeal from the decree of the Second Sub-Judge of 24-Parganahs, dated September 23rd, 1910, confirming that of the First Munsif of Diamond Harbour, dated March 23rd, 1910.

FACTS.—This suit was brought for the ejectment of the defendants from 12 *cottahs* of homestead land after service of a notice to quit under the provisions of the Transfer of Property Act. The defence, *inter alia*, was that the land in suit formed part of the plaintiffs' agricultural holding and that as such the incidents of the defendant's tenancy were governed by the Bengal Tenancy Act. The defendant also denied that any notice to quit was served and contended that the notice, if any, was not sufficient and valid.

The first Court held that although the purpose of the defendant's tenancy was not agricultural but residential, yet the incidents of it are to be regulated by the law which governs the plaintiffs' holding, that is to say, by the Bengal Tenancy Act. *Babu Ram Roy* v. *Mohendra Nath Samanta* (1). The notice to quit, therefore, ought to have been given under that Act and not under the Transfer of Property Act. The suit was dismissed.

On appeal, the learned Sub-Judge agreed with the Munsif and dismissed the appeal.

The plaintiffs preferred this second appeal to the High Court.

Babu *Gunoda Charan Sen*, for the Appellants.

Babu *Shoshi Shekhar Bose*, for the Respondent.

JUDGMENT.—It is obvious that this appeal is concluded by express provisions of law and by authority. The law on the subject is contained in section 4 of the Bengal Tenancy Act. An under-*raiyat* is a tenant holding, whether immediately or mediately, under a *raiyat*, and "tenant" is defined in section 3 (3) as a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person. Section 182 also includes homestead lands which are part of the *raiyats'* holding as falling within the scope of the Act; and if authority was required, the case of *Babu Ram Roy* v. *Mahendra Nath Samanta* (1) has decided the question. The remarks of Mitra, J., who was also a party to the case we have just cited, in *Syed Hassan Ali* v. *Gobinda Lal Basak* (2), have no bearing whatever upon this case. He says that the Bengal Tenancy Act, of course, has no operation as regards homestead lands situated in towns or outside towns. This observation was not necessary for the decision of the case and it can only apply to such homestead lands as are not part of the *raiyats'* holding.

That being the case, the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 8 C. W. N. 454.
(2) 9 C. W. N. 141 at p. 143.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 152 OF 1912.

February 7, 1913.

Present:—Justice Sir George Knox, KT., and Mr Justice Rafique.

KUNWAR SEN AND OTHERS—DEFENDANTS —APPELLANTS

versus

JWALA PRASAD AND OTHERS—PLAINTIFFS —RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 146, 148—Proprietor, meaning of—Muafidar—*Sale for Government revenue—Right of purchaser.*

The word 'proprietor' used in sections 146 and 148 refers only to those who, in the *wajib-ul-arz*, are set out as being the persons on whom the revenue has been at the time of Settlement assessed jointly or severally. *Muafidars* are not such persons. Hence, if a *mahal* is sold for payment of the arrears of Government revenue, the *Muafidar's* right is not extinguished.

A mortgage of *nankar* property created by the *nankar* holders is not extinguished by the subsequent sale of the property for arrears of revenue, and is enforceable against the purchaser at the revenue sale.

Second appeal from the decision of the District Judge of Farrukhabad.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—The plaintiffs to the suit, out of which this second appeal has arisen, describe themselves as mortgagees from certain persons, whom they have arrayed as defendants Nos. 1 to 3. It appears that the *mahal* in which the land in dispute is situate was sold for arrears of revenue which were due from the *mahal*. On December 24, 1892, the *mahal* was sold at a revenue sale and purchased by one Jagan Bahadur Lal. Jagan Bahadur Lal in turn sold all the rights he had purchased to one Tara Chand and defendants Nos. 4 to 6 are the repersentatives in interest of Tara Chand. The mortgagees are now seeking to enforce their rights and ask that the mortgage money may be awarded to them by sale of the mortgaged property. The suit was defended only by defendants Nos. 4 to 6. The contention is that as the whole of the *mahal* including the area in dispute was sold to Jagan Bahadur Lal, even if defendants Nos. 1 to 3 and the plaintiffs had any right as co-sharers, that right became extinct under section 167 of Act XIX of 1873. The land in dispute, they say, though known as grove-land, is not actually a grove, but has been actually under cultivation from a long time prior to the execution of the mortgage set up by the plaintiffs. The Subordinate Judge of Farrukhabad, before whom the suit came in the first instance, relying upon sections 146 and 148 of Act XIX of 1873, held that the plaintiff might be granted a decree for recovery of possession of the land in dispute. In appeal, the learned Judge found that the land in dispute was really '*nankar*' land and ex-proprietary tenancy had been created so far as the occupiers of the '*nankar*' land were concerned. He, further, held their rights in the land were in no way affected by the sale of *zamindari*. He, therefore, decreed the suit, against the first three defendants, for recovery of possession of the land in suit by the plaintiffs as usufructuary mortgagees of these defendants' interests as ex-proprietary tenants of the land in suit, for Rs. 800. But he dismissed the rest of the suit. Defendants Nos. 4 to 6 have appealed to this Court and they again contend that as the entire proprietary rights in the village Neknampur were sold, the mortgage in suit was extinguished and could not be enforced.

Apparently, the confusion into which the Subordinate Judge fell arose from the words in which the land in dispute is described in the *wajib-ul-arz* at the Settlement of 1870. There, the land is set out as being *sir, bila lagani bitaur malikana wa bila mundarja khewat*, and it has been strongly argued before us that the terms used in sections 146 and 148 of Act XIX of 1873 justify the contention. It is true that in section 146 it is said that in the case of every *mahal*, the entire *mahal* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahal*, and that section 148 provides that any sum not so paid becomes thereupon an arrear of revenue and the persons responsible for it become defaulters. We are also referred to section 53 of the same Act. The learned Counsel was asked whether he could produce any precedent in support of his contention, that persons in a *mahal*, who are generally known by the term *muafidars* and are, as in this case, persons who are not entered as payers of revenue to the Government for the time being, are, in the event of the *mahal* falling into arrears of payment of reveuue, responsible for payment under section 146 and

their rights, if the *mahal* is brought to sale, extinguished in favour of the seller. The rights of the mortgagors in the present case were rights which came into existence before the Settlement of 1870. It is not shown, and it is in the highest degree improbable, that they were rights created by the *zemindars* who were responsible for the arrears under which the *mahal* in which the property in dispute was situate was brought to sale. In our opinion, the word proprietor used in sections 146 and 148 refers only to those, who in the *wajib-ul-arz*, are set out as being the persons on whom the revenue has been at the time of Settlement assessed jointly or severally. The *wajib-ul-arz* of 1870 shows no such payment of revenue by the mortgagors in the present case. The contention raised in this appeal is, in our opinion, without force and the view taken by the learned Judge is the correct view. It is not for us in the present case to say what precise portion the mortgagee held in the *mahal*. All that we have to decide is what rights were sold in default of arrears of revenue. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CITY CIVIL COURT APPEAL No. 12 OF 1912.
February 7, 1913.
Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Tyabji.
PENUKONDA VENKIAH—DEFENDANT—APPELLANT
versus
SANKA KRISHNAMOORTHY, MINOR BY HIS NEXT FRIEND SRIRAM LAKSHMIKANTHAM—PLAINTIFF—RESPONDENT.

Easement—Right of way—Unity of possession of tenements in one owner—Severance by conveyances—Single transaction—Rights passing to transferees considered.

Where the same grantor conveys, in the course of one transaction, portions of his property to several grantees, each grantee, who takes his tenement with the knowledge that the other tenements are or will be conveyed as part of the same transaction, is, in the absence of express stipulation, presumed in law to take the tenement subject to such rights as are created in favour of the other grantees.

When the Official Assignee sells property under an order of Court which is recited in the sale-deed, it must be taken that the sales formed part of one transaction.

Though, in a deed of conveyance, there is no express reference to a right of way, if the further words 'with the same held and enjoyed' are used along with appurtenances,' they are wide enough to convey a way which has never existed as an easement but which, during the unity of possession, is in fact used for the convenience of one of the tenements afterwards severed.

Chunder Coomar Mookerjee v. *Koylash Chunder Sett*, 7 C. 665, followed.

Appeal against the decree of the City Civil Court of Madras in Original Suit No. 446 of 1910.

Mr. *T. Ethiraja Mudaliar*, for the Appellant.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—In this case, the plaintiff claimed, among other things, that he was entitled as owner of a house, which we will call No. 67, to the use of a passage to a latrine in his house, the passage in question forming part of a house which we will call No. 11—the property of the defendant. The two houses are practically adjacent. The learned Judge granted him this declaration. The Judge was of opinion that he was not entitled to the right which he claimed under section 13 of the Easements Act or on the ground that it amounted to an easement of necessity. But, on a construction of the sale-deed in favour of the plaintiff, the Judge held that the words of the conveyance were wide enough to pass by express grant the right over the defendant's passage. Now, before considering the law, it is desirable to state the precise findings with reference to this passage and the use of it. The learned Judge found on the evidence that the plaintiff's scavenger always entered the latrine of the plaintiff's house through the passage which now forms part of the house of the defendant. On the question of ownership of the properties, he found that one Narasimhulu Naidu was the owner of the two houses till the 23rd January 1893, that on that date the plaintiff's house passed to Canthum and Co., and that both the properties again became subject to the same ownership on the 17th August 1894, when the defendant's house was sold to Canthum and Co., who had already purchased the house No. 67. It comes to this, according to the finding, that there was unity of possession in one owner of the two houses till January 1893, and severance

between January 1893 to August 1894, and there was again unity of possession in one owner in August 1894. Now, this owner who had unity of possession became an insolvent, and the Official Assignee sold the two houses by auction on the 22nd April 1910. At the auction sale, the plaintiff bought No. 67, and the defendant bought No. 11. As regards the order in which the properties were sold, we are told that the plaintiff bought before the defendant. Formal conveyances were given by the Official Assignee. The defendant got his sale-deed on the 3rd August 1910, and the plaintiff got his sale-deed on the 21st September 1910.

For the purposes of the question, we have to decide, it seems to me immaterial that house No. 67 was knocked down first at the sale by auction whilst the formal conveyance to the defendant was prior in time to the formal conveyance to the plaintiff, because I think, for the purposes of the question we have to decide, we must take it that the transaction was one and that we must deal with the case on the footing that the two conveyances were simultaneous. The law is stated in Mr. Peacock's book, page 385 :—"It is now settled law that when on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously or at different times but as part of one transaction, *quasi easements*, apparent and continuous and necessary for the enjoyment of the several tenements as they were enjoyed at the time of severance, will pass by presumption of law to the grantees thereof. In either case, the conveyances are regarded in equity as one transaction, and each grantee, who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance." Then, later on, on page 387, he says :—"It is important to note that the rule applies not only in the case of simultaneous conveyances as in *Allen* v. *Taylor* (1), but also in the case of conveyances executed at different times but as part and parcel of the same transaction. In such cases, the conveyances are founded upon transactions which, in contemplation of equity, are equivalent to conveyances between the parties at the time the transactions were entered into, such transactions being entered into at the same moment of time and as part and parcel of one transaction." On behalf of the appellant, it was contended that the right which the plaintiff claims in this case is not a *quasi easement* apparent and continuous. It seems to me it is a *quasi easement*. Whether it is a *quasi easement* apparent and continuous, I do not think it is necessary to consider, because I think the principle laid down there with regard to *quasi easements* apparent and continuous is applicable to the right which the plaintiff claims in this case.

With regard to this question of one transaction, I may refer to the terms of the conveyances. Both the conveyances recite the sale by the Official Assignee was made under an order of Court, and both the conveyances, I think I am right in saying—certainly the conveyance to the plaintiff—recite the sale at Court auction to the vendees in pursuance of which a formal deed of conveyance was afterwards executed. Now, turning to the words of the conveyance itself, what the sale-deed to the plaintiff purports to convey is "all his rights, title, interest and claim whatsoever and of the said adjudicated insolvents and of the said mortgagee in and to the said house and ground No. 67, Govindappa Naick Street, Peddunaicken Pettah, Madras, more further described in the schedule hereunder written together with all the buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto." There is no express reference to any right of way in that conveyance whereas in the conveyance to the defendant, there is reference in express terms to rights of way. It seems to me that, on the authority of the case *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (2), we ought to construe this conveyance to the plaintiff as wide enough to carry the right to use this particular passage for the purpose of obtaining access to the plaintiff's latrine. The words are "appurtenances whatsoever to the said house

(1) 50 L J. Ch. 178; 16 Ch. D. 355.

(2) 7 C. 665.

and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto." Words, very similar if not identical, were before the Court in the case reported in *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (2). Mr. Justice Wilson (page 670), in dealing with the law, says:—"About the law applicable to this question, there is, I think, no doubt. The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and, therefore, will carry no right over the land of the grantor." Later on, he says: "Where further words are used, such as those in this deed, 'therewith held or used,' "—and we have these words in the deed before us, 'with the same held and enjoyed'—"the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." I should be disposed to hold that the present cases come within the first proposition, "those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession." Whether this is so or not, I have very little doubt that the present case falls within the third proposition, "where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." Here, we have the finding that the particular way has always been used as the means of access to the plaintiff's latrine, the inference from that finding is that, during the unity of possession, the way had in fact been used for the convenience of tenement No. 67 which was afterwards severed from tenement No. 11. On behalf of the appellant, it has been pointed out that there is express reference in the instrument which was being considered by Mr. Justice Wilson to 'ways, paths, passages etc.,' and that there is no such reference in the deed before us. That is, no doubt, perfectly true. But, notwithstanding that, it seems to me that the words "appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto," are sufficiently wide, as the learned Judge held, to carry the right in question. In connection with this point, I may refer to the decision in *Bayley* v. *Great Western Railway Company* (3). There was a conveyance to the vendee of all the rights of the vendor at the time the conveyance was executed. All that was conveyed was a house. In that case, "the vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company, and no express mention of it was made in the conveyance. It was held that, notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance." Other authorities have been cited to us, but I do not propose to discuss them, as it seems to me that this case falls within the principle of the decision reported in *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (2) and the view of the City Civil Court Judge that the words of the grant were wide enough to pass this particular right is right. I think that the appeal fails and should be dismissed with costs.

TYABJI, J.—On the 22nd April 1910, the Official Assignee sold by public auction the properties now owned by the respondent and the appellant respectively. The conveyance to the appellant is dated the 3rd August 1910, and the conveyance to the respondent is dated the 21st September 1910. In the first of the two conveyances, *i.e.*, to the appellant, there is no reservation by the Official Assignee of any such right of way or passage as is claimed by the respondent, and we have to decide whether, in the words of the Earl of Selborne in

(3) 26 Ch. D. 434; 51 L. T. 337

Russell v. *Watts* (4), the respondent in this case has the right to "insist that the appellant cannot consistently with the terms and good faith of the contract under which he derives his title" obstruct the respondent from using the passage in question. The case to which I have alluded shows that such rights may arise though there may be no express reference to them in the conveyance, and the question is whether the facts in the present appeal come under the principle laid down or implied in this case. They clearly cannot come under the principle unless we come to the conclusion that the two conveyances in this case form part of one transaction. I agree with the learned Chief Justice that there are sufficient reasons for our holding that these two conveyances did form part of one transaction.

Assuming that the two conveyances are to be taken as forming one transaction, I agree with the learned Chief Justice that, under certain circumstances such as exist in the present case, we should be justified in holding that the conveyance to the appellant must be read with such reservations as to entitle the grantor, *i.e.*, the Official Assignee, to pass to the respondent the right in question, and to burden the appellant with the corresponding duties, notwithstanding that such reservations may not have been expressly contained in the conveyance to the appellant. The principle of law governing such cases, I understand to be that the same grantor conveys in the course of one transaction portions of his property to several grantees, it is equitable under certain circumstances to presume that it was intended that each grantee should take the property conveyed to him subject to such rights as are created in favour of the other grantees, and that each grantee knew that it was so intended and consequently that the grant to him must be read with such reservations. The principle must, of course, be applied with great caution. Nothing could more strikingly illustrate this than the difference of views in *Russell* v. *Watts* (4). That case, it must be observed, was concerned with the obstruction of windows, and it is clear that the easement of light and air stands on a somewhat different footing from that of a right of way. But when a reference is made to the remarks by Mr. Justice Chitty in *Bayley* v. *Great Western Railway Company* (3) and to the remarks of Sir Charles Sargent, C. J., in *Esubai* v. *Damodar Ishvardas* (5), the latter of which were alluded to by the learned Judge in the 10th paragraph of his judgment, I think it will be found that the principle to which I have referred above may be applicable also where the disputes are of the nature that we have to deal with in this case.

It remains to decide whether, assuming that the two conveyances formed part of one transaction and that the said principle is applicable to the present case, the terms in which the conveyance to the respondent is couched are such as to give him any right to this passage. The clause in the conveyance so far as material is as follows: "All rights, easements, advantages and appurtenances whatsoever.....appertaining to or with the same held or enjoyed or reputed as part thereof or appurtenant thereto." Now, on the authority of the cases referred to by the learned Chief Justice, I think we should be justified in holding that the right of passage in question falls within the description of "rights, easements, advantages and appurtenances." The cases decided in England, such as the decision of Mr. Justice Chitty in *Bayley* v. *Great Western Railway Company* (3), show the wide meaning given to such words as 'rights.' We have here, in addition, the word 'advantages.' Again, the cases referred to by Mr. Justice Wilson in *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (2) show the meaning to be given to such expressions as 'appurtenant to,' 'enjoyment of' or 'being reputed as forming part of' in deciding what easements or other rights are to be taken as having been granted under a conveyance which contains them. It seems to me, therefore, that, both when we consider the class of rights that are referred to in the conveyance in the descriptive part of the clause, and when we refer to the manner in which those rights are annexed to the premises, we have words sufficiently wide to pass the right of passage involved in this appeal. I, therefore, agree that this appeal should be dismissed with costs.

(4) 10 A. C. 590 at pp. 596, 597; 55 L. J. Ch. 158; 53 L. T. 876; 34 W. R. 277; 50 J. P. 68.

(5) 16 B. 552.

DIL MIR *v.* DEVI DAS.

JUDGMENT IN MEMORANDUM OF OBJECTIONS.

WHITE, C. J., AND TYABJI, J.—As regards the drain, the Judge said he was not satisfied that it existed before the purchase by the plaintiff. It is true there was no cross-examination of the plaintiff's next friend with regard to this, and there is no specific denial of the allegation in the plaint with reference thereto; but the written statement states that the defendant does not admit any of the allegations not expressly admitted. We are not satisfied the Judge was wrong as to this. Also we are not satisfied he was wrong as regards the water pipe.

The memorandum of objections is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 923 OF 1909.

December 13, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Shah Din.

Mehr DIL MIR—DEFENDANT—APPELLANT

versus

DEVI DAS—PLAINTIFF—SADA NAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (*II of* 1905), *ss.* 11, 12, 14—*Pre-emption—Rival pre-emptors—One belonging to same tribe and other being member of agricultural tribe—All* Aroras *form one tribe—Share of* shamilat *part of* khewat *after partition.*

The mere fact that a pre-emptor is a member of an agricultural tribe gives him no preferential right of pre-emption as against a person who fulfils the requirements of the proviso to section 11 of the Pre-emption Act.

All *Aroras* form one tribe although they may belong to its different sub-divisions.

Manga Ram v. *Mengha Ram*, 62 R. R. 1909; 83 P.W. R. 1909; 63 P. L. R. 1909; 2 Ind. Cas. 938, followed.

After partition, the portion of *shamilat* separately allotted to a proprietor becomes part and parcel of his *khewat* holding and can, therefore, be taken into consideration for determining the respective rights of the rival pre-emptors with reference to section 14 of the said Act.

Second appeal from the decree of the Additional Divisional Judge of the Shahpur Division, dated the 26th April 1909, confirming that of the District Judge, Jhang, dated the 30th May 1908, decreeing the claim in part.

Mr. *Shah Nawaz*, for the Appellant.

Lala *Durga Das* and Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—The facts of this case are briefly these. By a registered deed dated the 16th January, 1907, defendant No. 1, Sada Nand Ahuja, sold to certain vendees 591 *kanals*, 14 *marlas* of land situate in *Mauza* Rustam Sargana, Tahsil Shorkote, District Jhang, for Rs. 2,467. Two separate suits for pre-emption in respect of the land sold were brought by Mehr Dil Mir, a Bharwana Rajput, and Devi Das Dhaneja, respectively. Each rival pre-emptor was impleaded as a defendant in the suit of the other, and besides other issues which arose out of the pleadings of the parties in the two suits, an issue was drawn as to which of the rival pre-emptors had a preferential right of pre-emption over the other. The Court of the first instance held that both Dil Mir, and Devi Das were entitled to claim pre-emption on the grounds (1) as regards Dil Mir, that he was a member of an agricultural tribe and a proprietor in the village of Rustam Sargana, and (2) as regards Devi Das that his case was covered by the proviso to section 11 of the Pre-emption Act, inasmuch as he was a member of the same tribe as the vendors, both being *Aroras* by caste, and had also been recorded as owner of agricultural land in the estate in which the land sold was situate for twenty years previous to the date of sale. The vendees were not land owners in the village, nor were they members of an agricultural tribe at the time when the sale was made or when the suits for pre-emption were brought. The Court further held that the amounts of land owned by Dil Mir and Devi Das were pretty nearly equal, and accordingly under section 14 of the Pre-emption Act, a decree for half of the land sold on payment of Rs. 1,205-8-0 was passed in favour of each.

From the decrees of the first Court, appeals were filed in the Divisional Court by Devi Das and Dil Mir; but the Additional Divisional Judge agreed with the first Court in holding that Devi Das had a right of pre-emption equal to that of Dil Mir by reasons of the proviso to section 11 of the Punjab Pre-emption Act, and that the price which each pre-emptor had been called upon to pay had been correctly fixed, and both the appeals were accordingly dismissed. Mehr Dil Mir

has preferred a further appeal to this Court, and on his behalf, Mr. Shah Nawaz has contended:—

First, that the appellant being a member of an agricultural tribe had, as such, preferential right of pre-emption as against the respondent, Devi Das, who does not belong to an agricultural tribe;

secondly, that Sada Nand, who is an *Ahuja* by caste, was not proved to be an *Arora*, and that, therefore, Devi Das, who belongs to the Dhaneja *gôt* of *Aroras*, is not a member of the same tribe as the vendor and, consequently, his case is not covered by the proviso to section 11 of the Pre-emption Act; and,

thirdly, that under section 14 of the Pre-emption Act, Devi Das was not entitled to share the land in suit equally with the appellant, inasmuch as he (Devi Das) owned at the time of sale a much smaller area of *khewat* land than did the appellant Dil Mir, the greater portion of the land standing in the name of Devi Das being part of the *shamilat* land which had fallen to his share on the partition of the said *shamilat*.

We think that these contentions are devoid of force. The first contention was not very seriously pressed, as Counsel found it exceedingly difficult to explain, in view of the provisions of sections 11 and 12 of the Pre-emption Act, how the mere fact of his client being a member of an agricultural tribe gave him a preferential right of pre-emption as against Devi Das if the latter was a member of the same tribe as the vendor and otherwise also fulfilled the requirements of the proviso to section 11. Under the said proviso, Devi Das had a right of pre-emption in respect of the land in suit, and at the same time Dil Mir, appellant, was also entitled to this right because of being a member of an agricultural tribe; and both of them belonged to the same category of pre-emptors under section 12 (*a*) *thirdly*. The pre-emptive right possessed by Devi Das was, therefore, equal to that of Dil Mir; and the lower Courts have correctly determined the extent of their respective rights by reference to section 14 of the Act. The second contention has been raised for the first time in this Court, as a reference to the pleadings of the parties and to the issues framed by the first Court shows that it was not disputed that both Sada Nand, vendor, and Devi Das, pre-emptor, were members of two sub-divisions of *Aroras*. We can see no sufficient reason for allowing this contention to be raised at this stage of the case and we accordingly overrule it. According to *Manga Ram* v. *Mengha Ram* (1), Devi Das is a member of the same tribe as the vendor, Sada Nand, and as such has a right of pre-emption under the proviso to section 11 The third contention is also untenable. Admittedly, the *shamilat* area had been partitioned before the sale in dispute took place in 1907, and by that partition, the amounts of *shamilat* land which were allotted to Dil Mir and Devi Das respectively became part and parcel of their *khewat* holdings, with the result that each became the separate owner of a practically equal area of land. Under section 14 (*c*) of the Pre-emption Act, therefore, each pre-emptor is entitled to half the land in dispute, and the decision of the Courts below is perfectly correct. The appellant's Counsel gave up his third ground of appeal, admitting that the market-value as determined by the Courts below was correct. The appeal was not, therefore, pressed against the vendees, and they are entitled to their costs.

For the above reasons, we dismiss the appeal, and direct that the appellant pay half the costs of this Court to Devi Das, respondent, and half to the vendees.

Appeal dismissed.

(1) 62 P. R. 1909; 83 P. W. R. 1909; 63 P. L. R. 1909; 2 Ind. Cas. 938.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 206 OF 1911.

September 2, 1912.

Present:—Mr. Justice Hartnoll and Mr. Justice Young.

MA YI BY HER GUARDIAN *ad litem* THET PON—PLAINTIEF—APPELLANT

versus

MA GALE—DEFENDANT—RESPONDENT.

Buddhist Law—Inheritance—Dissolution of marriage—Rights of children—Abandonment of each other by husband and wife for more than prescribed period—Re-marriage by both—Dissolution of marriage tie—

MA YI *v.* MA GALE.

Disposition of children in case of divorce—No filial relations—No right of inheritance.

Where there was mutual abandonment of each other by a husband and a wife for more than the prescribed periods, and both re-married, each starting a new home:

Held, that the marriage tie between them was dissolved.

Thein Pe v. *U Pet*, 3 L. B. R. 175, referred to.

In a case of divorce or dissolution of marriage where the children are of tender years, it is the will of the parents which decides the disposition of the children and the children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed.

Ma Paw v. *Ma Mon*, 4 L. B. R. 272; 14 Bur. L. R. 236, *Ma E Me* v. *Po Mya*, 11 Bur. L. R. 316, *Maung Hmat* v. *Ma Po Zon*, P. J. L. B. 469, followed.

Mr. *Maung Kin*, for the Appellant.

Mr. *D. N. Palit*, for the Respondent.

JUDGMENT.

HARTNOLL, J.—In this case, Ma Yi by her next-of-kin and natural mother, Ma Thet Pon, sued Ma Gale under the following circumstances. Ma Yi's father was Maung Chan Tha, who married her mother, Ma Thet Pon, about the year 1255, B. E. Ma Yi was born to them in the year 1257, B. E. In that year, Ma Thet Pon sued Maung Chan Tha for divorce in the Civil Court and lost her case. She and Maung Chan Tha did not come together again but lived separately. Then in or about the year 1261, B. E, they both re-married, Maung Chan Tha marrying the defendant, Ma Gale. Maung Chan Tha died in the year 1272, B. E. leaving as his issue with Ma Gale one child of tender years. Ma Yi sues Ma Gale for her share of the inheritance. She claimed on the grounds that there was no division of property at the time of her mother's divorce from Maung Chan Tha and because that even up to the time of bringing the suit, she had not attained the proper age to carry out the duties of a child. Ma Gale contested the suit on the grounds that Maung Chan Tha had been living separately since 1257 B. E., that since then Ma Yi had been living with her mother, Ma Thet Pon, that she never once visited her father, Maung Chan Tha, till the year 1272 B. E. and never carried out the duties due to her father, and that as she had always been living with her mother, she was not entitled to inherit her deceased father's estate. The learned District Judge found that Ma Yi was entitled to inherit and awarded her a five-eighth share in the property, Maung Chan Tha brought to his marriage with Ma Gale and a one-eighth share of the *lettetpwi* property of that marriage. On appeal, the learned Divisional Judge held that Ma Yi was not entitled to inherit any of her father's estate and dismissed her suit with costs.

She appeals from this decision and takes two points:

(1) that the marriage between Maung Chan Tha and Ma Thet Pon was never dissolved;

(2) that even if it was, she is entitled to inherit her father's estate as there was no division of property when her parents separated and as she, being a minor at the time of the separation and up to the time of Maung Chan Tha's death, had no opportunity of exercising her choice to live with her father and perform the duties of a daughter to him. It is admitted that there has never been any filial relationship between Maung Chan Tha and Ma Yi. Concerning the first point I have no doubt that the marriage tie was dissolved between Maung Chan Tha and Ma Thet Pon. The law on the subject was discussed in the Full Bench ruling, *Thein Pe* v. *U Pet* (1). There was mutual abandonment of each other for more than the prescribed periods and both re-married. When Ma Thet Pon re-married, that was clearly an act of volition on her part showing that she considered the marriage tie with Maung Chan Tha dissolved and, when Maung Chan Tha took no steps against her and her second husband to assert his rights as her husband, it seems clear that he finally abandoned her as his wife. They each started a new home and I must answer that first point by holding that the marriage tie was dissolved between them in or about the year 1261 B. E.

The second point has been one of considerable discussion. The first case, relating to it is that of *Mi Thaik* v. *Mi Tu* (2) and the last that of *Ma Paw* v. *Ma Mon* (3). Many of the intermediate cases are discussed in the last ruling. In the last mentioned case that of *Ma E Me* v. *Po Mya* (4) was not referred to. In this case, the same grounds were taken as in the present one and were not allowed.

(1) 3 L. B. R. 175.
(2) S. J. L. B. 184, 2nd Ed.
(3) 4 L. B. R. 272; 14 Bur. L. R. 236.
(4) 11 Bur. L. R. 316.

It seems to me that appellant has no right to inherit for, when the marriage tie between her parents was dissolved, she was taken by her mother and has remained with her ever since and this must have been with her father's consent. As has been pointed out in the various cases, parents have a right of control over their children, and in the case of a divorce, a position very analogous to that of adoption arises. In adoption parents give away their children to others and unless filial relations are resumed, the children so given away lose all rights of inheritance from their natural parents. In the case of young children, their wishes are not consulted. It is the will of the natural parents and those who adopt them which decides the matter. Similarly, in a case of divorce where the children are of tender years, it is the will of the parents which decides the disposition of the children and I think that it must be held similarly that children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. The remarks of Mr. Thirkell White in the case of *Ma Pon* v. *Maung Po Cha* (5) and of Birks, J., in the case of *Mi San Mra Rhe* v. *Mi Than Da U* (6) quoted in the case of *Ma Paw* v. *Ma Mon* (3), above referred to, seem very appropriate, as also those of Mr. Copleston, J. C., in the case of *Maung Hmat* v. *Ma Po Zon* (7), when he said:

"A child removed from the father's family and continuously resident with her divorced mother, after she is of an age when she might assist in the affairs of her father's family, appears to be in the position nearly of a child adopted from the father's family and while she acquires or retains rights in her mother's or new family's property, she loses rights in the family whence she came."

It is true that in the case of *Maung Pe* v. *Ma Myitta* (8), a daughter, who had lived with the divorced wife, was given a share of her deceased father's estate, but in that case, it was held the father was on very affectionate terms with the daughter, had her to stay with him and never regarded her as cut off from his family—in other words that there were filial relations subsisting. Similarly in the case of *Ma Thet* v. *Ma San On* (9), where a similar decision was given, it was found that filial relationship between the daughter and father was resumed and continued for many years after the separation. In the present case, there never were any filial relations between father and daughter and I am of opinion that the daughter has no right of inheritance to the father's estate.

I would, therefore, dismiss this appeal with costs.

YOUNG, J.— I concur.

Appeal dismissed.

(5) 2 U. B. R. (1897-1901) 116.
(6) 1 L. B. R. 161.
(7) P. J. L. B. 469.
(8) 2 Chan. Toon. L. C. 220.
(9) 2 L. B. R. 85.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO. 872 OF 1909.
February 19, 1913.
Present:—Justice Sir Frederick Robertson, KT., and Mr. Justice Shah Din.
Chaudhri AYA RAM AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Musammat THARI BAI—DEFENDANT—RESPONDENT.

Custom—Succession—Bhatias—*Hindu Law—Right of daughter's son to succeed in presence of collaterals*—Bhatias *rank as twice-born*—Kangarh *in Muzaffargarh District.*

Bhatias of the small town of Kangarh in the District of Muzaffargarh, though owning agricultural land, generally follow Hindu Law in the matters of succession and there exists among them no custom modifying that law to the extent of excluding daughters and their sons in favour of separated collaterals.

Bhatias rank as twice-born but below *Aroras* and *Banias*.

First appeal from the decree of the District Judge, Multan, dated 4th May 1909, dismissing the suit.

The Hon'ble Rai Bahadur Lala *Shadi Lal*, for the Appellants.

The Hon'ble Khan Bahadur Mr. *Muhammad Shafi*, for the Respondent.

JUDGMENT.—The facts of this case are fully given in the judgment of the Lower Court.

The real question in the case is whether the parties are governed by Hindu Law or agricultural custom.

The lower Court has found that they are governed by Hindu Law, and after hearing the case fully and ably argued for the appellants, we see no reason to differ from this finding.

The parties are *Bhatias* of the Muzaffargarh District, belonging to the small town of Kangarh.

They certainly own a considerable amount of land, but they belong to a strict Hindu community, who do not permit widow re-marriage. They are described at page 297 of Ibbetson's Punjab Ethnology and at page 90 of Rose's Glossary, Volume I. The point actually in dispute here is whether a daughter's son succeeds in preference to collaterals.

The collaterals claiming in this case are in the 4th degree.

Bhatias rank as twice-born, but below *Aroras* and *Banias*, according to Ibbetson.

They are described both in Ibbetson's and in Rose's books as "very strict Hindus, far more so than the other trading classes of the Western Punjab eschewing meat and liquor. They do not practice widow re-marriage."

In the Gazetteer of the Muzaffargarh District, they are all lumped together page 67, as *Kirars*; no separate mention is made. so far as we have been able to see, of *Bhatias*; Some "*Kirars*" are said to be agriculturists. The parties in this suit, however, are clearly residents of Kangarh carrying on the business of petty shopkeepers and the like and the Hindu community amounts to more than half the town, which has about 3600 inhabitants.

As regards the direct evidence of the exclusion of daughters by collaterals put forward by the plaintiffs, we can only say that it is very weak indeed. In the *Riwaj-i-am*, *Bhatias* are not mentioned by name specifically and one "instance" given among *Bhatias* of the exclusion of a daughter is that of Tirath Ram's own widow, and appears to us not to help the appellants at all; it refers principally to the *kirya karm* ceremonies, and, though it mentions the collaterals as the heirs, they do not seem actually to have succeeded, and Tirath Ram, the husband, grandfather of the respondent, was alive. On his death, the land went to respondent in whose favour mutation was made and who has possession and the "instance" itself shows clearly that the feeling of the *Bhatia* community was in favour of the daughter's son, but that the collaterals, who are stated to be very influential, carried their point.

As regards the oral evidence, not one single instance was quoted, so far as we could ascertain, which could be shown clearly to have been a case of the exclusion of daughters or daughter's sons by relatives of the deceased, not being members with him of a joint Hindu family.

Perhaps the strongest piece of evidence that the parties follow Hindu Law, and not agricultural custom, is contained in the statement of Lalu Ram, plaintiff's own witness, at page 61 of the paper book. He shows conclusively that among this community of *Bhatias*, widows do not get a life tenure of the estate, but merely maintenance, a very strong proof that they follow Hindu Law, as this is a well-known incident of the joint Hindu family. We think it is clearly shown that the parties are not governed by agricultural custom, and we consider the evidence quite insufficient proof to prove the existence of any custom modifying Hindu Law to the extent of excluding daughters and their sons in favour of separated collaterals. We do not think it necessary to call on the respondent for a reply.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 177 OF 1910.

September 10, 1912.

Present:—Sir Charles Fox, KT., Chief Judge and Mr. Justice Hartnoll.

RAM BULLAB RHIRKAWALA—PLAINTIFF—APPELLANT

versus

Babu BICKRAJ AND ANOTHER—DEFENDANTS—RESPONDENTS.

Insolvency—Adjudicated insolvent not discharged—Suit on pro-note in his favour—Official Assignee not interfering—Defendant cannot object—Negotiable instrument—Holder's right to sue.

An adjudicated insolvent, who has not obtained either his personal or final discharge, may, even if all his property both present and future has been vested in the Official Assignee, sue on a promissory-note in his favour, provided that the Official Assignee does not

interfere. It is not open to the defendant to raise the plea that the plaintiff has no right of suit on the note.

Under the law of Negotiable Instruments, the rule is that the holder of such an instrument at the time of action brought, *i. e.*, the person who is then entitled to receive its contents, is the only person who can sue on it.

Mr. *Giles*, for the Appellant.

Mr. *McDonnell*, for the Respondents.

JUDGMENT.

Fox, C. J.—The plaintiff-appellant sued on two promissory-notes in his favour, said to have been executed in January 1906, which were payable twelve months after date. During the course of the case, it appeared that the plaintiff had in 1901 been adjudicated an insolvent by this Court. The record of this Court shows that he was adjudicated on his own petition, and he filed a schedule of debts he owed jointly as a member of a firm; although he entered nothing in the schedule of separate liabilities and amounts due to him, he stated he had then only Rs. 50 worth of separate property.

He obtained an *ad interim* protection order, and after that did nothing. Although required to appear before the Court, he did not do so, and a warrant for his arrest was of no avail. He obtained neither his personal nor his final discharge.

The vesting order made in the case vested in Official Assignee of this Court all his property which he had then and all the property which he might thereafter acquire. That order continued and was in force at the time he made the loans sued on and at the time he brought the suit.

The District Judge held that the vesting order was a bar to his suing on the notes. The first question to consider is whether this was so. The plaintiff wished to change his case when his insolvency in 1901 was raised against him, but on the plaint he was suing for monies personally due to him on promissory-notes purporting to be in his personal favour and on transactions which took place about five years after his adjudication and the vesting order. Assuming that he stated that the monies he lent had been acquired by him subsequent to the insolvency, then according to the law of Bankruptcy as administered in England, the previous vesting order would have been no bar to his recovering any monies due on the notes unless the Official Assignee interfered. The law is most clearly laid down in *Drayton* v. *Dale* (1) in the following words:—

"An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, (corresponding to the Official Assignee in this country), and he may maintain trover for them against a stranger. It is clear, therefore, that bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property; and if they do make any claim, it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt and his debtor, the latter cannot set up their title; but the bankrupt has a right, in a Court of law, to enforce the payment of his debt."

This statement of the law was re-affirmed by Tindal, C. J., in *Herbert* v. *Sayer* (2) in the Exchequer Chamber and according to Byles on Bills at page 407 of the 17th Edition, it is still the law.

In the present case, the Official Assignee had not interfered and claimed the monies due on the notes; consequently, it was not open to the defendants under the law as stated above to raise the plea that the plaintiff had no right of suit on the notes. Possibly owing to his being met with the above plea, the plaintiff set up at a late stage that the debts for which the notes were given were really debts owing to the plaintiff's wife, and that the plaintiff in bringing the suit was only acting as trustee for his wife. The District Judge held that on such a case the plaintiff could not succeed unless the plaint was amended so as to show (presumably) that the plaintiff was suing as a trustee, and the learned Judge considered that the case was not one in which amendment should be allowed.

Under the law of Negotiable Instruments, the rule is that the holder of such an instrument at the time of action brought, *i. e.*, the person who is then entitled to receive its contents, is the only person who can then sue on it—*see* Byles on Bills, 17th Edition, page 359.

(1) (1823) 2 B. & C. 293; 3 D. & R. 534; 26 R. R. 356; 2 L. J. (o. s.) K. B. 20; 107 Eng. Rep. 393.

(2) (1844) 5 Q. B. 965; 8 Jur. 812; 2 D. & L. 49; 13 L. J. Q. B. 209; D. & Mer. 723.

The plaintiff was the holder of the notes which were expressed to be in his favour personally, and he was the only person who could properly sue on them, the Official Assignee not having interfered or claimed on them.

In my opinion, the decree dismissing the suit must be set aside, and the case must be sent back with directions that it be re-admitted under its original number and tried.

I would order that the costs of this appeal follow the ultimate decision of the suit.

HARTNOLL, J.—I concur.

Decree set aside:
Case remanded.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEALS Nos. 1985, 2042 TO 2045 OF 1910.
February 26, 1913.

Present:—Mr. Justice Coxe and Mr. Justice N. R. Chatterjea.

Chowdhry RAM BRICH NARAYAN SINGH—PLAINTIFF—APPELLANT

versus

Babu AMBIKA PROSAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee in possession purchasing raiyati *lands—Accessions—Subject of redemption — Special advantage by reason of position as mortgagee, if should exist—Expense of acquisition to be borne by mortgagor in proportion to share—Transfer of Property Act (IV of* 1882*), s.* 63.

Although every purchase by a mortgagee in possession of a sub-tenure, existing at the date of the mortgage, must not be taken to have been made for the benefit of the mortgagor, yet many acquisitions by the mortgagee are treated as accretions to the mortgaged property and, therefore, subject to redemption.

Rajah Kishen Dutt Ram v. *Raja Mumtaz Ali*, 5 C. 198: 5 C. L. R. 213; 6 I. A. 145: *Rakestraw* v. *Brewer*, 2 P. Wms. 511; Sel. Ch. Ca. 55; Mos. 189; 24 Eng. Rep 839 and *Deo d. Gibbon* v. *Pott*, 2 Dougl. 710; 99 Eng. Rep. 452, relied upon.

The mortgagor's right to the accession under the provisions of section 63 of the Transfer of Property Act does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring the accession. But the mortgagor must pay to the mortgagee the expenses of acquiring it.

The *raiyati* lands purchased by a mortgagee in possession of the mortgagor's share of the *mehal*, are accessions to the mortgaged property to the extent of the mortgagor's share in the *mehal*; and the mortgagor is entitled to those lands upon redemption to the extent of his share in the *mehal* on payment to the mortgagee the proportionate share of the expenses incurred in acquiring them.

Appeals from the decrees of the District Judge of Shahabad, dated April 21st, 1910, reversing those of the Sub-Judge of Arrah, dated July 31st, 1909.

IN No. 1985.

Babu *Kulwant Sahay*, for the Appellant.

Moulvi *Syed Enayet Karim*, for the Respondents.

IN Nos 1985, 2042 TO 2045.

Dr. *Rash Behari Ghose*, Babu *Mohendra Nath Roy* and *Chandra Sekhar Pershad Singh*, for the Appellant.

Babus *Umakali Mukherji* and *Mohini Mohan Chatterji*, for the Respondents.

JUDGMENT.

N. CHATTERJEA, J.—The first question to be determined is whether the *rayati* lands purchased by the defendants, while they were in possession of the plaintiff's share of the *mahal*, as mortgagee, are accessions to the mortgaged property, *i. e*, to the extent of the plaintiff's share in the *mahal*. The learned District Judge was of opinion that they were not accessions, because some of the defendants were co-owners of the *mahal* with the plaintiff and their position as mortgagees did not give them any special advantage or facilities in purchasing the lands.

On behalf of the plaintiff-appellant, the provisions of section 63 of the Transfer of Property Act, and the case of *Raja Kishen Datt Ram* v. *Raja Mumtaz Ali* (1), were relied upon, in support of the contention that it was not necessary, that the mortgagee should have any special advantage in order to entitle the mortgagor to the benefit of the accessions.

In the case of *Raja Kishen Dutt Ram* v. *Raja Mumtaz Ali*(1), certain subordinate *birt* tenures within a *taluk* mortgaged, were acquired by the mortgagee in possession and it was found that the mortgagee taking advantage of his position of *talukdar de facto* had acquired the *birts* for very inconsiderable sums and allowed them to merge in the *taluk*. But the judgment of the Privy Council did not rest exclusively on these circumstances. Their Lordships, while not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage, must be taken to

(1) 5 C. 198 5 C. L. R. 213; 6 I. A. 145.

have been made for the benefit of the mortgagor (for instance, a *patni* or *mukarari* tenure purchased by the mortgagee of a *zemindari* with his own funds and for his own benefit), observed that the general principle recognized in English law was that most acquisitions by a mortgagor enure for the benefit of the mortgagee and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property and, therefore, subject to redemption. Their Lordships referred to (among others) the case of *Rakestraw* v. *Brewer* (2), where the mortgagee of an original term in respect of certain chambers in Inns of Court, was granted an additional term, to commence after the expiration of the old term, as a pure personal favour and kindness to a brother Bencher and which probably would not have been given to the representatives of the mortgagor who were females, and the latter were allowed to redeem on the ground that the additional term "comes from the old root," and observed that the law laid down in that case had never been impeached. And referring to the case of *Doe d. Gibbon* v. *Pott* (3), where it was held that if the lord of a manor mortgage it in fee and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them, said:—"It is difficult to see, why as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders." So the fact that the mortgagee in *Raja Kisan Dutt Ram's* case(1), had peculiar facilities for obtaining the surrenders of the *birt* tenures, by reason of his position as mortgagee in possession, appears to have been relied on only as an additional ground for holding that the same equity should attach to the mortgagee as in the case of a renewable lease.

The law as to accessions to mortgaged property in this country, is now formulated in section 63 of the Transfer of Property Act, which provides that where mortgaged property in possession of the mortgagee, has during the continuance of the mortgage received any accession, the mortgagor upon redemption, shall in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession and where the accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it.

The mortgagor's right to the accession, under the provisions of the section, does not appear to depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee, in acquiring the accession and in this respect the section seems to go farther than section 90 of the Indian Trusts Act, under which the mortgagee holds an advantage for the benefit of the mortgagor only when he gains it by availing himself of his position as such and in derogation of the rights of the mortgagor.

It is contended on behalf of the respondents that section 63 of the Transfer of Property Act, applies to a case where the mortgagee holds the property only as a mortgagee and not where, as in the present case, the mortgagee held the *mahal* both as co-proprietor and as mortgagee but the section provides that where the *mortgaged property* in possession of the mortgagee had, during the continuance of the mortgage, *received any accession*, the mortgagor is entitled to it on redemption. Had the *mahal* received a natural accession, such as land gained by alluvion, it could not be contended that because the mortgagee had a share in the *mahal* in proprietary right, the mortgagor was not entitled to the accession to the extent of his proportionate share in the *mahal*. The only difference between such a case and a case where the accession is acquired, is that in the latter, the mortgagor must pay to the mortgagee the expense of acquiring it.

It is unnecessary to consider whether every purchase of a sub-tenure by a mortgagee can be called an accession and how far the principles laid down by the Privy Council in the case cited above, have been modified by the provisions of section 63 of the Transfer of Property Act. In the present case, we are concerned with ordinary *raiyati* holdings.

(2) 2 P. Wms. 511; Sel. Ch. Ca. 55: Mos. 189; 24 Eng. Rep. 839.

(3) 2 Douglas 710; 99 Eng. Rep. 452.

Under section 63 of the Transfer of Property Act, the question is whether the property is an accession. If the lands purchased in the present case are accessions, the plaintiff is entitled to them, to the extent of his share in the *mahal*.

The Court of first instance found upon the evidence adduced by the defendants themselves that the lands purchased by the defendants had been separated from the lands which are in the possession of the tenants and this finding, so far as it goes, has not been set aside by the lower Appellate Court. The defendants, though holding different interests in the *mahal* and in the mortgage, represented, between themselves, the entire interest of the landlord for the time being, when the purchases were made. There was no one else to whom the portion of the rent which was payable for the lands purchased by them, could be paid during the subsistence of the mortgage. It has not been found that the purchases were made by the defendants in their character as co-owners only. Under the circumstances, there is no reason why the lands should not be treated as accession, and why the plaintiff should not be entitled to the benefit of it to the extent of his share in the *mahal* on payment to the defendants the proportionate share of the expense incurred in acquiring them. In this view, it is unnecessary to consider the rights of the plaintiff, as landlord, to *khas* possession of the lands.

The defendants are not entitled to any interest on the amount spent by them in acquiring the lands; the profits received by them should be set off against the interest (see last para. of section 63, Transfer of Property Act).

The plaintiff should get mesne profits only from the date which may be fixed for the payment hereinafter referred to as it has not been found that he demanded the lands and offered to pay to the defendants the expense of acquiring the lands. The decree of the lower Appellate Court will be set aside, and that of the Court of first instance restored with the modification stated above. The case will go back to that Court for determining the amount paid by the defendants for acquiring the lands and it will fix a date for payment of the said amount, on payment of which the plaintiff will get *khas* possession of the lands to the extent of his share in the *mahal* together with costs of all Courts and in default of such payment the suit will be dismissed with costs of all Courts.

COXE, J.—In this case, it is said that the plaintiff's father and uncle obtained by partition a separate *putti* of 8 annas in *mahal* Somraon. This separate *putti* was *Tauzi* No. 4101. About a third of the uncle's half share was purchased by the ancestors of defendants Nos. 1 to 4, 9 to 11, and the other $\frac{2}{3}$rds by the ancestors of defendants Nos. 17 to 24, 26 and 27. Then the plaintiff's father's share was mortgaged to the predecessors-in-interest of defendants Nos. 1 to 15, 17 to 24, 26 and 27. Subsequently, the plaintiff redeemed the mortgage but on re-taking possession found that the defendants had severally bought in holdings amounting to about a third of the *raiyati* land of the village. It is found that holdings are not transferable without the landlord's consent. The plaintiffs sued to have the defendants declared trespassers and in the alternative for possession on payment of the considerations for the purchase from the tenants. The first Court held that the purchases were accessions to the mortgaged property and gave the plaintiff a decree on payment of the considerations. The District Judge dismissed the suits and the plaintiffs appeal.

The first point taken is that the purchases ought to be treated as accessions under section 63 of the Transfer of Property Act. The learned District Judge has not accepted this contention because in his opinion the mortgagees obtained no special advantages from their position as mortgagees towards making the purchases. It is argued, however, that it is not necessary that the mortgagees should have any special advantages to bring them within the scope of section 63 of the Transfer of Property Act and the case of *Raja Kishen Dutt Ram* v. *Raja Mumtaz Ali* (1) is relied on. In that case, their Lordships of the Privy Council, while "not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must have been taken to have been made for the benefit of the mortgagor", yet allowed the mortgagor in the circumstances of the case to redeem. It appears to us that in the circumstances of this case, redemption should also be

allowed. It is evident that the defendants of these suits as a whole were in possession of the whole estate, though different defendants had different interests. It is, we think, generally considered a judicious policy for a landlord to try to convert *raiyati* land into what is called *khas* possession. If the plaintiff had been in possession, he would also have been able to pursue this policy. But it appears to us unjust that because he has mortgaged his interest to his fellow landlords, he should find himself on the redemption of the mortgage in his present position. His co-sharers have acquired a third of the *raiyati* land of the village and whether the holdings are transferable or not, his right, if he has any, of acquiring *khas* possession of his interest in the land could not be enforced without a struggle. He has a right, on redemption, to find the village in the same condition as when he mortgaged it, and clearly it is in a condition far more prejudicial to his interests when a third of the land is in the possession of his co-sharers.

In this view of the case, it is unnecessary to consider the effect of the purchases against the plaintiffs as landlords and not as mortgagors. Accordingly, we think that the appeal should be allowed, the decision of the District Judge set aside, and that of the Subordinate Judge restored. The latter officer, however, has omitted to fix a time for the payment of the purchase money by the plaintiffs. And we think that he is wrong in allowing mesne profits. Mesne profits can be set off against interest. The case will accordingly go back to the Court of first instance who will take an account of what will be due under his decree for purchase money and fix a date for the payment of that sum. If the sum is paid, the plaintiffs will be entitled to recover possession with costs of all Courts; if not, the suit will be dismissed with costs.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 758 OF 1910.

March 17, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Chevis.

DELHI CLOTH AND GENERAL MILLS COMPANY, LIMITED, DELHI—

DEFENDANT—APPELLANT

versus

KANHIYA, MINOR SON OF MADAN LAL, DECEASED UNDER THE GUARDIANSHIP OF HIS MOTHER, *Musammat* INDAR KAUR—

PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 55, 120—Contract for purchase of bales of yarn—Condition to take delivery within specified time—Failure to take delivery entitling defendant to sell goods and recover damages—Time essence of the contract.

A. purchased some bales of yarn from *B*, the condition being that *A.* would take delivery of the goods within a certain period on payment, that if *A.* failed to take delivery before the expiry of the term, *B.* would, in his discretion, sell the goods whenever he thought fit, and realize damages in respect of rent, insurance and interest, from the date of contract to the date of sale:

Held, that the general rule in a sale of this description was that time was of the essence of contract; and as the terms of the contract were in accordance with this rule, the second paragraph of section 55 of the Contract Act did not apply.

Under section 120 of the Cantract Act, wrongful refusal by the purchaser to accept the goods sold to him amounts to a breach of a contract of sale.

First appeal from the decree of the Additional District Judge, Delhi, dated the 4th May 1910, decreeing claim for Rs. 3,742.

The Hon'ble R. B. Mr. *Shadi Lal*, for the Appellant.

Mr. *Dalip Singh* and The Hon'ble K. B. Mr. *Muhammad Shafi*, for the Respondent.

JUDGMENT.—This is a suit for damages by the proprietor of the firm known as Ram Dial Babu Ram of Hathras, based on the allegations that on the 24th March 1909, he purchased 500 bales of yarn, from the Cloth and General Mills Company, Limited, Delhi, at Rs. 3-1-0 per bundle of $10\frac{1}{2}$ counts, with an increase of one anna per bundle for each consecutive count up to $16\frac{1}{2}$ counts, the condition being that the plaintiff would take delivery of the goods within $3\frac{1}{2}$ months on payment and that on failure to take delivery within the contract period, he would pay interest at the rate of ten annas per cent. on the goods and insurance charges and godown rent; that the plaintiff advanced Rs. 1,975 to the defendant Company as earnest money;

that the plaintiff did not take delivery within the period of $3\frac{1}{2}$ months, but that on the 16th August 1909, he sent a notice to the defendant Company to deliver the goods to one Kundan Lal, broker, that one Deoki Nandan had in the meantime sued the plaintiff and secured the attachment of the goods that the District Judge of Delhi appointed the plaintiff a Receiver to realize the goods or damages in the event of non-delivery, and authorized him to sue and recover the goods, or damages from the defendant; that the plaintiff, on the 19th November 1909, gave the defendant notice to deliver the goods within 24 hours, and that the defendant's failure to deliver gave the plaintiff a cause of action.

The suit was filed on the 24th November 1909. [On the 27th August 1909, the defendant Company had through their Counsel offered, without prejudice, to allow the plaintiff to get the injunction of the District Court cancelled and to take delivery of the goods within three days on payment of interest, rent and insurance charges, etc., with the condition that after those three days, the plaintiff would lose all right to the goods.

The third clause of the contract sued on is as follows:—

"3. *Period*—From the 24th March 1909 to the 7th July 1909. No bale shall be taken delivery of within the first $1\frac{1}{2}$ out of $3\frac{1}{2}$ months. The entire goods shall be taken delivery of in the next two months."

The amount claimed as damages was Rs. 8,459-7 and the Court below gave the plaintiff a decree for Rs. 3,742 and costs in proportion.

The first three grounds taken in appeal, *viz.*, (1) that the plaintiff, Madan Lal, had no right to sue alone, the contract being made with the firm and releases by Babu Ram not being proved; (2) that the plaintiff neither sued as a Receiver, nor could sue as such without the sanction of the Court appointing him a Receiver, and (3) that the plaintiff could not sue in two capacities, the parties and the causes of action being different, were overruled at the hearing, the District Court having in a suit between Babu Lal and Deoki Nandan, proprietors of the firm of Deoki Nandan-Babu Lal, plaintiffs, and Madan Lal, Babu Ram, Salig Ram, Sagar Mal and Kesho Das, proprietors of the firm of Ram Dial-Babu Lal, defendants, ordered as follows on the 11th November 1909:—

"Plaintiff applies for the injunction to be cancelled and plaintiff appointed a Receiver to take delivery of the goods from the Delhi Cloth and General Mills, and to sell them under the terms of an agreement arrived at between the parties. Defendants Nos. 1, 4, and 5 agree to this before me and plaintiff's Counsel also. Order to be issued as above;" and having further ordered, on the 4th December 1909, as follows:—

"Prem Lal, for plaintiff, now states that he does not wish to be a joint Receiver and is content with defendant No. 1 alone, *i.e.*, Madan Lal, to be appointed Receiver. I accordingly order that defendant No. 1 be made sole Receiver to bring the suit."

The remaining grounds of appeal, however, have force:—

4. That time was of the essence of the contract;

5. that the plaintiff having failed to take delivery within the stipulated period broke the contract and is not entitled to sue;

6. that the defendants rescinded the contract and were justified in doing so; and

7. that the plaintiff is not entitled to any damages.

The record contains ample evidence that the price of yarn fluctuated daily. On the 9th June 1909, the defendant wrote to the plaintiff pointing out that not one bale had been taken delivery of; that only one month of the term of contract remained and that the goods should be removed. On the 3rd July, the defendant wrote to the plaintiff that no reply had been received; that the term of the contract would expire within four days; that not one bale had been taken delivery of and that the goods would be charged with interest, godown rent and insurance. On the 7th July 1909, the plaintiff replied that the goods would be removed within two months. On the 10th July 1909, the defendant wrote expressing regret that the plaintiff's suggestion could not be complied with and added on the 12th July, that as requested orally no steps would be taken for two days but that if "bargain" of the ready-made goods was not struck within that period, the Company would sell the goods on the plaintiff's behalf. The defendant Company then wrote to many possible purchasers, asking for offers for the 500 bales,

and received several replies. On the 19th July, the defendant wrote to the plaintiff that the plaintiff did not take delivery of any of the yarn, though frequently requested to do so; that no one had offered more than Rs. 3 per bundle; that Rs. 1,250 on account of loss at one anna per bundle, Rs. 93-12 on account of godown rent and insurance charges, and Rs. 116-2-6 on account of interest after deducting interest on the earnest money, making Rs. 1,459-14-6 in all was due; that the balance of the earnest money was Rs. 515-1-6; that the defendant could come and take it and that no interest would be allowed on this balance. The statement that Rs. 515-1-6 only was due was frequently repeated by the defendant.

The Court below has held that there was no cancellation or rescission by defendant of the contract and that the plaintiff consequently had a right to sue. The defendant frequently stated that the plaintiff's rights in the yarn had been extinguished and that all that the plaintiff was entitled to was a sum of Rs. 515-1-6. Clause 8 of the contract—"After the expiry of the term of contract, the goods shall be at our (plaintiffs') risk in every way," has been relied on by the Court below as proving that after the expiry of $3\frac{1}{2}$ months the defendant was to hold the goods at the risk of the plaintiff and on his behalf and was to be reimbursed by charging interest, godown rent and insurance for which the earnest money was ample. The Court below has apparently overlooked the 7th clause of the contract, which vests in the defendant discretion to sell the goods after expiry of the term of contract whenever it thought fit, if the plaintiff failed to take delivery before the expiry of the term. This clause, moreover, empowered the defendant to realize damages in respect of rent, insurance and interest etc., from the date of contract to the date of sale.

Counsel for the plaintiff-respondent relied on the second paragraph of section 55 of the Contract Act, but the intention of the parties having, in our opinion, been that time should be of the essence of the contract, this paragraph is not applicable. The general rule is that in a sale of this description, time is of the essence of contract, and the terms of the contract are in accordance with this rule.

Under section 120 of the Contract Act, wrongful refusal by the purchaser to accept the goods sold to him amounts to a breach of a contract of sale, and such refusal by the plaintiff-respondent has been established. Plaintiff-respondent failed to prove that the rate on the 7th or 8th July 1909 exceeded the Rs. 3 per bundle alleged by the defendant-appellant and the plaintiff-respondent was entitled only to Rs. 515-1-6 admitted by the defendant-appellant. The appeal is in respect of the amount decreed in excess of this sum and is, therefore, decreed with costs here and below. The result is that the cross objections are disallowed.

Appeal allowed.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT NO. 830 OF 1912.
December 12, 1912.
Present:—Mr. Justice Beaman.
JAYANTILAL RAMDAS—PLAINTIFF
versus
NAGNATH SHAMBHUAPPA KATHLEY—DEFENDANT.

Bombay High Court Rules (Original Side), rr. 105, 106—*Defendant not filing written statement—Right to defend suit* ex tempore—*Civil Procedure Code (Act V of* 1908), *O. VIII, r.* 10.

Rules 105 and 106 of the Bombay High Court Rules (Original Side) do not prevent a defendant, who has not filed his written statement, from defending the suit *ex tempore* at the hearing.

Mr. *Kanga* (with him Mr. *Desai*), for the Plaintiff.

Mr. *Wadia* (with him Mr. *Bhandarkar*), for the Defendant.

JUDGMENT.—The plaintiff sues to recover a sum of money alleged to have been paid to the defendants by mistake. The plaintiff, who is the grandson of the deceased Chunilal, is a minor suing by his guardian *ad litem*. The defendants are the heirs and representatives of Shambhuappa, who was a partner of the deceased Chunilal. The accounts were made up from time to time and finally the amount found due to Shambhuappa was settled in December 1911 and mutual releases given and taken. A sum of some Rs. 4,000 was then paid by cross-

cheques by the plaintiff to the defendants. In April 1912, on going over the accounts, the guardian's son pointed out to him that a sum of Rs. 11,000 odd, for which the defendants were liable in proportion to their interest in the partnership, had been omitted; and it is to recover the defendant's four-anna share in that liability by mistake overpaid to them that the plaintiff has filed this suit.

The suit was filed in July 1912 and the summons was made returnable on the 11th of November. No written statement was put in, but the plaintiff did not move under rule 106 of the High Court Rules to have the suit set down for an *ex parte* decree. It, therefore, came on in the usual course late in the afternoon of Tuesday. Mr. Bhandarkar was instructed to apply for an adjournment. Mr. Desai for the plaintiff opposed. The Court saw no reason whatever to grant any further adjournment in the matter. In the ordinary course, Mr. Bhandarkar would then have withdrawn from the suit and the case would have proceeded *ex parte*. But, I suppose, with the idea of tiding over the short time remaining at the Court's disposal that day and so getting the benefit of the intervening Wednesday, the defendants' attorneys instructed a Senior Counsel, Mr. Wadia, to join Mr. Bhandarkar in defending the suit. Mr. Wadia, accordingly, raised issues for trial. Mr. Desai objected, saying that under the circumstances, the defendants were not entitled to defend the suit. After carefully considering High Court Rules 105 and 106, it seemed to me very difficult to say that a defendant, situated as these defendants were, was precluded by anything in these rules from defending the suit so to speak *ex tempore*. It is true that but for the lateness of the hour and the fact of the next day being a *dies non* so far as this Court is concerned, those tactics would not have been adopted. The result was that the plaintiff, according to what I am told is the Bar etiquette, also had to hurriedly brief another Counsel, Mr. Kanga. Thus all parties were put to quite unnecessary additional expense for no other purpose, that I can discover, than a factious opposition in the hope of gaining time which the Court had just formally refused the defendants. It is curious to read, in connection with rules 105 and 106, Order VIII, rule 10, of the Civil Procedure Code, which provides that where a written statement has not been put in, the Court may pronounce judgments (presumably summarily) against the defendant. Taking the rule as it stands, it appears to absolve the plaintiff from the necessity of proving his case at all. Judgment is to go against the defendant by way of penalty for not having put in his written statement. I have never had occasion in my experience to make use of that order and I doubt very much whether it is or ever has been the practice on the Original Side of this Court to decree the plaintiff's suit, or in other words to pronounce judgment against the defendant, without in the first place insisting upon the plaintiff formally proving his claim. But if the plaintiff is allowed to prove his claim, that must be done by examining witnesses, and I do not see how the defendant in those circumstances can be forbidden the right of cross-examination. It appears to me that it would be very desirable that some addition should be made to rule 105 corresponding with the marginal note which is always made upon the defendant's summons. I confess that I can see no reason whatever in principle, nor can I discern any practical utility, in support of rule 106. I cannot conceive why the Prothonotary should not *suo motu* set down all cases falling within the scope and intention of rule 105 for *ex parte* decrees on the returnable date of the summons without putting the plaintiffs to the great additional expense of instructing Counsel to formally move to have that done. That means one more additional hearing and an entirely unnecessary delay and expense to attain no useful object whatever that I can discover.

In the present case, it appears to me that the defendants, if left to themselves, would have been perfectly reasonable, and have in their letter, Exhibit F in the case, evinced a correct and honest attitude. Unfortunately, however, instead of acting up to that letter, they appear to have consulted attorneys in Bombay with the almost inevitable result that they were advised to defend the suit. A perusal of the correspondence shows that the defendants had never contemplated, at any rate up to Tuesday evening, repudiating liability for the items said to have been omitted by mistake from the accounts. But between the rising of the Court on Tuesday

and its sitting this morning I suppose Counsel consulted, and as a forlorn hope embarked on cross-examination, the object of which seems to be to show that the deceased Shambhuappa had in 1906 or thereabouts disclaimed all responsibility for the expenditure which formed almost the whole of the present claim. In the circumstances of the case, I do not attach any great importance to that suggestion. The guardian, who has no interest of his own to serve, and appears to be a perfectly straightforward and honest person, has sworn that the items, afterwards unfortunately omitted, were shown in the first account, submitted to Shambhuappa, and that no exception whatever was taken to any one of them. In the second account, unfortunately these items were omitted by mistake. There is no evidence available to support the defence fore-shadowed in the belated cross-examination of the guardian. Indeed, but for the unusual course adopted by the defendants' attorneys late on Tuesday evening, the case would have undoubtedly been disposed of *ex parte* in less than half an hour. The same result is now reached at an additional outlay of time and money to all parties concerned; and I must own that I prefer the usual procedure that which, with very rare exceptions of which this is a typical one, has always been followed since I presided over this Court. I have not the slightest doubt of the truth and *bona fides* of the plaintiff's claim, and I must, therefore, now decree the suit in full, with one modification only, *viz.*, that I see no reason to allow him 9 per cent. interest on the amount.

There must be a decree for the plaintiff for Rs. 2,996-2-6 with interest at 6 per cent. per annum from the 2nd of May 1912 to judgment.

Costs and interest on judgment at 6 per cent. per annum.

Suit decreed.

Attorneys for the Plaintiff: Messrs. *Matubhai*, *Jamietram* and *Madan*.

Attorneys for the Defendants: Mr. *D. J. Mantri*.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 19 OF 1912.

December 21, 1912.

Present:—Mr. Drake-Brockman, J. C.

FARIDBI—PLAINTIFF—APPELLANT

versus

MOHAMAD AMIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 4, O. XLIII, r 1. (c)—Suit dismissed in default—Application for restoration also dismissed in default of both parties—Application to set aside the order of dismissal of application for restoration rejected—No appeal lies.

A suit was dismissed for default, both parties being absent, and the application for restoration of the suit was also dismissed for default of both parties. An application for setting aside the order of dismissal of the application for restoration was rejected:

Held, that no appeal lay from the order of rejection.

Section 141, Civil Procedure Code, (Act V of 1908), relates to procedure only; it cannot confer a right of appeal, which is a matter of substance, and not of procedure.

Clause (*c*) in rule 1 of Order XLIII does not give a right of appeal in cases of dismissal for default of both parties.

Miscellaneous appeal against an order of the District Judge, Chanda, dated the 13th April 1912.

JUDGMENT.—The appellant, Faridbi, moved the lower Court for permission to sue as a pauper. After contentious proceedings lasting nearly five months, permission was granted on the 27th November 1911, when the appellant was represented by her father and agent, Daud Khan. The following day an order was passed fixing the 23rd January 1912 for settlement of issues. On the last mentioned date, both parties were absent and the suit was dismissed for default. On the 30th January, Daud Khan applied for restoration of the suit to file. This application too was dismissed for default of both parties on the 18th March. On the 28th March, one Abdul Karim put in an application to have the order of the 18th idem set aside on the ground that Daud Khan had died on the 9th idem, but this was rejected because the signature of the plaintiff herself was wanting and Abdul Karim could not produce a power-of-attorney authorising him to act for her. Finally, on the 11th April, Abdul Karim put in another application for restoration of the one dismissed on the 18th March: this was rejected two days later as time-barred.

The present appeal is directed against the orders of dismissal dated the 13th April and the 23rd January, but having been filed on the 18th June is clearly time-barred in respect of the earlier order of which no copy has been put in. By the other order what was dismissed was not an application for an order to set aside the dismissal of a suit, and there is nothing in section 104 or in Order XLIII, Schedule I, Civil Procedure Code, which gives a right of appeal from an order rejecting an application for an order to set aside the dismissal of an application. Moreover, the appellant's suit and her application of the 30th January were alike dismissed for default of both parties, *i.e.*, under rule 4, not under rule 9 of Order IX, so that by no straining of the language in clause (*c*) in rule 1 of Order XLIII could a right of appeal be recognised. In *Manikji* v. *Surajmal* (1), it was held that an application for restoration of a suit, which application had itself been dismissed for default, may be restored, section 141, Civil Procedure Code, operating to give the plaintiff the same remedy in respect of the application as he had under Order IX in respect of the suit. But section 141 relates to procedure only, and a right of appeal is a matter of substance, not of procedure: see *Minakshi Naidu* v. *Subramanya Sastri* (2) and *Nana* v. *Sheku* (3). I would add that there is ample authority for construing strictly the terms of section 588 (8) of the Code of Civil Procedure, 1882, to which clause (*c*) of Order XLIII in the first Schedule to the current Code corresponds: see *Jung Bahadur* v. *Mahadeo Prasad* (4), the cases cited therein and *Ghasiti Bibi* v. *Abdul Samad* (5). On the strength of these cases, I would be prepared to hold that if the appellant's application of the 30th January had been dismissed for her default in the presence of the defendant, she would have had no right of appeal from an order refusing to restore that application to the file.

It is not suggested that any bar of time precludes the appellant from bringing a fresh suit. I need not, therefore, consider whether interference by way of revision is called for, nor have I been moved to so interfere. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 7 N. L. R. 32; 10 Ind. Cas. 705.
(2) 11 M. 26; 14 I. A. 160.
(3) 32 B. 337; 10 Bom. L. R. 330.
(4) 31 C. 207; 8 C. W. N. 160.
(5) 29 A. 596; A. W. N. (1907) 186.

BOMBAY HIGH COURT.

APPEAL No. 2) OF 1912.

January 20, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

NADIRSHAW HORMUSJI SUKHIA—

APPELLANT

versus

PIROJSHAW RATANJI RATNAGAR

RESPONDENTTS.

Defamation—Libel—Publication in newspaper—Privilege—Fair comment—Justification—Proof of truth—Damages, contemptuous and nominal—Costs—Discretion—Evidence—Admissibility—Statement of deceased person—Evidence of similar facts—Evidence Act (I of 1872), ss. 14, 15, 32 *cl.* 3.

A. offered himself as a candidate for election as a trustee of the charitable funds of the Parsi community. In furtherance of his candidature, he gave certain public lectures. *B.*, who was a frequent contributor to the columns of *Jam-e Jamshed*, a daily newspaper, wrote a letter to that paper criticising the conduct of *A.* In the course of that letter, *B.* stated that the late Sir Jamsetjee Jeejeebhoy on one occasion said to *B.*—"What can we do, *B.*? If such persons (meaning *A.*) are not allowed to speak, they send us threats that they will create disturbance and stop the conduct of the business."

A. thereupon sued *B.* as well as the editor, proprietor, printer and publisher of *Jam-e-Jamshed* for the recovery of Rs. 9,000 as damages for injury done to his reputation by the libel. That libel was charged as containing two distinct imputations on the conduct of *A.*, *first*, that he had obtained the privilege of being called on to move or second propositions at the meeting of the Parsi Anjuman by sending to the trustees of the Parsi Panchayet, who conveyed those meetings, threats that if he was not allowed to move or second propositions, he would create disturbance at the meetings, and, *secondly*, that *A.* had boasted in the lectures delivered by him of being a greater friend of the late Sir Jamsetjee than he really had been:

Held, (1) that the words complained of were defamatory;

(2) that the statements were not privileged, as they were published in a newspaper, read by the public at large and circulated among all classes of readers besides Parsis;

(3) that as the imputations contained an allegation of fact imputing misconduct, the libel was out of the sphere of fair comment;

(4) that the libel could be justified only on the ground that the allegation was true;

(5) that the statement alleged to have been made by the late Sir Jamestjee to *B.* was inadmissible in evidence under section 32(3) of the Evidence Act, as,

if true, it would not have exposed Sir Jamsetjee to a criminal prosecution or to a suit for damages;

(6) that, consequently, there was no evidence at all in justification of the truth of the libel in substance and fact;

(7) that, even if true, the statement of Sir Jamsetjee was insufficient to prove the truth of the libel as it lacked the test of cross-examination;

(8) that as no misconduct in or with reference to the suit was found against *A*, he ought to be awarded nominal and not merely contemptuous damages;

(9) that it would be fair to allow *A*. Rs. 200 as damages with costs of the suit.

Both privilege and fair comment are two aspects of the law of privilege, with this difference that the former technically so called relates to the special rights of an individual, whereas the latter concerns the common rights of every member of the public at large.

Given facts which are true as regards a matter of public interest, it is open to any member of the public to comment on them fairly, but if any allegation of fact imputing any act of misconduct is made in the course of the comment, the libel is out of the sphere of fair comment, and can be justified only on the ground that the allegation is true.

In a suit on libel, evidence of instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to him in the libellous statement is inadmissible. The defendant can justify the libel as true in substance and in fact by proving *its* truth, not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and intentional, not accidental, conduct of the plaintiff.

In a case of libel, the law is that the damages are at large. It is not necessary to prove any particular damage. The Jury may give such damages as they think fit, having regard to the conduct of the parties and all the circumstances of the case.

Although the question of costs is in the discretion of the Judge, that discretion must be exercised on proper materials.

Per *Beaman, J.*--Where a plaintiff claims substantial damages for injury to his reputation, he should himself come before the Court and tell the Court who he is, so that the Court may form some idea of the reputation for injury to which money compensation is claimed.

In Courts of law, there is only one way of proving the truth, and that is by legally admissible and relevant evidence.

The doctrine of privilege is referable to cases in which communications are made in what we may call confidence by one person having special information to give to another person entitled to receive that confidence.

Appeal from the following judgment of

BEAMAN J.—In this case, the plaintiff, Dr. Sukhia, asks for Rs. 9,000 damages for injury done to his reputation by an alleged libellous publication written by defendant No 1 and published by defendants Nos. 2 and 3, editors and proprietors of the *Jam-e Jamshed* newspaper, on the 28th of January 1911. The defamatory matter complained of can now be reduced to virtually a line and a half in the long letter written by defendant No. 1 over his own name and published by defendants Nos. 2 and 3. That statement is that the late Sir Jamestjee Jeejeebhoy on one occasion met defendant No. 1 on the platform of the Neral Railway Station and said to him: "What can we do Ratnagar? If such persons (meaning Dr. Sukhia) are not allowed to speak, they send us threats that they will create disturbance and stop the conduct of business" The plaintiff does not complain specifically of any other passage in defendant No. 1's letter which extends over five and half columns of printed matter. In his plaint, the plaintiff pleads by way of innuendo that the passage as printed and put into the mouth of the late Sir Jamsetjee Jeejeebhoy must mean Dr. Sukhia and that its general meaning was that he was such a person as would be guilty of the disgraceful conduct suggested in the passage. That part of the innuendo was withdrawn at the trial and the plaintiff has confined himself to the words as they stand and their literal meaning, the defendants all admitting that the passage meant Dr. Sukhia. So that there has been no plea in answer to the innuendo, nor any need of further inquiry upon that point.

Thus stated, it will appear that the libel complained of is of a comparatively trivial character, and it may be wondered that the trial of the action should have occupied so much time and excited so much feeling. Unfortunately in a numerically small community like the Parsi community of Bombay, into which are compressed quite a disproportionate amount of wealth and intelligence, matters touching the common interest of that community, particularly where those involved sentiments of religion or charity, are apt to excite much personal feeling, with the result that the members of that community seem to lose in some measure all sense of proportion. I have very little doubt that had we in this country the assistance of a Jury, the trial of this case would not have occupied more than two days at the most. Nor can I entertain much doubt as to what the verdict of a Jury would have been. In India, however, the trials of libel actions, which, in my opinion of every action of the kind, are most proper to be left entirely to a Jury, have to be decided by the Judge without

that assistance, first disposing as a Judge of such points of law as usually arise *in limine*, and then doing the best he can as a Jury to give a sensible verdict upon the facts.

In order to approach the question as far as possible generally and in a broad common sense spirit, it may be as well, before taking up legal technicalities, to state the manner in which the libel complained of came to be published. Dr. Sukhia is avowedly a demagogue, who has set himself up to be the champion of the lower middle class and the lower classes of his community. He has expressed in the course of his examination very sweeping opinions concerning the educated or the upper, or what I may call the aristocratic, part of that community. Now there is nothing upon which the Parsis collectively are more sensitive than the proper control and application of their great religious trusts and charities. Traditionally those accumulations, the gifts of pious and honoured men in the past, have always been confided to the keeping of certain highly respected families, who had until a short time ago acquired something like a hereditary right, and, in connection therewith, a sacrosanct character, as a specially fit hierarchy to hold and administer those ancient and ever-growing charitable accumulations. Then came a schism in the community accentuated by a point going, as many thought, to the very roots of their religion in a case which was tried by my brother Davar and myself.* As a consequence of that case, Davar, J., framed a scheme for the appointment by electoral methods of trustees of the great Parsi charitable funds. Considering the venerable character which, as I say, had always belonged to those leaders of the community who filled that character hereditarily, it was only natural that the introduction of elective methods should stir up much excitement and mixed feelings in the community. It probably was the hope of the conservative party, if I may so style it, that the electors of trustees should return to office representatives only of the old and honoured names. It was at this period that Dr. Sukhia, who has on his own showing no respect whatever for traditionary rank and authority, came forward as a candidate for election. It is easy enough to understand how the appearance of a candidate of Dr. Sukhia's position and antecedents and avowed public leanings in such a connection must have affronted all those who wished to see the former order and high dignity of the office of trustees preserved. I am not saying a word against Dr. Sukhia in this connection more than he has cheerfully said, if not against at any rate by way of candid description of himself, and of what he conceives his public mission to be. But he too must have realised that he was deliberately putting himself in opposition to a very powerfully organised body of public opinion in his community. In furtherance of his candidature, he determined to give certain lectures. He hired a public theatre and announced his intention of educating and instructing the electorate from the platform of that theatre by way of public lectures on three several occasions. He invited the leading newspapers of the community to inform the public through their columns of his intention. The *Jam-e-Jamshed* newspaper replied to Dr. Sukhia's invitation by inserting among its answers to correspondents a line or two suggesting that what he asked of the newspaper was more properly an advertisement than an anticipatory announcement. Thereafter Dr. Sukhia did deliver his three lectures to which publicity was given by a section of the Parsi press. The *Jam-e-Jamshed* newspaper confined itself to a fragmentary report of the first lecture only. Now, those lectures have been read out *in extenso* to the Court, and although it may well be that owing to inefficient reporting they do not exactly and fully reproduce all that Dr. Sukhia said, it is impossible to read them without realising how violently portions at least of them must have irritated that part of the community which did not share Dr. Sukhia's opinions. In the course of the trial, particularly towards its close, the learned Counsel for the defendants have condemned those lectures in the most unmeasured and emphatic language. I do not myself think that there is anything in them, as far as my memory of such a mass of material goes, to justify the assertion that Dr. Sukhia actually libelled any individual member of the community. But he certainly did sneer bitterly enough at that class towards which he appears to

*See *Sir Dinshaw Manockji Petit* v. *Sir Jamsetji Jeejeebhoy*, 2 Ind. Cas. 701; 11 Bom. L. R. 85; 33 B. 509; 5 M. L. T. 301.—*Ed.*

entertain a deadly animosity, that is, the upper wealthier class of the community. And there is much also in the lectures which, if not in any way libellous, must certainly have proved most offensive and provocative reading to the older conservative school. Thereupon Mr. Ratnagar, defendant No. 1, who seems to be a very obscure person, felt called upon to take up the cudgels on behalf of that aristocratic class which he believed Dr. Sukhia to have deliberately insulted. Mr. Ratnagar appears to me to be one of a very common type of gentlemen who are in a position of leisured ease and perhaps slightly affected with the itch of writing. I expect if any true analysis could be made of the motives which prompted the composition of Mr. Ratnagar's letter, they would be found to be compounded at least as much of personal vanity and the desire to appear before the public not only as a popular but as a singularly brilliant writer as of any desire to protect the aristocratic class of the community or of a very particular personal hatred of Dr. Sukhia. I feel that it must be unfair to form an opinion of any composition from its translation by the interpreters of this Court. Considering that Mr. Ratnagar appears to have been a favoured contributor of the *Jam-e-Jamshed* newspaper, and that this particular contribution had the benefit of special and careful revision by the assistant editor, the editor and the late editor and proprietor of the *Jam-e-Jamshed*, all experienced journalists, I must presume that in its native dress it possesses merits which have entirely disappeared in the process of translation. As it now reads, it has all the sound of a rather savage, crude and school-boyish attack which one would have thought the editors of a respectable journal would hardly deem worthy of so much space as five and half columns. But it is quite possible, indeed I think it must be the case, that as written in the vernacular, the letter as a whole would read quite differently. There can be little doubt, I think, that just as Mr. Ratnagar was eager to find an opportunity of coming forward in this way, expecting applause and approbation from all those whose opinions he valued, at the same time hitting a man whom he disliked very hard, so too the responsible proprietors and editors of the *Jam-e-Jamshed* were not unwilling to make use of Mr. Ratnagar to give much more emphatic expression than they themselves would have cared to do in their leading columns to the sentiments of intense dislike and hostility which had been excited in them by Dr. Sukhia's public candidature. That I take to be the genesis and the sufficient preliminary explanation of the composition and form of the libellous publication now complained of. It is certainly striking, when the letter as a whole comes to be read, that out of five and half columns of bitter invective, satire and insult, the plaintiff, Dr. Sukhia, can find no more than a line and a half upon which to found his present action for damages. And it has indeed been virtually admitted at the close of the case that however humiliating and offensive all the rest of that letter is, however calculated to bring Dr. Sukhia into ridicule, to deride his pretentions, to lower him in the estimation of his community, there is nothing in it but this small isolated passage on which he could hope to bring an action for libel with success. The rest of the letter has been commented upon at the close of the case, because its tone is said to be proof enough of the malice of the writer; but it is not pretended, and I do not think it can be pretended, after that letter has been compared with the lectures which provoked it, that the Court would have been likely to find a single statement in it libellous except the statement upon which this action is founded. Now, where a particular passage in a particular composition is complained of as being libellous, where there is a Jury, the whole composition would have to be handed to them, and, reading it throughout from the first to the last line, they would then be left to say whether the particular word or words complained of amounted to libel or not; and although that rule is commonly applied for the reason that by reading the rest of the letter and taking the impugned passage with its context, the Jury might find that what was complained of had been softened or explained away in other parts of the composition, a result which certainly would not be obtained by reading Mr. Ratnagar's letter, still I think in a case of this kind the Jury, who read the letter as a whole

and saw how very carefully the plaintiff had sought to restrict the battle-ground, would be disposed to say for themselves that if all the rest of this contumely, abuse and ridicule had not in any way harmed his reputation or injured his feelings, then the selected passage could have hardly done so to any marked degree. That, of course, is merely a general way of looking at the composition as a whole, and it is because Juries are in a position to give effect, without much regard to niceties, either of law or logic, to what they believe to be the general reason and justice of the case that I do think a case of this kind would be much more satisfactorily tried by a Jury than a Judge, for in all the entanglements of jural and judicial definitions of libel and justification, and privilege, and fair comment, an accurately trained mind, desirous to keep the straight path, finds itself so often confronted by technical difficulties and contradictions that it might well envy the license of a Jury and adopt the definition once given summarily and concisely of what was and was not a libel by a very eminent Judge:—"Nothing was libel which twelve honest bakers, green-grocers and butchers, did not think to be so." I have very little doubt that in a case like this, where many points are really of much nicety, the Jury would leap lightly over the fences of the law, and, if they could not find the way to disentangle the arguments of Counsel and the directions of the Judge, would, as Juries usually do in such cases, take shelter under a general verdict. The Judge unfortunately is confined more strictly within the limits of the law as he understands it and cannot give the go-bye to any legal technicality if he feels that it really is good in law, however exasperatingly it may seem to bar the way to a practically right conclusion of the whole matter.

Before dealing with the technical defences of justification, privileged occasion, fair comment, total want of reputation on the part of the plaintiff, so that the libel, if it be a libel, could not have injured him, I must take this opportunity of expressing my deep obligation to the learned Counsel representing all the parties to this suit for the extreme diligence, ability, and candour, with which, from the very commencement to the end of the case, they have endeavoured to assist the Court. The subject being one with which this Court rarely has to deal, I cannot overstate, I think, the extent to which I feel that if I have been ultimately able to give a correct expression of the law governing all the points in controversy, I am indebted for that result to the assistance Counsel have given me.

First of the procedure. When the case had been opened, plaintiff's Counsel said that though not bound to do so, he was willing and intended to put his client Dr. Sukhia into the box. On further reflection, he desired not to do so, unless the Court compelled him to adopt that course. It was not, he said, that he wished to withhold Dr. Sukhia as a witness; but merely that he wished to be sure that he was produced at the proper time. It appeared to me that where a plaintiff claims substantial damages for injury to his reputation, the least he can do is to come before the Court and tell the Court who he is, so that the Court may form some idea of the reputation for injury to which a money compensation is claimed. I am well aware that in theory the law imputes some damage; and that it is not uncommon in practice, in England, for the plaintiff to satisfy himself with proving the libel, and then leaving the defendant to justify if he can. This was the procedure followed in *Scott* v. *Sampson* (1), *e.g.*, with the rather strange result that the defendant had to call the plaintiff. In another case cited by Counsel for the plaintiff, *Tripp* v. *Thomas* (2), substantial damages were awarded although the plaintiff was not called. Here the plaintiff claims Rs. 9,000 damages. He says his reputation has suffered to that extent. Suppose no evidence whatever is called, how is the Court merely upon proof of the libel to say whether it has caused the plaintiff so much injury? The Court, till it is informed by evidence, knows absolutely nothing of the parties; the plaintiff might be the most eminent or the least eminent of men, of the highest or of the lowest class. Or he might be an average person. His Counsel suggests that in the absence of all evidence to the contrary, the Court should at least

(1) (1882) 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

(2) (1824) 3 B. & C. 427; 5 D. & R. 276; 1 Car. & P. 477; 3 L. J. (o. s.) K. B. 42; 107 Eng. Rep. 792.

presume that much, that a plaintiff is an average citizen. I fail to see why the Court should be put upon presumptions at all. The plaintiff is here to ask for relief, why should he not come forward, tell his own story, and leave the Court to form its own estimate from so much of his character as he reveals wittingly or unwittingly in the witness-box what his reputation may fairly be worth? I entirely agree with the general rule laid down by eminent Judges in consultation, and evidently after full consideration [*Mercer* v. *Whall* (3)], that in all actions in which the plaintiff claims damages, he ought to begin. It is true that the point had arisen in a rather different way; in the cases which had brought it prominently forward, it was usually the defendant who claimed the right to begin, and the plaintiff who disputed it; not as here the plaintiff who suggests that he is under no obligation to go into the box till the defendants have begun on the ground of justification. But the rule remains as valid, I think, and for as good reason. I, therefore, decided that Dr. Sukhia must go into the box and give his evidence, if he expected to obtain substantial damages.

Next, in dealing with the plea of justification, I have first to remember that the defendants placed it upon the record when they came to trial, evidently highly sanguine of being able to establish it. I do not think that the defendants' legal advisers, whoever they may have been, ever realized, until the case began, the extreme strategical ability, if I may say so, certainly meaning no offence, with which the plaintiff's legal advisers had chosen their battle-ground. Had the defendants done so, I expect they would have been advised that they could not justify; they would probably have been advised (while maintaining that they had acted perfectly *bona fide* and in the firm and sure belief that the statement was true) to withdraw from it and admit that they were no longer in a position to prove its truth. But considering the extremely aggressive nature of the alleged libellous letter as a whole, particularly the challenge with which it concludes, I can well understand that the defendants must have felt exasperated at being thus restricted and so proved a little blind to reason and prudence. They were only too anxious, I have not the least doubt, to meet Dr. Sukhia in Court upon the whole body, not omitting a single detail of the general attack; but they had, I think, clearly overlooked the difficulty, a difficulty which as soon as the trial began was seen to be insuperable, of actually proving the truth of the particular words placed by Mr. Ratnagar in the mouth of the late Sir Jamsetjee. The plaintiff, by confining his case to this single statement, shut out all justification of anything else which the letter might contain and pinned the defendants down relentlessly to the performance of what was obviously impossible. When the defendants' Counsel opened their case, it was only too clear to me that they were under the mistaken belief that by merely proving that Sir Jamsetjee Jeejeebhoy had made the statement to Mr. Ratnagar or to others, they had justified the libel. That, I think, was a very natural mistake for laymen like the defendants themselves to fall into; but it is certainly strange that they were not forewarned in time of the pitfalls awaiting them. I can understand, and I am sure that any Jury would understand at once, the attitude of mind of these three defendants upon this point. Sir Jamsetjee Jeejeebhoy was the venerated head and leader of the whole Parsi community. Most handsome tributes have been paid to him quite as frankly and generously by Mr. Raikes for the plaintiff as by those Counsel who represented the defendants. These defendants, Mr. Ratnagar in particular, a man relatively humble and proud enough to be allowed Sir Jamsetjee Jeejeebhoy's acquaintance, would only say, as indeed the old Mr. Murzban did say in the witness-box, that it never entered into their head to doubt the statement coming to them on such authority. "Why should they," they would say, "endeavour to verify the truth of what the late Sir Jamsetjee Jeejeebhoy had himself told them? Impliedly that would be an insult to that gentleman's unblemished reputation for probity and truthfulness." So that these defendants, unfortunately misled upon this point and believing that the ways of the law are as simple as the ways of the man in the street, confidently thought, as their Counsel confidently thought at first, that if they proved the statement made by Sir Jamsetje

(3) (1845) 5 Q. B. 447; 14 L. J. Q. B. 267; 9 Jur. 576; 114 Eng. Rep. 1318.

to them, that would be conclusive of its truth.

Now, when the defendants' Counsel sought to prove that the impugned passage was true by evidence that Sir Jamsetjee did say what that passage states that he did say to Ratnagar, that was objected to by Mr. Raikes as being entirely irrelevant. I quite agree that that is no evidence at all of the truth of the libel complained of. But I allowed the evidence in merely in support of the *bona fides* of the three defendants. In strictness, I still entertain some doubt whether Mr. Raikes' objection was not well founded. But the matter is so delicate and difficult to analyse that I thought it safer, again imagining that at the close of the trial the Jury might have to deal with all such matters, to allow the defendants to prove that they at least satisfied themselves or were satisfied that the late Sir Jamsetjee did say the words which defendants Nos. 2 and 3 printed on the authority of defendant No. 1. Mr. Raikes had cited authorities in the English Courts, (and indeed there seems to be authority upon almost every conceivable point connected with a trial of this kind, although that authority is not always in agreement or, as far as I can see, reducible to wholly consistent principles) to show that an editor may not disclose the name of a contributor merely by way of mitigation of damages. I admit that in that case the reason given, resting too as it does upon very high authority, seems natural and sound. But here, I think, there is rather an obvious distinction in the facts, though how far that distinction affects the principle I have found it very difficult to work out to my own satisfaction: for in this libel it is not the writer who makes the libellous statement on his own authority but he gives it to the world from the first on the authority of, and in the words of, the late Sir Jamsetjee Jeejeebhoy. So that I do think that when the *bona fides*, at any rate, of the publishers, the defendants Nos. 2 and 3, has to be taken into calculation in estimating damages, it is only right that all the defendants should be allowed to prove this much at least that they have printed no more than the bare truth when they say Sir Jamsetjee used those words.

Now, there is another point in this connection, which has never been touched on, perhaps does not strictly arise upon the pleading or arguments, which I have not the least doubt the Jury would consider either in estimating damages or any general verdict they might shelter under, that is, the context of the impugned passage. If we looked to the scheme of Ratnagar's letter as a whole, remembering what provoked it, no one can doubt, I think, that it is an elaborate answer, step by step, to all that was publicly delivered by Dr. Sukhia in support of his own candidature. When I read the libel complained of in its full context, I had no doubt in my own mind that what Ratnagar really meant to achieve by the repetition of this most unfortunately remembered incident was the refutation of Dr. Sukhia's claim to have been deeply in the confidence of the late Sir Jamsetjee Jeejeebhoy and entrusted by him with the charge of important resolutions bearing upon these questions which, as I have said, so vitally touched the passions and sentiments of the Parsi community. I do not think that Ratnagar's object in relating the incident was to fix Dr. Sukhia with the accusation of having threatened Sir Jamsetjee Jeejeebhoy so much as to expose to the public the falsity of Dr. Sukhia's claim to have been a great personal friend and to have stood high in the estimation of the late Sir Jamsetjee Jeejeebhoy. The mode he chose of doing it was, as I have just said, most unfortunate, for he was obliged then to give the true reason and that reason is the statement of fact which on the face of it is libellous. It is in this manner, I have no doubt, that the defendants either fell blindly into the trap which the careful preparation of the case of the plaintiff laid for them, or even seeing this they were so indignant and so determined to make Dr. Sukhia pay for the luxury of an apology that they persisted up to the last in a plea of justification, which, if well advised, they would have seen they could never make good. Thus as the trial proceeded, and one after another of the defendant's attempts to justify indirectly were shown to be inadmissible according to the well-settled and understood rules of law governing the production of such proof, they realised but only too late that this plea must be abandoned. At the end of the case, neither of the learned gentlemen representing the three defendants was in a position even to argue that the truth of the libel had been justified. It is

true that Mr. Mulla did suggest that if they had not completely justified, they had gone so near doing so that the Court would hardly press that point against them. But I know of no way between justification and non-justification. Either that which is stated is true or it is not true; and in Courts of law there is only one way of proving the truth, and that is by legally admissible and relevant evidence; so that if no evidence of that kind be forthcoming, however great the probabilities might be thought to be outside a Court of law, that a statement which cannot be proved to be true really is true, all that the Court can say is that its truth has not been proved, so that the party justifying, upon whom the onus of proof naturally lies, has failed.

I come next to consider another line of defence upon which the three defendants evidently placed much reliance. All three contend that the publication of the libel complained of was upon a privileged occasion. And the Court has had the benefit of a very thorough discussion of the law upon this point as laid down in cases of great authority and passages from all the accepted text book writers on the subject. There is perhaps hardly any part of the complicated, and often I fear, somewhat inconsistent, law of libel, which is more difficult to free from the garb of words and definitions in which the ingenuity of Judges and jurists have wrapped it than this of privileged occasion. The latest, most accepted, and probably by far the most elaborate, definition of privileged occasion to be found in Halsbury's Laws of England is contained in so many terms that if the full contents of each is to be given to it, the doctrine would quite easily be stretched far enough, and indeed must be stretched far enough, to cover every publication in a newspaper; for there is certainly no newspaper of any repute which would ever think of publishing matter so entirely personal as to escape the nets of one or other of the terms of this definition; yet the proof, that so far from that being the true principle of privileged occasion it is almost the exact opposite of it, is that the utmost diligence on the part of all Counsel concerned in this case has been only able to discover two cases where publications in a newspaper have claimed the protection of privileged occasion. One of these cases, that of *Laughton* v. *The Bishop of Sodor and Man* (4), was of a very peculiar character since the delivery of the Bishop's charge to his clergy, which was afterwards made the matter of publication in a newspaper, was, of course, given beyond all doubt upon a privileged occasion. There remains only the case of *Mangena* v. *Wright* (5), where Phillimore, J., upon a preliminary argument, carried the law, as far I think as it ever could be carried in that direction, much further indeed than, speaking for myself, I should ever be disposed to allow it to go in this country. But there again the defendant claimed privileged occasion upon a very special ground as being the Agent General of a particular colony and thereby the one man in England probably competent to speak with authority to the public upon a question which was being agitated in public in the public interest. What became of that case I am unable to say; but although no doubt the decision indicates that the learned Judge thought the publication by right in the *Times* newspaper might be protected on the ground of privileged occasion, that was only upon a preliminary argument in which the learned Judge was asked to hold that it could not possibly be so, and the result of the decision merely was that the question was relegated for final determination to the trial. Now, if every person who has, or imagines he has, an interest in any matter may libel any other person in communicating his opinion upon that matter through the columns of a newspaper to the public, pretending that the public have a corresponding interest in hearing his opinion, it seems to me that the doctrine of privileged occasion would be carried far beyond all reason and principle. This dangerous extension certainly does appear to have been given effect to in America in connection with electoral proceedings where every adult in the community possesses a vote; and a work of authority goes so far as to say that in such circumstances there is a duty lying upon every voter to communicate to every other voter anything he may know to the disparagement of a candidate for their suffrages and that the proper medium for such a communication is the public press. I cannot

(4) (1872) L. R. 4 P. C. 495; 9 M. P. C. (N. S.) 318; 42 L. J. P. C. 11; 28 L. T. 377; 21 W. R. 204.

(5) (1909) 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960; 53 S. J. 485; 25 T. L. R. 534.

accede to such a view. I cannot bring myself to do so. I think that would be carrying the doctrine of privileged occasion to most dangerous lengths. If we look back to its origin, and the limits within which it is always confined by the great English Judges, I think, it will become perfectly clear that the doctrine is referable to cases in which communications are made in what we may call confidence by one person having special information to give to another person entitled to receive that confidence. But if any individual, who has opinions to publish, or criticisms to make, or grievances to ventilate, or aspersions to cast, can take the whole world into his confidence and say, if it is not, it ought to be, interested in his communications, then it appears to me that the whole framework and proper limits of the doctrine of privileged communication will be utterly broken down. Here, I have been told that the election of candidates to be trustees of the Parsi Panchayet charitable funds was a matter in which every member of the Parsi community was interested. Ratnagar says that Dr. Sukhia was a most unfit person to be made a trustee. Dr. Sukhia doubtless is of a different opinion. Dr. Sukhia made his appeal to the electorate publicly and sought after making that appeal to give still further publicity by publication in the papers. So Ratnagar says he had an interest in exposing the impostures and arrogant pretensions of Dr. Sukhia to the general reading public just as every member of that reading public had a corresponding interest in receiving those communications. Now under the terms of the definition, and within the language used in certain cases, even so extreme a case as this can, no doubt, be plausibly defended. Never for a moment have I been disposed to yield to the defendants' contentions upon this point. I say no member of the public, no private citizen, merely as a member of the public or as a private citizen, merely because he wishes to air his own opinions or court popularity by attacking an unpopular candidate, has an interest of that kind which is a pre-requisite for establishing privileged occasion; much less the newspaper reading community, many of whom cannot take any active or living interest in a particular controversy, has any duty or interest whatever to listen to the gratuitous pronouncements of a self-constituted critic in the columns of a newspaper. If we look to the true reason of privilege, it will be found, I think, that in every undoubted case of it, it arises out of peculiar knowledge possessed by one person and special right in some other person or persons to have that knowledge imparted to him or them. There is thus established a relation of confidence between the giver and receiver of all privileged communications. The reason disappears as soon as a person, even though he have special knowledge to which other persons have a special right, publishes that knowledge indiscriminately, so that it may become known to anybody and everybody who chooses to read it. The subject has been complicated in the long course of judicial decisions by the manner in which very eminent Judges have occasionally appeared to deal with privilege and fair comment as though they were identical and synonymous. It is, however, clear that fair comment is radically different from a privilege extended to certain *prima facie* libellous communications. What is meant by privileged occasion is no more than that the circumstances under which any statement, oral or written, is published, are such as to negative the presumption of malice, which the law draws from the quality of the statement and the bare fact that it is untrue. Even after the occasion has been thus shown to be privileged, it is still open to the plaintiff to prove special malice, general malice alone having been rebutted by the character of the occasion; while in fair comment it is clear that no special malice could ever be proved at all, for, were that so, the comment would no longer be fair. Fair comment is a complete answer, and where the Jury takes that view it will find no libel. Privileged occasion is no complete answer but merely throws an additional burden on the plaintiff. I have no hesitation in holding upon this point that this occasion was not privileged, and, therefore, the publication complained of will in law be ascribed to malice and entitle the plaintiff, if it has injuriously affected his reputation, to damages. Thus then I have found that in strictness the defendants have been unable to justify by proving the truth of the alleged libel, and that the occasion of its publication was not privileged.

I shall next come to consider the various points which may be collected generally under the head of libel or no libel, fair comment, mitigation of damages, general reputation, and the like. Let me first turn

again to the actual libel complained of and see what is the nature of the aspersions said to have been cast upon the plaintiff's character. He is said to have threatened Sir Jamsetjee that if he were not allowed to speak at these public meetings, he would create a disturbance and obstruct business. Now throughout the earlier part of the case, the defendants made desperate attempts to justify indirectly by offering to the Court instances in which the plaintiff is said to have so conducted himself as to make it likely that he actually did threaten Sir Jamsetjee, that if not allowed to speak, he would create disturbance and obstruct business. The Court was obliged to rule out all evidence of that kind, for one of the best settled rules of law in this department is that no evidence can be given by way of particular instances showing that the plaintiff's disposition or character is such that he would be likely to do the particular act which the defendant has said that he did do; and owing to the very singular form of the statement made in this case by the defendants, the plaintiff has had a great advantage throughout the trial. He has been able to shut out all evidence which the other side were only too ready and eager to offer of the manner in which he is said to have behaved on many occasions as a public man at public meetings; yet inasmuch as the gist of a libel action is really, as said by some writers of authority, to lie in the pecuniary damage sustained by the plaintiff in consequence of the libel, or by others in the loss of his reputation occasioned by the libel, it certainly is a matter of primary importance and a matter which probably would be paramount with the Jury to see whether the libel is of a character which, in all the circumstances disclosed at the trial, would have occasioned the plaintiff any pecuniary damage or any serious loss of reputation. And in coming to that conclusion, having in view the doing of substantial justice rather than conforming too strictly to mere technicalities, I think, a Jury would be perfectly right, and acting as Jury I should be perfectly right, in looking not only to the form but to the substance of the libel complained of. Alter this particular libel ever so little, leaving it just as damaging, if not more damaging than it is in its present form, to the plaintiff's character, there can, I think, from what has been elicited from the plaintiff himself, be little or no doubt that the defendants could easily have justified it. Consistently with the skill shown by the plaintiff's legal advisers in selecting the point of attack, his Counsel has throughout the case dwelt with insistent emphasis upon what he maintairs to be a great and real distinction between the one sentence complained of and all the rest of the letter. Although the rest of that letter, as I have said, is calculated to bring the plaintiff into ridicule and contempt, is often abusive, always derogatory, he says that he has picked out the one obviously libellous passage and has not gone into the rest of the letter because he thought it desirable to curtail the proceedings. I think, however, he might with perfect truth have gone further and said that he could have had no hope of obtaining any redress from the Court in respect of all the rest of the criticisms and charges such as they are of vanity, absurdity and arrogance levelled at him. All that, he would wish the Court to believe, he treats as unimportant, while he feels his honour deeply touched and his reputation seriously injured by the simple statement that he threatened Sir Jamsetjee to create disturbance and obstruct business if he were not allowed to speak at those meetings. Now, as I have said, let us alter the form of the libel but very little. Suppose Ratnagar has put into Sir Jamsetjee's mouth words such as these: "What can I do Ratnagar? If Dr. Sukhia is not allowed to speak, he breaks up meetings or he creates a disturbance and obstructs business." Or again he might have said: "If I don't allow Dr. Sukhia to speak as much as he pleases, he has shown himself such a turbulent fellow that I am sure he will break up our meetings and obstruct our business". Notwithstanding the great ingenuity and power with which his learned Counsel has insisted that the statement complained of in its present form really strikes much more deeply at Dr. Sukhia's honour and integrity, not only as a public but as a private gentleman, than such statements as I have just suggested, I really cannot see that this is in fact so. And if the libel had taken that form, or either of those forms, then it might have been justified by all those particular instances which have been shut out by the fact that as it stands it says that Dr. Sukhia actually threatened a particular man who is now dead. If we look to the

vernacular form of the libellous passage, it comes to this that Sir Jamsetjee certainly is made to say those words: "he sends us threats that he will do etc. etc." But considering, as I said in the earlier portion of the judgment, that what the defendants had probably had in view was not so much the actual threat, if any threat, was ever used, offered by Dr. Sukhia to Sir Jamsetjee as merely to show by Sir Jamsetjee's words that it was because of Dr. Sukhia's character and the habit he had exhibited of disturbing public meetings that Sir Jamsetjee allowed him to take so prominent a part in them, it might very well be that the words recorded may have gone a little beyond what Sir Jamsetjee actually meant, although he may have in fact used them. To say that a man, if not allowed to do this, that and the other, menaces us with certain conduct, might, if so expressed, mean no more than that that was the reasonable apprehension in the mind of the speaker. If those had been the actual words published by the defendants, the substituted words I mean which I have suggested, then their line of defence would have been much strengthened and extended, and I cannot help feeling that the superior skill of the plaintiff's legal advisers has given altogether a fictitious importance to the special form of the libel, while intentionally avoiding its substance; and by this tactical superiority has thrown the very greatest difficulty in the way of the defendants. I am not, of course, here, either directly or indirectly, blaming or remotely suggesting blame of the learned and experienced Counsel who has thus so very ably conducted the plaintiff's case. I merely point out that more than most cases conducted in this Court, this appears to have resolved itself into a trial of skill, indeed a very difficult and complicated game, in which the plaintiff's advisers showed themselves superior from the commencement to the defendants'. But I am not on that account to shut my eyes to the substantial justice, if I can discern it, of the cases in controversy. I have never been able to accede to the plaintiff's contention that there is anything so peculiarly offensive in the form of the alleged libel that it stands quite apart from the rest of the letter and constitutes a very special and real grievance, or that it would not have been quite as offensive or damaging to the plaintiff's reputation if, instead of saying that he threatened that he would create disturbance, Sir Jamsetjee has said of him that he actually did create disturbance and obstruct business whenever he was not allowed to speak at his pleasure. It is easy enough to see the difference between the two accusations, and in his client's interest Counsel for the plaintiff has made, and rightly made, the very most of it. But when we come to reckon the effect upon a man's reputation or his pocket of a slander or libel, we surely ought to look as much to the substance as to the form of it. And if a man could be shown to have committed six forgeries or six murders, I really do not see how his reputation in that respect could be seriously damaged by saying that he had threatened to commit a seventh in like circumstances. It is only too clear that had the defendants had a free hand, they could have brought, and were ready and eager to bring, evidence before the Court to show that Dr. Sukhia had in fact created disturbances and obstructed business. But that would, of course, be no justification of the limited libel contained in the statement that he had threatened to do so. In itself, I do not think that the published charge (having regard to what Dr. Sukhia has told us of himself and his mental attitude towards his opponents in public life) expresses anything which would very materially injure or lower his reputation as a public man by the statement that he threatened Sir Jamestjee, if not allowed to speak he would create a disturbance. "Creating a disturbance," in the mouth of a gentleman like Sir Jamsetjee, probably meant no more than that he would insist upon speaking out of his turn, and "obstructing business" no more than that he would go on speaking interminably. I really do think that a man like Dr. Sukhia, who takes so prominent a part in certain walks of public life in this city and whose career appears to have been, by his own description of it, a stormy one although not in any sense that I can see dishonourable, ought not to be so thin-skinned. He is the kind of man, as his Counsel described him, who insists upon adhering to his own opinions, and possibly, though this is not his Counsel's description, enforcing them in season and out of season upon those who do not share them. He is quite evidently a person of great courage and pugnacity, and in the role he has chosen to adopt, that of a demagogue and leader of the lower classes, he may very well

have been a real terror to a quiet and retiring gentleman like the late Sir Jamestjee and I say all that without meaning any imputation upon Dr. Sukhia's character. Indeed I understand that is the character which he gives himself, and which he rather glories in. Would such a character as that really be seriously injured, can it be supposed, by the statement of the late Sir Jamsetjee that he threatened to do those things which were exactly what his own description of his character would lead one to suppose that when the occasion arose he does habitually do? Surely the grievance here has been considerably exaggerated and put upon a very high ground indeed when it is said that through this saying of Sir Jamsetjee the defendants struck at the private honour and probity of Dr. Sukhia. I am not, of course, defending, or attempting to defend, the tone of the letter addressed to the *Jam-e-Jamshed* by Mr. Ratnagar. But although that letter appears to me to have been quite unnecessarily aggressive and in many parts offensive, it is not at all surprising that a man setting himself up, as Dr. Sukhia did, to be a champion of the lower classes and expressing his contempt for the wealthy but brainless aristocracy and the graduate classes as he did in the witness-box here, that is to say, for those people whom the community has hitherto held in special veneration and respect, should excite at the hands of his opponents bitter hostility. Dr. Sukhia in the witness-box displayed much manliness and never showed at any moment the least desire to resile from any of his opinions. He is evidently himself a very hard hitter, and he ought not to complain when others hit back at him. And I understand him not to complain of any part of that letter except this particular statement. Nor do I believe for a moment that if the statement had been worded, as I have suggested it might have been worded, without detracting in the least from its offensiveness and the damaging effect is might have upon his character, that Dr. Sukhia would have instituted these proceedings, because I think, and I hope I do not wrong him in this, he would have felt that the defendant's hands would not then have been tied and they would have been in a much better and stronger position to make their defence. Indeed I do not attach very much importance to the evidence upon general reputation except in so far as I can collect what the character of the plaintiff must be from his own cross-examination and his published utterances. I think that the evidence of general reputation almost always presents insuperable difficulties and can hardly be kept within the bounds of any true principles of evidence. It is very hard in this country particularly to make any witness, even the most intelligent, understand what is meant by general reputation. He always exhibits a tendency to stray into particular instances from which he has drawn his own inferences and thus not to express general reputation at all but his own personal opinion of the plaintiff's character. Nor indeed can general reputation, as usually understood in English Courts, be anything more than hearsay, a kind of evidence which is ordinarily rigorously excluded. A man may only say that the plaintiff has such and such a reputation. As soon as he is cross-examined upon the ground of his statement, he is almost certain to fall back upon private opinion derived from individual experience. Whereas, as I understand it, the evidence of general reputation, which is required, would be something of this sort. Suppose the alleged libel were repeated in any number of places frequented by those amongst whom the plaintiff lived and worked and who might, therefore, be supposed to be the repositories of his reputation, would the repitition of that statement cause the least surprise? If with one voice every man who heard it, whether true or false, were to say: "that is nothing: that is exactly what X would have done:" then we should have real evidence of his reputation. That is the kind of evidence we never get. And the whole of the evidence given on both sides for and against Dr. Sukhia's reputation seems to me to be of little or no value. It is true that the witnesses called on his behalf were at least as good, if not better, than those called for the defendants. But each one of them really gave expression, as far as I can see, to little more than his own personal feelings towards Dr. Sukhia.

Now I am to consider in mitigation of damages not only the general reputation of the plaintiff, the true character of the libel complained of, but in a less degree such points as *bona fides*, want of special malice (which perhaps would not arise unless aggravated damages were asked for), and fair and reasonable comment as a possible defence. Touching this latter, it was dropped

at an early stage of the case probably in consequence of some observations I then made. Sitting here as a Judge, I am afraid I could not bring myself by any stretch of casuistry to treat a bald statement of fact as comment, fair or unfair. Nevertheless I have not the slightest doubt that were the matter left to the Jury under the general head of libel, or no libel, fair comment or not, they would find no great difficulty, if they thought the justice of the case pointed that way, in surmounting that technical obstacle. Look at such a case as *Odger* v. *Mortimer* (6). There it is quite evident from the result of the trial that the Jury treated the statements of which the plaintiff complained as fair comment, although one at least of them could not possibly fall under that head. To say of a man that he was ready to sell his political principles for a Government appointment cannot be fair comment; neither by any possibility from the circumstances of the case could it have been justified; yet we find the Jury bringing in a general verdict for contemptuous damages and the Court of Appeal refusing to interfere.

As to the *bona fides* of all the three defendants, I have not the least doubt. I must first find upon the evidence recorded before me that Sir Jamsetjee did use the words published by the three defendants. I do not see why I should disbelieve the four witnesses who have all deposed to having heard those words used. It is true that about that time, Sir Jamsetjee was writing friendly letters to the plaintiff, but after all it is quite consistent with Sir Jamsetjee standing in some dread of him and being above all things a peace-lover that he should have kept him in play, so to speak, by civility and a certain amount of patronage; while in his heart of hearts he did not entertain for him so much esteem as the public might have thought he did when he put him prominently forward. Now if Sir Jamsetjee really said those words, as I have held that he did, then, having regard to the very high place he occupied in his community, it is quite natural that the defendants should have accepted them without question as being perfectly true. When they were questioned on the head of having taken reasonable precautions before publication, they appeared to be suprised that any one should have thought it necessary that they should go behind Sir Jamsetjee's statement for verification of it elsewhere. It certainly is true, as Mr. Ratnagar pointed out, that before Ratnagar's letter was published, both the defendants Nos. 2 and 3 took much interest in it and were evidently concerned specially over the passage which had been made the subject of the action. They consulted about it and the elder Murzban was quite sure that it was true. By that what he really meant was that it was quite true that Sir Jamsetjee had said it to Ratnagar. At the close of the judgment, Mr. Raikes objected to this reference saying that he would have cross-examined Mr. J. Murzban had not the Court stopped him. I have merely quoted what Mr. Murzban did say. When his own Counsel wished him to give the reason and he was about to report what he himself had heard from the late Sir Jamsetjee, the Court stopped him. I do not see how this could have been pursued in cross-examination without encountering the same objection. Had Mr. Raikes asked him how he was sure (which he says is what he would have done), the witness would have said exactly what he was stopped from saying in the examination-in-chief. It is always at that point that the defendants stopped their inquiries. But in estimating their *bona fides*, I have to look at things reasonably from their point of view. I think, therefore, that in mitigation of damages, they might be entitled, were the calculation to be so nicely made, to have their *bona fides* so adjudged.

Then there is the consideration drawn from the case of *Kelly* v. *Sherlock* (7), whether a Jury might not very properly take into consideration the manner in which the plaintiff has expressed himself towards others, what regard he has shown for their feeling when he is asking through the intervention of the Court for a pecuniary solatium for injury done to his own. Quite apart from the high judicial authority of Blackburn, J., it appears to me that under section 14 of the Evidence Act it will always be a very proper matter for a Court to consider. Of course, I do not mean for one moment that one libel can be set off against another. Nor do I understand that that was what Black-

(6) (1873) 28 L. T. 472.

(7) (1866) 1 Q. B. 686; 35 L. J. Q. B. 209; 12 Jur. (N. S.) 937; 6 B. & S. 480.

burn, J., meant. I think the principle he laid down, *obiter* indeed, is not really in conflict with what is decided in *May* v. *Brown* (8), but was rather foreshadowed in the opening observations of Bayley, J, in that case. It certainly does seem to me that when a public man, who is very free with his criticisms of other people, comes crying into Court for injury done to his reputation by a defamatory statement, that general conduct of his might very well be considered in estimating the amount of damages he is fairly entitled to. But in the present case, I think the true ground of decision is really this, notwithstanding the peculiar form the libel has taken and the inability under which in consequence of it the defendants have lain either to justify it or to bring evidence of reputation directly in point upon it, has it in any way, and if so to what extent, injuriously affected the reputation of the plaintiff? I say from the very nature of the libel the evidence of general reputation, quite apart from the remarks I have already made upon it, was necessarily open to Mr. Raikes's criticism that under strict analysis it could hardly be said to be evidence of reputation at all, whether general or, as I wished it to be, specially confined to the trait in the plaintiff's character said to have been attacked by the defendants. An exception may be taken to the form of the question which I put to every witness called to speak to general reputation. I conceive that that is the true question which the Court desires to have answered. I think that where the libel attacks some particular, perhaps very minor, trait in a person's character, evidence of general reputation ought in theory at any rate to be confined as far as possible to the reputation as exhibited by conduct displaying that trait of character.

Mr. Raikes pointed out, and I do not doubt that there is considerable force in his contention, that this rule has got into the text books from the criminal law where, as in such a case as *Reg.* v. *Rowton* (9), the prisoner gives evidence of good character and the prosecution has to rebut it; whereas in all libel cases, the rule appears to have found general favour that evidence of reputation should be of reputation in the widest sense and not confined to that small part of it attacked by the libel, in other words, the only object of that evidence is to show that the man had literally no reputation to lose; and that is the interpretation and explanation of the case of *Wood* v. *Cox* (10), which Mr. Raikes offers to the Court. If, however, I have to perform the functions of the Jury and to estimate in sums of money what loss has been occasioned to a man's reputation by an attack upon one point, and one point only, of his character, it certainly does seem to me that the general evidence of reputation ought logically to be confined as far as possible to that point of character alone. Whether I am right or wrong in that view matters little, since as I have said my decision in the case will not be affected by the evidence given on behalf of the defendants of the plaintiff's general reputation.

Were I now assisted by a Jury, the case would, so far as I am concerned, be one of the utmost simplicity. I should have to tell the Jury that there was no evidence of justification, that the occasion was not a privileged occasion, and I should have had to tell the Jury that the statement on the face of it was libellous, but that it was for them to find whether in the circumstances disclosed at the trial it was libel or not, and under that head they would, of course, consider generally whether the passage complained of exceeded the bounds of fair and reasonable criticism of and comment upon the public life and conduct of a public man. And it would then be for the Jury to say further, whether assuming that they found it was a libel and did exceed the limit of fair and reasonable comment, what amount of damages, if any, the plaintiff has suffered in pocket or reputation; and I have very little doubt in my own mind what the verdict of the Jury so directed would be. We are to remember, as I say, that Dr. Sukhia has deliberately chosen a stormy path. He has put himself forward as a self-constituted champion of the people. In the eyes of many who do not like him and who disagree with him, he has displayed much arrogance and put a price upon himself

(8) (1824) 3 B. & C. 113; 4 D. & R. 670; 2 L. J. (o. s.) K. B. 212; 107 Eng. Rep. 676.

(9) (1865) 34 L. J. M. C. 57; L. & C. 520; 11 Jur (N. S.) 325; 11 L. T. 745; 13 W. R. 436; 10 Cox. C. C. 25.

(10) (1889) 5 T. L. R. 272.

very much higher than in their estimation he deserves. He has thrust himself forward in season and out of season in connection with these *Panchayet* funds, aiming at a position of much greater consequence than his opponents in the community think him entitled to. They in their turn are very desirous of lowering or even humiliating his pride; and hence this unfortunate correspondence in the *Jam-e-Jamshed*. It is not really a question so much of personal malice (though that is a consideration I have little to do with in the present case), as that kind of general anger and resentment which was so ably and correctly described by Mr. Raikes in his concluding address. That is the feeling which animates hundreds of people, thousands of people, where political strife runs high. It is probably no exaggeration to say that many of those, who have gone down to history in our own country as amongst the best and the greatest Englishmen, have been more violently hated by thousands of men, whose political opinions differed from their own and who had never set eyes upon them in their lives, than the basest malefactors or bitterest personal enemies. That must account for the general rancour of Ratnagar's letter. Taken all through, as I say, it is a violent party attack, personal from the first word to the last, full of bitterness, and ending with a defiance to Dr. Sukhia to come forward and fight out if he desired the justice of this public castigation. Now that is the kind of thing which I suppose happens every day in all parts of the civilized world where party strife rages and partizans attack their political opponents. The sting of the whole matter is said to lie merely in this single sentence which accuses Dr. Sukhia not of having done certain things but having threatened to do them. Had the statement been that he had actually done them, then I doubt very much whether Dr. Sukhia would have cared to launch this litigation; but because the public were told that he threatened to do these things if baulked in his desire to be given a prominent part in public meetings, he says that his character and reputation have been seriously damaged. In the witness-box, his demeanour was defiant throughout. I have already commented upon that and I think I have not said a word in that connection that would hurt Dr. Sukhia's feelings; but I cannot help thinking when I remember some of the answers that he gave—no doubt, he gave his honest opinion—that he must be a *persona* very much *ingrata* with many if not all the leading men of his community. The question is whether a man, so placing himself deliberately not amongst the refined and educated society of the Parsi community but as the champion of those who come from the slums and the markets, could have suffered any serious, any appreciable, damage at all by this isolated passage. Having regard to Dr. Sukhia's own evidence in the witness-box, as well as the general reputation he bears—even his own witnesses agreeing in that—of combativeness, tenacity of purpose, insistence upon his own opinion, I confess that I think he has been making a most unnecessary mountain out of a very tiny mole-hill in his eager desire to take up the challenge thrown down at the close of Ratnagar's letter. I do not believe for one moment that Dr. Sukhia's reputation as a public man has been injured a pennyworth by this statement or could be. I say if the statement had been ever so slightly worded differently, I have no doubt in my own mind that it could be justified up to the hilt, and even so I do not think it would have injuriously affected the reputation of a man whose career like that of Dr. Sukhia's has been that of a fighter from first to last.

I say I have not the slightest doubt what the verdict of the Jury would be in a case like this. I doubt not that under the cover of a general verdict they would actually have found for the defendants—no matter how the Judge had directed them upon points of law. I, however, am obliged to hold that there is a technical libel and that libel has not been justified. But I do not believe that it has resulted in any damage whatever to Dr. Sukhia's character or reputation. And putting myself once more, and for the last time, in the position of a Jury, who would be much better fitted to deliver than I, the final verdict in every case of this kind, I should find a verdict for the plaintiff with one rupee damages. Both sides to bear their own costs. I need only add that taking the view I do, it has been unnecessary to consider the arguments addressed to the Court by

plaintiff's Counsel for aggravated damages on the ground of defendants' persistence in justification and manner of conducting the case.

Generally, I agree with what Mr. Raikes said; and had I been disposed to give the plaintiff any substantial damages at all, I should certainly have increased them very largely on these grounds. But as I have come to the conclusion that on the real merits of the case, the plaintiff is only entitled to a formal verdict and contemptuous damages, I may dismiss these considerations.

The plaintiff appealed.

Mr. *Raikes* (with him Mr. *Strangman*, Advocate-General, and Mr. *Inverarity*), for the Appellant.

Mr. *Kanga* (with him Mr. *Mulla*), for Respondent No. 1.

Mr. *Davar* (with him Mr. *Desai*), for Respondents Nos. 2 and 3.

JUDGMENT.—The suit, out of which this appeal arises, was an action for damages for libel instituted by the appellant, Nadirshaw Sukhia, a Veterinary Surgeon, against the three defendants, the first of whom, Phiroz Ruttonji Ratnagar, was a frequent contributor to the columns of a daily newspaper, called the *Jam-e-Jamshed* published in Gujarati in Bombay, and the 2nd and 3rd defendants are its proprietor and editor, and printer and publisher, respectively. All the parties belong to the Parsi Zoroastrian community. The libel complained of is contained in a letter written by the first defendant and published in the *Jam-e-Jamshed* of the 26th of January 1911. That libel was charged as containing two distinct imputations on the character of the appellant, *first*, that he had obtained the privilege of being called on to move or second propositions at the meetings of the Parsi Anjuman by sending to the trustees of the Parsi Panchayet, who convened those meetings, threats that if he were not allowed to move or second the propositions, he would create disturbance at the meetings, and *secondly*, that the appellant had boasted in certain lectures delivered by him of being a greater friend of the late Sir Jamsetjee Jeejeebhoy, the 4th Parsi Baronet of that name, than he really had been.

The pleas advanced in defence by the three defendants were that the statements in the letter charged as defamatory were not libellous, that, if they were, they were justified as being true in substance and in fact, that they were protected by privilege, and that they were fair comment on a matter of public interest.

The action was tried by Beaman, J., who held that the words complained of were defamatory, that the defendants had failed on the pleas of justification, privilege, and fair comment; but he awarded one rupee as damages to the appellant and ordered each party to bear his own costs upon the ground that "the published charge, having regard to what Dr. Sukhia had told us of himself and his mental attitude towards his opponents in public life," did not express "anything which would materially injure or lower his reputation as a public man by the statement that he threatened Sir Jamsetjee that if not allowed to speak he would create a disturbance."

From that judgment, this appeal has been preferred; and the respondents, defendants in the Court below, have filed cross-objections, maintaining that the learned Judge should have held their defence proved on all or any of their pleas of justification, privilege, and fair comment, and dismissed the suit with costs.

In support of the appeal, it has been urged by the appellant's Counsel, Mr. Raikes, that this was a case, not as held by Beaman, J., for contemptuous, but for, at least, nominal damages, because the libel held proved had been published in a largely circulated newspaper, with the deliberate object of preventing the appellant's election to the office of trustee of the Parsi charitable funds, at the trial the plea of justification had been persisted in by the respondents in ignorance of the facts, and the appellant had been subjected to a vexatious and insulting cross examination with reference to his general character and conduct.

It will be convenient to deal at the outest with the cross-objections of the respondents, since if good they go to the root of the whole case. In urging them, Mr. Kanga, Counsel for the 1st respondent, sought to argue that the statements charged as libel, taken by themselves, were no libel at all; but as this was not a ground of the cross-objections but was raised at the hearing of the appeal, the Court declined to allow it to be raised and to permit the respondents to amend their cross-objections. So the questions argued in sup-

port of the cross-objections are three: (1) whether the respondents have justified the truth of the libel in substance and fact, (2) if they have not, whether they are protected by privilege and (3) if they are not so protected, whether the statements charged as libellous are fair comment on a matter of public interest.

The circumstances under which the libel complained of came to be published may be briefly stated.

As a result of what is called *Juddian case**, which, in 1908, excited great commotion in the Parsi Zoroastrian community, and which was decided by a Division Bench of this Court, consisting of Davar and Beaman, JJ., Davar, J., framed a scheme for the election of trustees for the Parsi charitable funds, which aggregate over a crore of rupees. The first elections under that scheme were settled to take place in March 1911. Before the period of the elections, the appellant, who had taken a prominent part in the *Juddin case*, contributed an article to the columns of a Parsi daily newspaper published in Gujarati and circulated among other classes besides Parsis, an article over his own signature, criticising the conduct of the Parsi trustees in consenting to certain details of the scheme without consulting the Parsi Anjuman. The appellant came forward in January 1911 as a candidate for election to the office of trustee. He convened meetings of the Parsi community to hear his addresses in furtherance of his candidature and the candidature of others whom he supported; he advertised those meetings in the newspapers; he invited the reporters of some newspapers to the meetings with a view to the publication therein of his lectures; he wrote a letter (Exhibit 8) to the Editor of the *Sanj Vartman* saying that he proposed giving lectures to "lay before the public much which it is worth the while of our (Parsi) community to know." He also wrote to the 2nd respondent, proprietor of the *Jam-e-Jamshed*, a letter (Exhibit 1) informing him of the lectures intended to be given and requesting him to report them fully "in his newspaper" "as the matter is of public importance and much affecting our community." In another letter (Exhibit 3), the appellant requested the 2nd respondent to send his reporter to report his lectures in the *Jam-e-Jamshed*.

Three lectures were accordingly delivered; and as desired by the appellant himself, they were reported in the *Sanj Vartman*, a Gujarati daily newspaper, which, the appellant in his deposition admits, has circulation not only among Parsis but readers of other communities as well. In these lectures, he dwelt on his own qualifications for the office of trustee. The sum and substance of those qualifications was that he had rendered services to, and spent his life for the benefit of, the middle and lower classes of the community. He criticised in severe terms the aristocracy and the graduate class of the Parsi community whom he called "brainless". He charged the Parsi trustees, as they then were, with spending the moneys of the Parsi charitable funds "unnecessarily and unreasonably" and with so manipulating the arrangements and procedure of the elections to be held as to defeat his own chances of election, and prejudice the rights of that portion of the Parsi community whose interests he had espoused. He charged one of the trustees with telling a falsehood. He passed strictures on several Parsi gentlemen. Lastly, the appellant in his lectures referred to the charges and attacks, "the writing and speeches," against himself, to the agitation against him in connection "with the present burning questions," with the result, as he said in the lectures, that he had "become quite unfit in the eyes of some," and was regarded "by those elated with pride on account of wealth as a beggar." To such people his answer in the lectures was that he and those like him who did not belong to the aristocracy had "not risen by moneys of any of the poor widows or by the moneys earned by the sweat of others," meaning that the rich Parsis whom he criticised had grown rich at the expense and on the moneys of poor widows and hard-working people. The appellant also pointedly referred to the opinion held about him by his opponents that he was a troublesome man, fond of sending lawyer's notice in every trifling matter, and liking always to rush into litigation.

*See *Sir Dinshaw Manockji Petit* v. *Sir Jamsetji Jeejeebhoy*, 2 Ind. Cas. 701; 11 Bom. L. R. 85; 5 M. L. T. 301; 33 B. 509.—*Ed.*

It is with reference to, and by way of comment on, these lectures that the letter complained of as libel and published in the *Jam-e-Jamshed* of the 26th of January 1911 was written by the first respondent.

Of the three pleas on which the respondents rely in defence, in our opinion, having regard to the nature and character of the matter charged as libel, neither the plea of privilege, technically so called, nor that of fair comment can be open to the respondents. Both privilege and fair comment are two aspects of the law of privilege, with this difference that the former technically so called relates to the special rights of an individual, whereas the latter concerns the common rights of every member of the public at large: *McQuire* v. *Western Morning News Company* (11). To sustain the plea of privilege in the strict legal sense, it must be shown that the matter charged as defamatory was communicated by the defendant having an interest or a moral or social duty in respect of it, to a person or persons having a correlative interest or duty. That cannot be said of the present libel. Here plainly, on the facts proved and undisputed, the defendants, who as members of the Parsi community had an interest in the questions raised by the appellant's candidature for the office of trustee of the Parsi charitable funds and his lectures, went beyond the privilege when they published the libel to the public at large, instead of confining it to the members of the Parsi community. The fact that the appellant had in the first instance courted general publicity and had contributed of his own accord to the circulation of his lectures among all classes of readers indiscriminately so as to make it a matter of public interest by means of the *Sanj Vartman* newspaper could not extend the rights of the respondents, so far as those rights flowed from privilege, technically so called. By publishing his lectures to the public at large, by dwelling in them on his own merits as a candidate for the office of trustee, and referring and replying to the views held about him by his opponents, he, no doubt, himself courted general publicity and made the matter one of public interest. In that view of the case, every member of the public, Parsi or no Parsi, became entitled to comment on the conduct of the appellant and on his lectures, so far as that conduct lent itself to fair comment, having regard to the matter contained in the lectures. But because the appellant made it a matter of public interest, open to fair comment, the respondent did not become entitled to treat as privileged communication their discussion of it in a newspaper circulated among all classes of readers besides Parsis. Such discussion carried the matter beyond the sphere of privilege, understanding that term in the sense in which it is used in the books and in the decided cases in the English Law Reports.

Then as to the plea of fair comment, it is of the essence of it that it should be, in the first place, *comment* on facts truly stated on a matter of public interest. In other words, given facts which are true as regards a matter of public interest, it is open to any member of the public at large to comment on them fairly, but if any allegation of fact imputing any act or acts of misconduct is made in the course of the comment, the libel is out of the sphere of fair comment, and can be justified only on the ground that the allegation is true. That is the law to be collected from the cases of which we need only mention three: *McQuire* v. *Western Morning News Company* (11); *Hunt* v. "*Star*" *Newspaper Company, Limited* (12) and *Davis* v. *Shepstone* (13), where the Privy Council, Lord Herschell delivering the judgment expounded the law as follows:—

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism, and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

Applying that test of the plea of fair comment here, what is charged and found

(11) (1903) 2 K. B. 100 at p. 112; 72 L. J. K. B. 612; 88 L. T. 757; 51 W. R. 689; 19 T. L. R. 471.

(12) (1908) 2 K. B. 309 at p. 320; 77 L. J. K. B. 732; 98 L. T. 629; 24 T. L. R. 452.

(13) (1886) 11 A. C. 187 at p. 190; 55 L. J. P. C. 51; 55 L. T. 1; 34 W. R. 722; 50 J. P. 709.

proved as libel is not comment but an allegation of fact, not found in the lectures of the appellant, but an allegation made by the 1st respondent on the authority of a third party, imputing misconduct to the appellant in that he had gained prominence as a speaker at the meetings of the Parsi Anjuman by means of threats to the late Sir Jamsetjee and his co-trustees. The rest of the letter containing the libel may be in the nature of comment; but the libel itself is not.

That plea of fair comment, therefore, is, in our opinion, out of the way, as well as the plea of privilege, for the respondents; and their only means of escape is by proving the plea of justification and establishing the truth of the libel in substance and fact.

The plea rests on the evidence of the statement alleged to have been made by the late Sir Jamsetjee Jeejeebhoy to the 1st respondent. Beaman, J., has believed the oral evidence led to show that the statement was so made. But the question is whether the statement is admissible in evidence, being that of a deceased person. Respondent's Counsel relied on clause 3 of section 32 of the Indian Evidence Act, which makes relevant any statement of a deceased person "when, if true, it would expose him, or would have exposed him, to a criminal prosecution or to a suit for damages." Here, if the statement that the appellant had sent threats to the trustees were true, as alleged, Sir Jamsetjee's communication of the fact to the 1st defendant could not have exposed him either to a criminal prosecution or to a suit for damages, because it would have been protected by the exception to the offence of defamation in the Penal Code, which says that it is not defamation to publish a libel, provided it is true and the publication is for the public good. Nor could a suit for damages have lain, because the truth of the libel would have been a complete defence.

If the statement of Sir Jamsetjee as that of a deceased person is inadmissible in evidence, then there is no evidence at all in justification of the truth of the libel in substance and fact. That is Beaman, J.'s view and we agree. But assume that the statement is admissible. Even then we do not think that the circumstances of the case are such that it would be wise to act upon it and hold the truth of the libel proved. Coming from a man of the high position such as the late Sir Jamsetjee occupied, his statement may be presumed to be true; but, on the other hand, it lacks the test of cross-examination. That defect could have been cured by the respondents calling as witnesses any of those who were co-trustees of the late Baronet and who are alive. And in this connection we cannot shut our eyes to the fact that whereas the statement had been made by Sir Jamsetjee to the 1st respondent in 1908, the respondent published it three years afterwards, in January 1911, long after Sir Jamsetjee's death in 1908. We do not say that they waited so long for an opportunity to publish the statement after Sir Jamsetjee's death, and have the benefit of it without the test of cross-examination. The fact that they published the statement when and after the appellant had offered himself publicly as a candidate for the office of trustee and posed as a champion of the middle and lower classes of Parsi society is proof of the respondent's *bona fides*. But if the appellant had, as a matter of fact, gained prominence at the meetings of the *Anjuman* by sending threats, it is probable the facts could be proved by more certain testimony than the statement of a deceased person, which, as the Privy Council put it in *Sri Virada Pratapa Raghunaddha* v. *Sri Brozo Kishoro Patta Deo* (14), is *prima facie* open to suspicion because incapable of contradiction by the deceased by reason of his death. This uncertainty gains when we find documentary evidence in the case which shows that the late Sir Jamsetjee was more or less on terms of friendship with the appellant. In this state of the evidence, we are not prepared, sitting in appeal, to disturb Beaman, J.'s finding on the issue as to justification, unless it is shown to be clearly erroneous. We cannot say it is.

The respondents complain, however, that in corroboration of the truth of Sir Jamsetjee's statement, they had tendered certain evidence on the plea of justification, but that Beaman, J., had shut it out on the ground of inadmissibility. The evidence so tendered but refused consisted of instances of acts of the appellant more or less closely resembling the particular act of misconduct imputed to the appellant in the libel. We think such evidence was rightly excluded. The

(14) 3 I. A. 154; 1 M. 69; 25 W. R. 291.

respondents could justify the libel as true in substance and in fact by proving *its* truth, not the truth of other acts and occasions, having nothing to do with the Parsi Anjuman and its trustees, unless the specific acts of misconduct charged in the libel having been proved, it was intended to show further that those acts were part of the habitual and intentional, not accidental, conduct of the appellant. See section 15, Indian Evidence Act; *Makin* v. *Attorney-General for New South Wales* (15). But no such question as the latter was raised at the trial; nor could it be raised with due regard to the nature of the libel and the pleadings in the case.

The question which has been debated with considerable force in this appeal by Counsel on either side is that of damages and costs. Beaman, J., has awarded to the appellant one rupee as what he calls in the judgment "contemptuous damages," and has consequently directed the appellant to bear his own costs. Damages and costs hang together as a rule, though not always, and, in this case, if the learned Judge is right in holding that it is a proper case for "contemptuous damages," he was well warranted in the order as to costs. We confess we have wavered considerably during the hearing of this appeal on the question of damages, mainly because that is a question which the Judge had to decide, discharging the functions of a Jury. In his judgment, Beaman, J., more than once repeats and emphasises the nature of the discretion he had to exercise in fixing the *quantum* of damages. The rule of law is: "If the case be one of libel—whether on a person, a firm, or a company—the law is that the damages are at large. It is not necessary to prove any particular damage; the Jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case:" per Esher, M. R., in *South Hetton Coal Company* v. *North-Eastern News Association* (16). It is true that when a case is tried before a Judge and Jury, and the Jury fix the damages *as they think fit*, they are sometimes not logical in their verdicts. But when a Judge sits in their place, we do not see any reason why he should trouble himself with what a fanciful Jury would have done. Beaman, J.'s findings of fact, so far as they rest on proved evidence, are in appellant's favour; so far as they go against him, the findings are more or less speculative. The learned Judge has found the libel not justified. We have this undisputed fact that the appellant sued because in a way the respondents had forced his hands. In the letter containing the libel, they had thrown him a challenge to sue, if he dared. And he sued. At the trial, the respondents not only persisted throughout in their plea of justification but they also subjected him to a severe cross-examination by means of offensive questions reflecting on his honesty and that without any basis of fact. It was suggested to him in cross-examination that he had brought the suit because "it was a paying game." Beaman, J., has found that there is nothing dishonourable in the appellant's career and nothing to justify imputation on his character. The learned Judge says in his judgment that he does not believe and is not influenced by the evidence of general reputation led by the respondents to show that the appellant was a man of worthless character. The most that can be said is, as the learned Judge finds, that the appellant is a pugnacious man, persistent in the maintenance of his own opinions. That does not justify a libel upon him and is not a sound reason for giving him no more than contemptuous damages. Beaman, J.'s main ground for giving them is that the imputation of the libel is not serious, and that it could not have materially lowered or injured the appellant's reputation. That may be, but we have the established fact that the appellant failed to be elected to the office of trustee. The imputation of the libel was that the appeliant sought to gain prominence as a speaker at public meetings by underhand means discreditable to a gentleman, namely, by sending threats to the organisers of those meetings. It is true that what led to the libel was the appearance of the appellant as a candidate for the office of trustee and the highly controversial character of the lectures he had delivered in public in support of his candidature. It is also true that in those lectures he had attacked several individuals, exposing himself in respect of them to the possibility of proceedings for defamation,

(15) (1894) A. C. 57 at p. 65; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox. C. C. 704; 58 J. P. 148.

(16) (1894) 1 Q. B. 133 at p. 139; 63 L.J. Q. B. 293; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196.

Those attacks may or may not have been justified. Of that there is no evidence and none could be admitted as relevant. But none of the attacks was on the respondents except one that the Parsi Punchayet had given its printing work only to the press of the 2nd and the 3rd respondents. That was a fact on which it was open to the appellant to make his own fair comment. But it did not justify the respondents in publishing a libel falsely imputing independent acts of misconduct to him. It cannot be said that the appellant had provoked the libel merely because he had come forward as a candidate for the office of trustee, and excited controversy by his lectures. No misconduct in and with reference to the suit itself is found against the appellant, unless it be that Beaman, J., thought he was at times "defiant" while he was under cross-examination. But there is the reasonable explanation that some of the questions put imputed to him without any justification dishonesty and dishonourable conduct in matters unconnected with the libel charged.

All this rests on the certain facts of the case, facts resting on relevant evidence and found proved by the learned Judge at the trial. The rest of his reasoning in the judgment under appeal, so far as it bears on this question of damages, is more or less conjectural, as, for instance, that the respondents could have completely justified the libel if the appellant had sued on the whole of the letter, Exhibit A, instead of picking out of it a few lines and having his cause of action on them. What might have been in that case is speculation in the absence of trial and evidence on that aspect of the action. Even then it might be fairly argued that the portion complained of as libel in this suit was an allegation of fact imputing acts of misconduct apart from the rest, standing as libel by itself, apart from the rest of the letter, as matter of comment and, that, therefore, it was justificable in law on no other ground than that the allegation was true in substance and in fact.

On these grounds, we have come to the conclusion that it is certainly not a case for contemptuous damages. Is it then a case for aggravated damages? According to Beaman, J., it would have been, were it not for the grounds on which he has awarded one rupee. The appellant's Counsel, Mr. Raikes, has contended here in appeal for aggravated damages. But as to that, we may well, I think, bear in mind that the libel was published at a time and in the course of a heated controversy and public excitement in the Parsi community. It is not easy to be precise in fixing the *quantum* of damages in such a case; but we are of opinion that the ends of justice will be sufficiently met by an award of Rs. 200 as damages to the appellant.

After this the question of costs becomes simpler and solves itself. The question of costs of the trial was, no doubt, in the discretion of the Judge; but that discretion had to be exercised on proper materials, *i. e.*, if there had been misconduct on the part of the appellant in commencing these proceedings or in the course of the suit, that would have been good cause for depriving him of his right to costs, even though he had won on the merits. In *Harnett* v. *Vise* (17), the successful plaintiff, whom the Jury awarded £10 damages, was not given his costs by the Judge, because, as held in appeal, the libel complained of "was not the true cause of the litigation" and the plaintiff had been actuated by a by-motive. There is nothing of the kind here. The appellant had been challenged by the respondents to sue; he sued and won; and they must pay his costs especially now that we have substantially raised the amount of damages and held that this was not a case for contemptuous damages.

Attorneys for the Appellant: Messrs. *Kanga & Sayani.*

Attorneys for the Respondents: Messrs. *Jehangir, Gulbabhai & Billimoria.*

(17) (1880) 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7.

BATTU LAL *v.* BHOLA NATH.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 92 OF 1912.
March 18, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
BATTU LAL AND OTHERS—DEFENDANTS—APPELLANTS
versus
BHOLA NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Construction of wajib-ul-arz—*Resumed* muafi *plot sold—Whether co-sharer in village can pre-empt.*

Where the *wajib-ul-arz* of a village gives a right of pre-emption between co-sharers, no pre-emption can be claimed in respect of resumed *muafi* land by a person who is not a co-sharer in the plot although he is a co-sharer in the *mahal*.

First appeal from an order of the Subordinate Judge of Moradabad, dated the 4th of June 1912.

The Hon'ble Mr. *Gokul Prashad*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The property in dispute is a specific plot of resumed *muafi*; the plaintiff is not a co-sharer with the vendor in this plot although he is a co-sharer in the *mahal*. The vendee is also owner of another plot. It lay upon the plaintiff to prove not merely that there was some custom of pre-emption in the village but that there was a custom of pre-emption which entitled him, as a co-sharer in the *mahal*, to pre-empt an isolated plot of resumed *muafi*. To prove the existence of such a custom, he adduced a copy of the *wajib-ul-arz*. The pre-emption clause of this document shows clearly that it was dealing with the right of pre-emption between the co-sharers. As already pointed out, the plaintiff is not a co-sharer with the vendor. In our opinion, the decision of the Court of first instance was correct and ought to be restored. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

ABDUL KARIM *v.* CHUNNI BIBI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No 1079 OF 1912.
March 19, 1913.
Present:—Mr. Justice Banerji.
ABDUL KARIM—DEFENDANT—APPELLANT
versus
Musammat CHUNNI BIBI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Adverse title—Denial of title—Non-payment of rent.

Mere non-payment of ground-rent by the tenant, unless it was coupled with a refusal to pay it and a denial of the landlord's title, would not terminate the relation of landlord and tenant or take away the landlord's right to rent.

Second appeal from the decision of the District Judge of Benares, dated 14th May 1912.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Harendra Krishna Mukerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff respondent to recover from the appellant Rs. 4-8-0 as *parjant* or ground rent for two years for the land on which the defendant's house exists together with interest. The plaintiff's allegation is that the land lies within the limits of her *zemindari*, that a ground rent of Rs. 2 a year is payable for the site of the defendant's house and that two years' arrears are due. The defendant denied the plaintiff's right and also denied that he had ever paid ground-rent. It appears that in the *jamabandi* prepared at the last Settlement, the land, on which the defendant's house stands, is entered as being in the occupation of Brij Bhukhan Lal, his predecessor-in-title, and in the column of remarks, there is an entry of a sum of Rs. 2. The entry by itself is unintelligible but it is explained by the final report on the survey and revision of records carried out in 1883-84. Paragraph 86 of that report has been quoted in the judgment of the learned Judge and it appears from it that in the case of lands on which buildings have been erected, ground rent has been "attested by consent of landlord and tenant and has been entered in the column of remarks in the *jamabandi* and in the *halat dehi*." This report clearly shows that the entry in the column of remarks in respect of land of this description is an entry of the ground rent payable for the land. This document affords very

strong evidence of the fact that a ground rent of Rs. 2 is payable for the land on which the defendant's house stands. It has not been shown or even suggested what the entry of Rs. 2 means, unless it is an entry of the ground rent payable. As the relation of landlord and tenant, according to the entry, must be presumed to have been created and to have existed at the time of the Settlement, that relationship did not terminate unless the plaintiff's right was denied by the defendant. Mere non-payment of ground rent unless it was coupled with a refusal to pay it, and a denial of the plaintiff's title, would not take away the plaintiff's right. It is not asserted that there was any such denial or refusal. It may be that by reason of the amount of the rent being insignificant the plaintiff did not enforce payment. But from that circumstance it does not follow that she is not entitled to it and that her right to it has become extinct. The sale-deed executed by the defendant vendor does not contain a denial of the plaintiff's title and there is nothing to show that the plaintiff had any knowledge of the terms of that deed. The appeal is without force and is accordingly dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 488 OF 1912.
March 17, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
Musammat RUKMIN—PLAINTIFF—APPELLANT
versus
JODHA SINGH—DEFENDANT—RESPONDENT.

Execution of decree—Execution proceeding against deceased judgment-debtor—Minor son and widow not brought on record—Auction sale set aside—Irregularity—Agra Tenancy Act (II of 1901), s. 193.

A decree was obtained against several persons including one *A*. The decree was put in execution but no steps were taken to bring the minor son of *A*. on the record in place of *A*. who had died. The minor son of *A*. also died before the sale and his heir was also not brought on the record:

Held, that the proceedings were throughout irregular and the sale ought to be set aside.

Malkarjun v. *Narhari*, 25 B. 337, 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.), distinguished.

Second appeal from the decision of the District Judge of Cawnpore, dated the 18th December 1911.

Mr. *Sawhny*, for the Appellant.

The Hon'ble Mr. *Abdul Rauf* (with him Mr. *Sital Prasad Ghose*), for the Respondent.

JUDGMENT.—This was a suit by the appellant to have an execution sale of a share in a village set aside and for possession of the share. It appears that the respondent on the 15th of August 1903 obtained in the Court of the Assistant Collector in charge of Tahsil Safipur in Unao District a decree against several persons, one of whom was Manni Lal. After the death of Manni Lal on July 25th, 1909, the respondent applied to the Assistant Collector to transfer the decree to the Court of the Assistant Collector (Tahsildar) of Tahsil Bilhour in the Cawnpore District. An office report was called for and a date was fixed for the appearance of the respondent decree-holder who was required to verify the facts stated in the application. After repeated adjournments, the respondent appeared on October 25th, 1909, and an order was passed for transfer of the decree to the Court of the Tahsildar of Bilhour. The file of the Bilhour Court shows that the respondent appeared there on December 21st and an order was made transferring the proceedings to the Court of the Collector of Cawnpore. In 1910, proceedings were taken by the Collector of Cawnpore and ultimately on July 20th the share was put up for auction and was purchased by the decree-holder himself. In March 1911, the appellant applied to the Collector to set aside the sale. Her application was refused and on July 5th 1911, she brought the present suit. Her claim was decreed by the Munsif, but his decision was set aside by the District Judge. It seems to us that the sale cannot possibly stand. The decree-holder did not bring it to the notice of the Safipur Court that Manni Lal had died. He did not obtain leave to execute his decree against the infant son of Manni Lal. He did not ask the Safipur Court or the Bilhour Court to appoint a guardian *ad litem* for the minor. No notice of the proceedings seems to have

been given either to the minor or to his mother the present appellant. The minor died before the sale took place and no steps were taken to have the appellant substituted for him. In fact, throughout, the proceedings were irregular. The sale seems to have been held behind the backs of the minor and his mother. No trace can be found of any notice having been given to either of them. *Lastly*, it is doubtful whether in the circumstances, section 193 of the Tenancy Act justified the Tahsildar of Bilhour in passing on the proceedings to the Collector of the District as the decree was not a decree passed by himself. The respondent has relied on the decision in *Malkarjun* v. *Narhari* (1). That case is clearly distinguishable from the present one. There the suit was brought long after the year prescribed for suits of this description. The Court decided to carry on execution proceedings against certain persons and all that could be said was that its decision was erroneous. In our opinion, the decision of the first Court was correct and should not have been disturbed. We allow this appeal, set aside the decree of the District Judge and restore the decree of the Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

(1) 25 B. 337; 5 C. W. N. 10; 10 M.L.J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 846 OF 1912.
March 20, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
GOBARDHAN DAS AND OTHERS—DEFENDANTS—APPELLANTS
versus
HORI LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 69—Proof of document—Attesting witnesses dead—Identification of signature of attesting witnesses—Subsequent deed recognizing execution—Document bearing only marks of the executant.

The executants of a document, being unable to write, made their marks upon it. Before a suit could be brought upon the instrument, all the attesting witnesses were dead. In order to prove the execution of the document, a witness was produced who simply identified the hand-writing of the attesting witnesses.

Further, a subsequent deed of usufructuary mortgage was produced, which was executed by one of the executants of the mortgage in suit and by the representative of the other executants, and referred to and recognised the genuineness of the mortgage in suit. The representatives of the executants of the deed had also executed a sale-deed which recognised the genuineness of the usufructuary mortgage mentioned above:

Held, (1) that the evidence did not comply with the provisions of section 69 of the Evidence Act and the signatures of the executant of the deed were not proved;

(2) that the deeds of usufructuary mortgage and sale were not evidence that the signatures of the executants were in their hand-writing.

Second appeal from the decision of the District Judge of Bareilly, dated the 14th of March 1912.

Mr. *L. M. Banerji*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent, Hori Lal, on a mortgage made in his favour on November 22nd, 1889, by three persons, Khushal Singh, Moti Singh and Baljit Singh. Both the Courts below have found that the mortgage in suit has been proved and have decreed the claim. This is a second appeal by some of the defendants who contend and have throughout contended that the mortgage-deed has not been proved. Other points are taken in the appeal to this Court. But in the view we take of the question of the proof of the deed in suit, it is unnecessary to refer to them. The three executants of the deed, being unable to write, made their marks. All three of them and all the attesting witnesses to the deed died before this suit was brought. The evidence adduced to prove the document consists of (1) the statement of a witness named Lalta Prasad who claimed to be acquainted with the hand-writing of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which refers to and recognises the genuineness of the mortgage in suit and (3) a deed of sale executed in 1902 by the representatives or some of the representatives

of the executants of the deed in suit which recognises the genuineness of the usufructuary mortgage mentioned above. This evidence leaves little doubt in our mind that the mortgage in suit is genuine and it has been accepted by both the Courts below as sufficient. But it is contended that the evidence other than the statement of the witness, Lalta Prasad, is not evidence of the kind required by law. The appellants rely on section 69 of the Evidence Act, which provides that "If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his hand-writing and that the signature of the person executing the document is in the hand-writing of that person."

The evidence of Lalta Prasad proves that the attestation of two of the attesting witnesses is in their hand-writing. But it appears to us that the two deeds relied upon are not evidence that the signatures of the persons executing the document are in their hand-writing. It was contended on behalf of the plaintiff-respondent that the usufructuary mortgage and the deed of sale prove indirectly that the signatures of the three executants are in their hand-writing. Section 69 of the Evidence Act re-produces as regards attesting witnesses part of a rule of the English Law. According to that law, where a document is required by law to be attested, one attesting witness at least must be called. But there are several exceptions to this rule, one being that if the attesting witnesses are dead, insane, out of the jurisdiction or cannot be found, secondary evidence of the execution may be given by proof of the hand-writing of the witnesses, or, if this is not obtainable by presumptive or any other available evidence (see the cases cited at page 494, Phipson on Evidence, 5th Edition and paragraph No. 1851, on page 1214, of the 9th Edition of Taylor on Evidence). It is quite clear that in England it is recognized that there is a distinction between proof of the hand-writing of a person and presumptive or other evidence that a document has been executed. The Indian law does not in a case of this kind appear to allow a party to rely on presumptive or other evidence of execution where he is unable to comply with the provisions of section 69, either as regards the attestation of the attesting witnesses or as regards the signatures of the executants.

In our opinion, the evidence adduced by the plaintiff-respondent in the present case to prove the signatures of the executants of the deed in suit does not comply with section 69 and we must, therefore, hold that the deed has not been proved. It was pointed out that one of the executants of the deed admitted execution by himself in one of the later deeds and section 70 was referred to but that does not avail the plaintiff-respondent, for it is not sufficient for his purpose to prove the admission of execution by only one party to the document. It appears to be a hard case, but the plaintiff-respondent has himself to thank for the result. He deferred instituting the suit until all the attesting witnesses had died, and seeing that the executants who could only make marks had made their marks on the deed, in any case, he had considerable difficulty in producing proper evidence of execution. We allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's claim with costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO 857 OF 1911.

March 15, 1913.

Present:—Mr. Justice Kensington and Mr. Justice Beadon.

FATTEH MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SULTAN MUHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Recorded co-sharer in possession of mortgaged property—Mortgagor bound to pay all co-sharers according to their respective shares—Manner in which money is spent after payment—Custom—Succession—Muhammadan Rajputs—Widow of predeceased son—Limitation Act (IX of 1908), Sch. I, Art. 134—Transfer of mortgagee's rights.

A recorded co-sharer in mortgage rights, who is in joint possession of the property mortgaged, can hold the mortgagor responsible for the payment of the mortgage debt. The mortgagor is bound to pay the debt to all the co-sharers in accordance with their respective shares, and is not responsible for the manner in which the money is spent after it leaves his hands.

The payment to a widow of her share of the mortgage money as one of the heirs of the mortgagee is valid for the purposes of redemption.

FATTEH MUHAMMAD *v.* SULTAN MUHAMMAD.

Sitaram Apaji Kode v. *Shridhar Anant Prabhu*, 27 B. 292; 5 Bom. L. R. 91, distinguished.

Among the Muhammadan Rajputs of the Hoshiarpur District, the widow of a predeceased son succeeds with the brothers of her husband to a share of the estate of her father-in-law.

Sandal Khan v. *Musammat Akki*, 23 P. R. 1892, followed.

Where the right of a mortgagee, and not full ownership, is transferred, Article 134 of the Limitation Act does not apply.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 2nd June, 1911, modifying that of the Subordinate Judge, 1st class, Hoshiarpur, dated the 16th February 1911, decreeing plaintiff's claim.

Khwaja *Ziauddin*, and Sheikh *Umar Bakhsh*, for the Appellants.

Mr. *Jalal-ud Din* for Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—On the 26th May 1892, the father of the plaintiffs-respondents, mortgaged the land in dispute with possession to one Jan Muhammad for Rs. 1,400 and subsequently Jan Muhammad sold his rights as mortgagee to Samand Khan.

The defendants-appellants are three of Samand Khan's sons, and *Musammat* Rahmi, defendant-respondent is widow of a fourth son of Samand Khan who predeceased his father.

When Samand Khan died, one of his sons, Maula Bakhsh, reported to the Patwari that his three sons and the widow of his fourth son were heirs in equal shares. An entry was made in the mutation register in accordance with this report and, Maula Bakhsh having again attested the correctness of this entry before the *Naib Tahsildar*, mutation was sanctioned on 3rd March 1909. By this entry, the defendants-appellants and *Musammat* Rahmi were recorded in the revenue papers as mortgagees in equal shares of the land in dispute in place of Samand Khan.

The plaintiffs-respondents in the month of *Jeth* 1910 desired to redeem the land. They sent notices to the defendants requesting them to accept the mortgage debt of Rs. 1,400 but the notices were refused. Thereupon the plaintiffs sent a money order for Rs. 350 to each of the four defendants but, though *Musammat* Rahmi accepted payment of her one-fourth share, the defendants-appellants refused to accept the money orders which were sent to them. The plaintiffs, then, instituted the present suit for redemption on payment of Rs. 1,050 and the claim has been decreed by the lower Appellate Court.

In the first ground of appeal, it is urged that the suit is barred by limitation under Article 134 but Counsel has not seriously pressed this ground of appeal which obviously has no force. Article 134 would have applied if Jan Muhammad had purported to transfer full ownership when in fact he had only the mortgagee right to transfer. It does not apply to the present case in which Samand Khan did not purchase the right of full owner but merely purchased the right of a mortgagee.

It is urged that *Musammat* Rahmi as widow of a predeceased son did not succeed to a share of her father-in-law's estate. There is, however, authority, *i. e.*, *Sandal Khan* v. *Musammat Akki* (1), in support of a custom among Muhammadan Rajputs of the Hoshiarpur District by which the widow of a predeceased son succeeds to a share and in the present case the mutation proceedings show that *Musammat* Rahmi's right to a share was recognised by the defendants-appellants at their father's death.

It is, of course, possible that *Musammat* Rahmi, being a woman, may not herself take any active part in the management of the land and may leave the management to the male co-sharers. She is nevertheless one of the recorded co-sharers in joint possession who can hold the mortgagors responsible for the payment of the mortgage-debt.

It is urged that *Musammat* Rahmi has at best only a life interest in the estate of her father-in-law and that money paid to her may be unnecessarily spent and lost to the estate. This, however, is a question between the appellants and *Musammat* Rahmi and is not one with which the mortgagors are concerned. The mortgagors are bound to pay the debt to all the co-sharers in accordance with their respective shares and are not responsible for the manner in which the money is spent after it leaves their hands.

Counsel for appellants has cited *Sitaram Apaji Kode* v. *Shridhar Anant Prabhu* (2) but this authority appears to be in favour of the plaintiffs-respondents. In that case, the mortgagor had paid the whole mortgage

(1) 23 P. R. 1892.
(2) 27 B. 292; 5 Bom. L. R. 91.

money to one of the heirs and it was held that this did not amount to a valid discharge to the mortgagor, but by the decree the mortgagor was not made to pay the whole debt over again but had only to pay the share of the heirs to whom he had not made payment. In the present case, the mortgagors do not dispute their liability to pay the appellants their share. The mortgagors could not induce the mortgagees to accept payment jointly and the only way in which they could discharge the debt was by sending a fourth share of the money to each co-sharer. If, as appellants allege they should have done, they had sent the whole of the money to the appellants, *Musammat* Rahmi, according to the authority relied on by appellants, could have compelled them to pay her share to her.

The lower Appellate Court, in our opinion, has decided rightly and we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4219 OF 1910.

February 7, 1913.

Present:—Justice Sir Richard Harington, KT., and Justice Sir Herbert Carnduff, KT.

JANGLI RAI—PLAINTIFF—APPELLANT

versus

GHURA RAI—DEFENDANT—RESPONDENT.

Surrender—Mokrari—*Receipt of consideration—Actual surrender of lands—Validity of relinquishment without formal document.*

The receipt of consideration by a *mokraridar* and the actual surrender of the *mokrari* lands to the *zemindar*, are quite sufficient to constitute a valid relinquishment and give a title to the *zemindar*, even without a registered document.

Imambandi Begum v. *Kumleswari Pershad*, 13 I. A. 160; 14 C. 109, followed.

Therefore, where a *mokraridar* returned his *patta* to the *zemindar* and gave up the lands, and endorsed a memorandum to that effect on the back of the *patta*, but the memorandum had not been registered:

Held, that there was a valid surrender which gave title to the *zemindar*.

Appeal from the decree of the Sub-Judge of Shahabad, dated August 16th, 1910, affirming that of the Munsif of Arrah, dated December 21st, 1909.

Moulvi *Muhammad Mustafa Khan*, for the Appellant.

Babu *Provash Chandra Mitter*, for the Respondent.

JUDGMENT.

HARINGTON, J.—This is an appeal on behalf of the plaintiff who sued for possession of certain lands which belonged to the defendant No. 2. The defendant No. 2 had given a *mokrari pattah* to the defendant No. 1; but it was alleged that the defendant No. 1 had surrendered his interest to the landlord who thereupon settled the lands with the present plaintiff. In the Court of first instance, the Munsif found as a fact that the *mokurari* interest had not been surrendered. The case came on in the lower Appellate Court and the learned Sub-Judge quite accurately stated the points which he had to determine, namely, whether the plaintiff had acquired any title to the lands and whether the *pattah* propounded was genuine and valid and, *secondly*, did the defendant No. 1 return his *pattah*, as alleged, and whether he surrendered the holding. Then, most unfortunately for the parties, instead of determining those questions, he assumed, for the purposes of the proposition that he was about to lay down, that the *pattah* had been returned and that the possession of the lands had been given up by the *mokraridar* and then he proceeded to lay down the proposition that that did not amount to a surrender because it was necessary that the memorandum which was endorsed on the back of the *pattah* should be registered. The memorandum in question is an undated one and, as it stands, it could not possibly have been registered because there is nothing to show whether it was made within the time within which it would have to be made to be entitled to registration. But however that may be, the proposition which the learned Sub-Judge laid down seems to me to be too wide in view of the *dictum* of the Privy Council in the case of *Imambandi Begum* v. *Kumleswari Pershad* (1), where their Lordships pointed out that the receipt of the consideration and the actual surrender of the lands were quite sufficient to give a title to the person to whom the surrender was made. In this particular case, the question whether there was, in fact, a surrender has not been determined by the lower Appellate Court and, in my view, the proposition laid down by that Court is inconsistent with the *dictum* of the Privy Council in the case to

(1) 13 I. A. 160; 14 C. 109.

which I have referred because the lower Appellate Court has assumed that, even if there was an actual giving up of the lands by the defendant No. 1, that would not be sufficient without a registered document. In that, I think, it has gone too far and, as I cannot agree in that proposition, in my view, the case must be remanded to be tried on the merits: and then it would be open to the lower Appellate Court to say whether the lands were, in fact, surrendered or not to the landlord. That was the point on which the decision turned in the Court of first instance and in the interest of the parties, I think that the Judge should have tried that question instead of attempting to dispose of the case on the proposition of law for which it was necessary to assume facts which were disputed. For these reasons, I think that the judgment and decree of the lower Appellate Court should be set aside and the case remanded to that Court in order that the case may be re-heard with reference to the observations that I have made. Costs will abide the result.

CARNDUFF, J.—I agree in thinking that this case should be remanded because the appeal has been decided on a proposition of law which has been much too broadly stated and cannot be accepted as it stands.

Case remanded.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 304 OF 1912.

March 11, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

JAMNA PRASAD RAUT—JUDGMENT-DEBTOR—APPELLANT

versus

RAGHUNATH PRASAD AND OTHERS DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 (c)—Agriculturist—Proof—Attachment of house of agriculturist.

Where a person, who is both a *zemindar* and a cultivator, wants to have his house exempted from attachment on the ground that it is a house of an agriculturist, he must prove that the main source of his income is from cultivation and that he is an agriculturist in the strict sense of the term.

Execution first appeal from the decision of the Additional Subordinate Judge of Gorakhpur, dated the 1st of June 1912.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Haribans Sahai*), for the Appellant.

Mr. *Chaudhry* (with him Mr. *Mangal Proshad Bhargava*), for the Respondents.

JUDGMENT.—The appellant is a judgment-debtor, whose house in a certain village has been attached in execution of a simple money decree. Two portions of the same house have already been attached and sold and the remainder, which is described as a 6-anna share, has now been attached. The judgment-debtor came forward and objected that he was an agriculturist and, therefore, his house was exempt from attachment and sale. The Court below has decided that the house is not occupied by him as an agriculturist and is, therefore, not exempt from sale. He has come here on appeal. The question is whether or not he has produced evidence to show that he is an agriculturist and occupies the house as such. The appellant was formerly the *zemindar* of the village, but his interest as such has been sold and he now holds his *sir* land as an ex-proprietary holding. He lives in another village and holds *zemindari* in several villages He has produced two witnesses who state that his cattle and implements are kept in the house in dispute. The appellant being both a *zemindar* and a cultivator of land, the question arises as to what is his main sourse of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such. The burden of proof lay on him and it was for him to show to the Court that his main source of income was cultivation and not *zemindari* and that he was in the strict sense of the term an agriculturist. He produced two witnesses and, in our opinion, their evidence is not sufficient to prove that his main source of income is agriculture and that he is an agriculturist within the strict sense of the term. As a matter of fact in the past, he held considerable *zemindari*, though he has lost some of it by reason of decrees obtained against him. In any case, it has not been satisfactorily proved that he is an agriculturist within the strict meaning of the term. The appeal fails and is dismissed with costs including fees on the highter scale.

Appeal dismissed.

RAM GOVIND *v.* SRI THAKURJI MAHARAJ.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 556 OF 1912.

January 17, 1913.

Present:—Mr. Justice Chamier.

RAM GOBIND INSANE THROUGH SITA RAM —PLAINTIFF—APPELLANT

versus

SRI THAKURJI MAHARAJ THROUGH KUNJBEHARI LAL AND ANOHER — DEFENDANTS—RESPONDENTS.

Land revenue—Vendor and purchaser—Agreement to reserve land revenue free—Enforcement of agreement—Res judicata—*Court of competent jurisdiction.*

Where the owner of a certain *mahal* has transferred it on condition that the transferor should retain certain plots of land and the transferee should pay the whole of land revenue including that of the land reserved, such an agreement for payment of revenue cannot be enforced for all time against the person, who might happen to be the owner of the *mahal*, at the instance of the person, who might happen to be the owner of the land reserved.

A decision of an Assistant Collector of the second class cannot operate as *res judicata* in a subsequent suit not cognizable by him, even though the plaintiff had let off a portion of his claim in the first suit in order to bring his case within the jurisdiction of the Assisiant Collector, second class.

Bhugwanbutti Chowdhrani v. *Forbes*, 28 C. 78, dissented from.

Second appeal from the decision of the District Judge of Bareilly, dated 14th February 1912.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *Nihal Singh*, for the Respondent.

JUDGMENT.— Debi Pershad, who was the owner of a *mahal*, in 1833, transferred it to one Dalganjan Singh on condition that he (Debi Pershad) should retain the land now in dispute as well as some other land but that Dalganjan Singh should pay the whole of land revenue including that of the land reserved for Debi Pershad and should also give him an allowance of Rs. 12 per annum. The original parties to this contract died many years ago. There has been a partition of the *mahal*. The plaintiff-appellant is the *lambardar* of one of the *mahals*. The plaintiff in *Sri Thakurji Maharaj* v. *Lachhmi Narain*(1), which will be mentioned again hereafter, is the *lambardar* of the other *mahal*. For many years, the *lambardars* of the two *mahals* have, with varying success, been endeavouring to compel the present holders of the land, originally reserved by Debi Pershad for himself, to pay the land revenue which has been assessed upon it. In the present case, the plaintiff is claiming the revenue of the land held by the defendants, for the years 1315, 1316 and 1317 *fasli*. The first Court dismissed the suit as barred by the rule of *res judicata*. The District Judge on appeal held that the matter was not *res judicata* but that there was an agreement between the predecessors-in-title of the parties that the owner of the *hakiat mutfuriqa*, *i.e.*, the land reserved by Debi Pershad, should be for ever free from liability to pay the land revenue, that the agreement had been acted upon and had never been set aside; therefore, the learned Judge was of opinion that until it was set aside, the *lambardars* had no claim to be reimbursed for the revenue paid by them. On the merits of the question, I have already expressed my opinion at length in *Sri Thakurji Maharaj* v. *Luchhmi Narain* (1) and I have nothing to add to what I said on that occasion. Several cases of this kind have arisen in Oudh and for many years past, it has been held that an agreement of the kind now in question cannot be enforced for all time against the persons who may happen to be the owners of the *mahal* at the instance of the persons who may happen to be the owner of the land reserved. The only other question in the case is whether the claim is barred by the rule of *res judicata*. Two decisions are relied upon. The first is one by an Assistant Collector of the second class who admittedly could not have tried the present case. The suit before that officer was, like the present suit, one for arrears of revenue for three years but the plaintiff gave up a few annas and so brought the claim within the jurisdiction of an Assistant Collector of the second class. In the present case, he has not given up those few annas and the claim is not cognizable by an Assistant Collector of the second class. According to the decision of this Court, it seems to me that the decree in the previous case does not render the matter *res judicata*. The only authority for the contrary view, to which I have been referred, is the remark made by Rampini and Pratt, JJ., in *Bhugwanbutti Chowdhrani* v *Forbes* (2). In view of the course of rulings in this Court, I do not feel bound to follow that decision. Next it was said that the matter is concluded by a decree of a Subordinate Judge passed in 1875. The parties to the case before the Subordinate Judge were not the same as the

(1) 11 A. L. J. 212; 19 Ind. Cas. 67.

(2) 28 C. 78.

parties to the present suit and there is nothing to show how, if at all, the parties to the present suit are in any way connected with the parties to the suit tried by the Subordinate Judge. In my opinion, it has not been shown that the matter is *res judicata*. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court to be disposed of according to law. Costs in this Court will be costs in the cause.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 429 OF 1911.
February 25, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerjee.
SHEORAJ SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
HARCHANDI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage – Substitution—First mortgage discharged—Intention of the parties to extinguish the first mortgage.

One *J.* executed a mortgage in favour of *H.* in 1876. His nephew *P.* executed another mortgage over the same property and in favour of the same person in 1879. In 1887, both *P.* and *N.*, the widow of *J.*, executed a third mortgage in favour of the same mortgagee in consideration of the amount due under the previous mortgages. In 1876, the mortgagee brought a suit to recover the mortgage money on foot of mortgage of 1887. He obtained a decree against *P.* alone. The decree-holder executed the decree but the whole decretal amount was not realised.

He then brought a second suit on foot of the mortgage of 1876:

Held, that inasmuch as the intention of *P.* and the mortgagee was to supersede the mortgage sued upon by the mortgage of 1887, no suit could lie on the basis of the mortgage.

First appeal from the decision of the Subordinate Judge of Bareilly, dated the 8th July 1911.

The Hon'ble Dr. *Sundar Lal*, (with him The Hon'ble Mr. *Moti Lal*), for the Appellans.

Mr. *B. E. O'Conor* (with him Mr. *Chaudhri*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 13th of November 1876. The original sum secured was Rs. 5,500. Plaintiffs clai Rs. 20,000 for principal and interest, relinquishing a very large amount. The circumstances are a little peculiar and the question for determination is chiefly a question of law.

Maharaj Singh and Jai Chand were two brothers. Maharaj Singh had a son, Phul Singh. Jai Chand had no issue but left a widow, *Musammat* Nandan Kuar, who survived not only Maharaj Singh but also Phul Singh. The mortgagor in the bond sued on was Jai Chand, who was admittedly separate from Phul Singh, his nephew Jai Chand was entitled to 5/6ths of the property in question and Phul Singh to 1/6th.

On the 6th of March 1879 and on the 26th of September 1881, Phul Singh alone executed mortgages in favour of the same mortgagee (the predecessor-in-title of the plaintiffs). On the 9th of September 1887 and on the 3rd of October 1887, fresh mortgages were executed. They purported to be executed not only by Pul Singh but also by Nandan Kuar. The consideration for these fresh mortgages was the amount due upon the mortgage now sued upon and also the two mortgages of the 6th of March 1879 and the 26th of September 1881 (executed by Phul Singh alone as already mentioned.);

The result of the transaction, if it had held water, would have been that the mortgagee got the security of Jai Chand's property for the indebtedness of Phul Singh and the security of the property of Phul Singh for the indebtedness of Jai Chand, in other words, the entire village was mortgaged under both mortgages. A suit was brought upon foot of the two mortgages of the 9th of September 1887 and the 3rd of October 1887 against Phul Singh and Nandan Kuar sometime in the year 1896. A decree was obtained against both from the Court of first instance. On appeal, however, it was held by this Court that Nandan Kuar was not bound by either of the two mortgages in suit, and the result of that litigation was that a decree was given against Phul Singh alone for the sale of his property for the aggregate amount of the two mortgages of the 9th of Septem-

ber 1887 and the 3rd of October 1887. There was an appeal to their Lordships of the Privy Council by the plaintiff mortgagee but the decision of this Court was upheld. The decree was put into execution but the full amount was not realized and we accept the finding of the Court below that no more was realized than the original amount of the mortgage-debt and interest which ought to be attributed to Phul Singh.

The present suit has been instituted on foot of the mortgage of the 13th of November 1876, it being the contention of the plaintiffs that in the events which have happened they are entitled to put this mortgage in suit notwithstanding that upon the terms of the mortgage of the 9th of September 1887, the mortgage now sued upon was discharged and handed over to Phul Singh. The Court below has decreed the plaintiffs' suit and the defendant's appeal.

In our opinion, the decree of the Court below was wrong. It is impossible now to say exactly who was to blame for the transaction which took place in 1887. It would appear that it was the opinion of this Court, when it dismissed the suit brought in 1896, that a fraud had been practised upon *Musammat* Nandan Kuar by Phul Singh and the predecessor in-title of the plaintiffs. The question in a case of this kind is one of intention. There can be no doubt that it was the intention of Phul Singh and the mortgagee that the new mortgage should supersede and be substitued for the mortgage which is now sued upon, and there can be no doubt that in pursuance of that intention the mortgage bond which is now sued upon was handed over to Phul Singh. In the present suit, the plaintiffs were unable to produce the mortgage and had to sue upon a copy. It is quite possible that if the plaintiff had succeeded in 1896, when this Court held that Nandan Kuar was not liable, in showing that a fraud had been practised upon the mortgagee by Phul Singh, the equities between Phul Singh and the mortgagee might have been in some way adjusted. The mortgagee might have taken a decree against Phul Singh only for the amount due by him and got a declaration that his rights under the mortgage now sued on should be revived or he might have taken some steps to recover the mortgage deed or to get a declaration that Phul Singh held it in trust for him. But nothing of this kind was done. A decree for the aggregate amount was obtained against Phul Singh and this decree was put into execution; no steps of any kind was taken by the plaintiffs until limitation was on the eve of expiry. In our opinion, at the time of the institution of the present suit, the plaintiffs were neither possessed of nor entitled to the possession of the mortgage bond sued upon and under these circumstances we do not think that the mortgagee's representatives were in a position to maintain the present suit. Notwithstanding that the mortgagee did not get all that he thought he was getting at the time of the execution of the new mortgages, we think that he must be held to have accepted the performance of the contract contained in the mortgage now sued upon (*i. e.*, the mortgage of the 13th of November 1876) by Phul Singh within the meaning of section 41 of the Contract Act. It is true, no doubt, that the defendants are the sons of Phul Singh. It must be remembered at the same time that they are in possession of the property, not as the sons of Phul Singh but as the reversioners to the estate of Jai Chand upon the death of his widow, *Musammat* Nandan Kuar.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit. We think under the circumstances, however, that it is fair that both parties should abide their own costs in both Courts and we order accordingly.

Appeal allowed.

HARI LAL SINGH *v.* TRIPURA CHARANI ROY.

CALCUTTA HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 3147 OF 1909.
March 28, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Richard Harington, Bart., Mr. Justice Stephen, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

HARI LAL SINGH—DEFENDANT—APPELLANT

versus

TRIPURA CHARAN ROY—PLAINTIFF—RESPONDENT.

Hindu Law—Bengal School—Prostitute—Stridhan *property—Inheritance—Undegraded relations—Out-cast Tie of kindred—Actionable claim—Arrears of rent—Purchase of Pleader—Whether claim may be enforced—Transfer of Property Act* (*IV of* 1882), *s.* 136.

When a person becomes an outcast, he is not, in the contemplation of Hindu Law, civilly dead for all purposes, nor is the tie of relationship which connected him with his kindred completely severed.

Therefore, when a Hindu woman lapses into prostitution, the tie of her relationship with her kindred is not severed so as to render it impossible for the kindred to claim her estate by inheritance. Consequently in the absence of nearer heirs, her *stridhan* property will pass to her brother's son as an heir under the Bengal School of Hindu Law.

The right to arrears of rent in respect of property purchased by a Pleader along with the property is an actionable claim and he cannot, under section 136 of the Transfer of Property Act, enforce it in any Court.

Full Bench reference in appeal from the decree of the Sub-Judge of Hooghly, dated October 4th, 1909, affirming that of the second Munsif of Howrah, dated May 7th, 1909.

The appeal came on for hearing before Mr. Justice Stephen and Mr. Justice Richardson who made the reference to a Full Bench by the following

ORDER OF REFERENCE.

This is a second appeal which arises as follows:—The suit is for rent for a house at Rs. 15 a month from September 1905 to August 1908 to which the plaintiff claims to be entitled under a *kabala*, dated the 20th July 1908, executed in his favour by Haro Chand Jalal which transferred to him not only the house but also rents in arrear from the defendant in respect of it. He is, therefore, suing for Rs. 690 in arrears and Rs. 15 that has accrued due since his purchase. Haro Chand purported to execute the *kabala* as being entitled to eight-annas of the property conveyed by purchase and to the other eight annas by inheritance from his aunt, Dayamoyi Dasi, who originally bought the property with him. The findings of fact in the Court below show that Haro Chand had a good title to the eight-annas share, that Harilal Sinha, the appellant, was tenant, though it is treated as a matter of estoppel, and that the *kabala* set up by the plaintiff is a binding document. It is an admitted fact that Dayamoyi was a prostitute and it is found that Haro Chand is the son of her brother and heir to Dayamoyi except in so far as he may be prevented from being so by the fact that Dayamoyi was a prostitute. The plaintiff is a Pleader of the Howrah Courts.

On these facts the appellant, defendant No. 1, has raised the following points of law; (1) that this suit is really a title suit and has been improperly framed as a rent suit; (2) that the plaintiff has not made out a title and that Haro Chand was not heir to Dayamoyi and (3) that the claim to arrears of rent bought by the plaintiff is an actionable claim and cannot, therefore, be enforced in any Court under section 136 of the Transfer of Property Act.

On the first point we are of opinion that this is a real rent suit and not such a suit as is referred to in *Ram Tunoo Koloo* v. *Sharoda Pershad Mullick* (1).

On the third point we are of opinion that the right to arrears of rent purchased is an actionable claim under section 136 of the Transfer of Property Act and that the plaintiff cannot, therefore, enforce it in any Court. But the result of this affects only Rs. 690 of the plaintiff's claim and does not touch the Rs. 15 falling due after the date of the *kabala*.

As to the second point two matters arise for consideration. The *first* is that the lower Appellate Court has held that Harilal, the defendant-appellant, is estopped from denying that he was the tenant of Dayamoyi and Haro Chand by his assertion that he was such a tenant in a previous suit brought against him by one who is not a party to this suit and also by the fact that he was inducted into possession by Dayamoyi and Haro Chand. In our opinion the lower

(1) 19 W. R. 91.

Court was wrong in treating the first of these matters as giving rise to estoppel and whether he was right or wrong in treating the second in the same way does not matter because he was considering it only from the point of view of a title set up in one Matangini, with which we are not now concerned. But the findings relating to both of these incidents lead to the same conclusion as that at which the Judge arrives, namely, that Hari Lal was the tenant of Dayamoyi and Haro Chand, who were entitled as landlords.

The *second* matter is that Dayamoyi was a prostitute and that the question of how a prostitute's property descends on her death has, therefore, to be decided in respect at least to one-half of the rent that has accrued due since the date of the plaintiff's *kabala*.

The rule followed by this Court in this matter is that unchastity in a woman, a term which includes prostitution, degrades her and severs the connection between her and the undegraded members of her family so that the latter cannot take her property by inheritance but its soundness has been doubted in this Court and others. The various authorities on the question have been set out in the recent case of *Tripura Charan Bannerjee* v. *Harimati Dasi* (2), decided by a member of this Bench sitting on the Original Side, from which we quote as follows: —

"This was acted on by this Court in *Taramunnee Dassee* v. *Motee Buneanee* (3), (The reference is quoted in 21 Calcutta pp. 700, 701 as Select Report 277 which seemed to be a misprint) where on a question of inheritance two prostitute daughters of a prostitute were preferred to two grandsons of an undegraded daughter. It was acted on again in *In the goods of Kamineymoney Bewah* (4), where the son of a sister of the husband of a prostitute was held not qualified to apply for revocation of Probate of the prostitute's Will. The decision was approved of in *Sarna Moyee Bewa* v. *The Secretary of State* (5), where a prostitute sister applied for Letters of Administration to a prostitute. These cases were followed in *Bhutnath Mondol* v. *Secretary of State* (6), where Letters of Administration were refused to the sons of the brother of the deceased husband of a prostitute, though Woodroffe, J., doubted the soundness of the rule. This doubt made itself felt again in *Sundari Dossee* v. *Nemye Charan Das* (7), where Letters were refused to the prostitute daughter of a sister of a prostitute. The case was covered by *Sarna Moyee Bewa* v. *The Secretary of State* (5), but the Court disapproved of the decision of *In the goods of Kamineymoney Bewah* (4) as being inconsistent with the decision of *Sarno Moyee Bewa* v. *The Secretary of State* (5).

"The rule has been followed in *Sivasangu* v. *Minal* (8), where among four children of a prostitute, of whom two daughters were also prostitutes, one of such daughters was preferred as heir to the other in preference to the sons of one of the brothers, who were born in wedlock. This decision seems to have been based in part on *Taramunnee Dassee* v. *Motee Buneanee* (3) and it was followed in *Narasanna* v. *Gangu* (9). But it with others to the same effect was considered in *Sarna Moyee Bewa* v. *The Secretary of State* (5) 'as based more or less on local custom or usage'—See *Sarna Moyee Bewa* v. *Secretary of State for India in Council* (5).

"On the other hand, in *Subbaraya Pillai* v. *Ramasami Pillai* (10), where an undegraded relation claimed to inherit from a woman, it was held that her adultery did not sever the bond between her natural relations and herself so far as to disentitle them to inherit from her; and the same principle was followed in *Narain Das* v. *Tirlok Tiwari* (11), where the question was whether a natural relation could execute a decree obtained by a deceased degraded woman against a stranger.

"On these authorities I find myself unable to hold that the rule laid down in *Kamineymoney Bewah's* case (4) is wrong; it has been recognised in a series of decisions in this Court, and has never been actually departed from. I do not consider the Madras cases as a strong authority on the other side; Woodroffe, J.'s doubts as to its soundness were

(2) 38 C. 493; 15 C. W. N. N. 807; 9 Ind. Cas. 657.
(3) 7 Sudder Dewanny Adawlut Reports 325.
(4) 21 C. 697.
(5) 25 C. 254; 2 C. W. N. 97.
(6) 10 C. W. N. 1085.
(7) 6 C. L. J. 372.
(8) 12 M. 277.
(9) 13 M. 133.
(10) 23 M. 171.
(11) 29 A. 4; 3 A. L. J. 537; A. W. N. (1906) 243.

not strong enough to prevent him acting on it, and the opinion expressed in *Sunlari Dossee* v. *Nemye Charan Daw* (7) was in fact *obiter*. The decisions in *Subbiraya Pillai* v. *Ramasami Pillai* (10) and *Narain Das* v. *Tirlok Tiwari* (11) certainly raise considerable doubt; but not enough to make it right for me to depart from what seems to have been the constant course of decisions in this Court. I, therefore, hold that Sowdamini's prostitution severed her as far as inheritance is concerned from her natural relations."

On the authorities quoted we agree with the Judge in entertaining doubts as to the correctness of the rule in question which is laid down most authoritatively perhaps in *Sarna Moyee Bewa* v. *The Secretary of State for India* (5). The matter has never been dealt with by a Full Bench and the question now before us is of constant occurrence.

We, therefore, refer this appeal to a Full Bench for decision.

Mr. *S. P. Sinha*, Counsel, Babu *Golap Chandra Sarkar*, Dr. *Dwarkanath Mitter* and Babu *Probodh Chandra Roy*, for the Appellant.

Dr. *Rash Behari Ghosh*, Babus *Brajalal Chakravarti* and *Mahini Mohan Chatterjee*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

This is an appeal by the first defendant in a suit for house rent. To appreciate the question of law which calls for decision, it is necessary to state briefly the undisputed facts. The house originally belonged to Kanailal Ghosh, who transferred it, on the 10th October 1893, to Dayamoye Dasi and her brother's son Harachand Jalal. The purchasers, while in possession of the house leased it to the first defendant on the 1st January 1901. Shortly after, Dayamoye Dasi died on the 25th February 1901. On the 20th July 1903, Harachand Jalal transferred the house to the plaintiff on the allegation that, upon the death of his father's sister, Dayamoye Dasi, he had taken by inheritance her half share of the property and had thus become full owner thereof. On the 8th September 1908, the plaintiff commenced the present suit for rent. Besides other defences, not material at this stage, the first defendant resisted the claim on the plea that Dayomoye Dasi was a prostitute, and, that, consequently, Harachand Jalal, though her brother's son, was not her heir under the Hindu Law. This contention has been overruled by both Courts below. The evidence shows that Dayamoye Dasi was a married woman, that after the death of her husband she became a prostitute, and that she was the mistress of one Bose. The house was apparently purchased by her with her own earnings, and, throughout this litigation, it has been assumed that it was her *stridhan* property. This assumption is in accord with the accepted view of the Bengal School of Hindu Law, namely, that the term *stridhan* has no technical meaning, or, in the words of Jimutavahana 'that alone is *stridhan*, which she has power to give, sell or use, independently of her husband's control.' [Dayabhaga Ch. IV, section 1, paragraph 18, *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (12)]. The substantial question of law, which consequently requires examination, may be formulated in these terms:—

"Does the *stridhan* property of a Hindu woman who has adopted the life of a prostitute pass upon her death to her brother's son as an heir under the Bengal School of Hindu Law"?

It cannot be disputed that if a Hindu woman, governed by the Bengal School, is respectable, her *stridhan* property passes upon her death to her brother's son in the absence of nearer heirs. This position is established by Jimutavahana in the Dayabhaga (Ch. IV, section III, paragraph 37). Having pointed out in paragraphs 35 and 36 that the text of Vrihaspati mentioned in paragraph 31 relates merely to the right of succession and is not declaratory of the order of inheritance, he observes that the text is "expressive of the strength of the fact (of the benefits conferred)" and, then proceeds to develop the order of succession in paragraph 37 in the following terms:—

"This then is the order of succession according to the various degrees of benefit to the owner of the property from the oblation of food at obsequies. In the first place, the husband's younger brother is entitled to the woman's property; for he is a *sapinda* and presents oblations to her, to her husband, and to three persons to whom oblations were to be offered by her husband. After him, the son either of her husband's elder or of

(12) 5 I. A. 1; 1 C. L. R. 318.

his younger brother, is heir to the separate property of his uncle's wife; for he is a *sapinda* and presents oblations to her, to her husband, and to two persons to whom oblations were to be offered by her husband. On failure of such, the sister's son, though he is not a *sapinda*, inherits the separate property left by his mother's sister, because he presents oblations to her and to three persons (her father and the rest) to whom oblations would have been offered by her son. In default of him, the son of her husband's sister, (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have similar relative precedence) is heir to the property of his uncle's wife; because he presents oblations to three persons to whom they were to be offered by her husband, and also present oblations to her and to her husband. *On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to the father, to her grandfather, and to herself.* If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law." The language used in this passage does not restrict its application to the *stridhan* property of a respectable woman only: the language is comprehensive enough to include the *stridhan* property of a prostitute, who does not, by the mere fact of lapse into prostitution, cease to be a Hindu or to be subject to the rules of Hindu law. (*Mitakshara* on Yajnavalkya, II, 290. Setlur's Edition page 1105; Girishchandra, Tarakalankar's Translation page 121). The question, therefore, arises whether the rule laid down in the Dayabhaga, Chapter IV, section III, paragraph 37, should be inapplicable to the case of succession to the *stridhan* property of a prostitute either because the reason on which the rule is founded ceased to be applicable in the case of a prostitute or because upon general principles of Hindu Jurisprudence, the rule should be restricted in its application only to the *stridhan* property of a respectable woman. In so far as the reason for the rule is concerned, Jimutavahna states that the brother's son is the successor to his aunt's property, because he presents oblations to the father, to her grand-father and to herself. It is plain that the capacity to present oblations to the father and the grandfather of the aunt is not dependent upon her character; the claimant offers such oblations, because they are the father and the grandfather of his own father. In so far, therefore, as capacity to present oblations to the father and the grand-father of the woman is concerned, the claimant possesses that qualification, whether or not his aunt is respectable. But, in so far as capacity to present oblations to herself is concerned, it may be argued that when she lapses into prostitution the claimant loses that capacity. This, in fact, is the line of argument adopted by the appellant as based upon general principles of Hindu Jurisprudence. The contention in essence is that when a Hindu woman lapses into prostitution, she is civilly dead, and that in the eye of the law, the tie which connected her to any person through her father, mother, husband or children is completely severed; in other words, so far as her relations are concerned, the position is precisely the same as if she had suffered physical death. To establish this position the appellant has been constrained to argue that when a woman lapses into prostitution she becomes an outcast and that when a person has become an outcast, whether a man or a woman, the kinsmen must perform the same ceremonies as at the time of death. Reference has been made to the following passages from the Law of Manu:

"The *sapindas* and *samanodakas* of an outcast must offer a libation of water to him *as if he were dead*, outside the village on an inauspicious day in the evening and in the presence of the relatives, officiating priests and teachers" (XI, 183).

"A female slave shall upset with her foot a pot filled with water *as if it were for a dead person* his *sapindas* as well as the *samanodakas* shall be impure for a day and a night" (XI, 184).

"But thenceforward, it shall be forbidden to converse with him, to sit with him, to give him a share of the inheritance and to hold with him such intercourse as is usual among men." (XI, 185).

"And, if he be the eldest, his right of primogeniture shall be withheld and the additional share due to the eldest son and in his stead a younger brother, excelling

in virtue shall obtain the share of the eldest." (XI, 186).

(Sacred Books of the East, Vol. 25, page 468).

Before we determine the true import of this passage, we may observe that passages, similar in scope and character, are to be found in other institutional writers, amongst whom may be mentioned Gautama (XX, 4-7 S. B. E., Vol. 2, page 278), Vasistha (XV, 12-16, S. B. E , Vol. 14, page 77), Baudhayana (II, 1, 36, S. B. E., Vol. 14, page 216) and Yajnavalkya (III, 295, Mandlik, page 270). In each of these instances, as in the case of the Laws of Manu, the passages are followed by rules for the performances of penance, which serve to throw light upon the true significance of the directions for ex-communication of outcasts. Thus, we have in the Laws of Manu:—

"But when he has performed his penance, they shall bathe with him in a holy pool and throw down a new pot filled with water" (XI, 187).

"But he shall throw that pot into water, enter his house and perform, as before, all the duties incumbent on a relative" (XI, 188). Of the like import are passages in Gautama (XX, 10-14 S. B. E., Vol. 2, page 179), Vasistha XV. 17-21 S. B. E., Vol. 14. page 77). Baudayana (II, 1, 36, S. B. E., Vol. 14, page 216) and Yajnavalkya (III, 296, Mandlik page 270). Of equal significance is the following passage from the Laws of Manu which refers specially to female outcasts:—

"Let him follow the same rule in the case of female outcasts; but clothes, food and drink shall be given to them and they shall live close to the family house" (XI, 189, S. B. E., Vol. 25, page 469).

Upon this passage, three of the commentators of Manu, namely, Medhatithi, Sarbajna Narayan and Gobindaraj observe that provision is necessary for the residence and subsistence even of fallen women, so that they may have no temptation to proceed further in the paths of vice (Manu, edited by Mandlik page 1439 and page 157 App.).

To the same effect is the following passage from the Institutes of Yajnavalkya:—

"This very ceremony is ordained in the case of degraded women. They should be given dwelling room in the vicinity of the house, provided with food and clothing and be guarded" (III 297, Mandlik page 270). Vijnaneswara comments upon this passage that the fallen woman should be allowed food just sufficient to sustain life and a piece of soiled cloth; he adds that she should be reproved and admonished not to have intercourse with another man (*Mitakshara* by Setlur page 1382). To the same effect is the comment of Apararka (Poona Edition page 1208).

It is fairly clear from the passages already quoted that the performance of ceremonies, similar to obsequial ceremonies by the kindred of a person who is guilty of a heinous sin and has thereby become an outcast is indicative not of the fact that he is civilly dead but rather of the fact that his social rights have been suspended and such rights may be revived by the performance of the appropriate ceremonies and penances. This is supported by the express statement of Apararka in his commentary on Yajnavalkya, III, 294, Poona Edition, page 1205, that the outcast is from the time of the performance of the ceremonies described to be excluded from all social and religious performances, and no one is to have intercourse with him in ordinary life. Apararka supports this view by quotations from the Institutes of Gautama, Basistha, Sankha and Likhita. This is further confirmed by the fact that the social rights of the outcast may be revived upon the performance of the prescribed penances and ceremonies. This is elaborated in the Prayaschitta Viveka of Sulapani, in which heinous sins which cause degradation are divided into nine classes. For sins of each class penances, ceremonies and gifts are prescribed and these vary in respect of different sins, even in the same class according to their gravity. A convenient summary of the different classes of sins and of the respective penances and ceremonies will be found in the Sabdakalpadruma, Art. Prayaschitta, Vol. 3, pages 321-364. The view that an outcast is not civilly dead is further supported by the fact that the kindred of an outcast has to perform his obsequial ceremonies after his death. Thus in the Chaturvargachintamani of Hemadri, (Asiatic Society's Edition, Pariseshkhanda, Vol. III, page 1631) it is stated that the obsequial ceremonies of an outcast or of a person who has killed a cow or a Brahmin, is to be performed after the lapse of one year from his death. To the

same effect is a passage in the Agnipurana in which it is stated that salvation is affected of a person who has killed a Brahmin or a cow or who has committed five heinous sins or who is guilty of ingratitude, if funeral oblations are offered for the benefit of such person at Gaya (Sabdakalpadruma Vol. III, page 24, Art. Patita). In fact Chap. XXII of the Pariseshkhanda of the Chaturvargachintamani of Hemadri (Asiatic Society's Edition, Vol. III, page 1657) shows conclusively that obsequial ceremonies of an outcast should be performed by his kindred for the purpose of his salvation. To the same effect is the statement in the Institute of Visnu (XXII, 57, S. B. E., Vol. 7, page 93):—"On the death day of an outcast, a female slave of his must upset a pot with water with her feet, saying, drink thou this". In fact there is no foundation for the position suggested by the appellant, namely, that when a person becomes an outcast, he is, in the contemplation of Hindu Law, civilly dead for all purposes, and that the tie of relationship which connected him with his kindred is completely severed. The rites which are directed to be performed by his kindred when he becomes an outcast are intended to emphasise the complete exclusion of the outcast from all social and religious performances. This view is not opposed to that adopted by Raghu Nandan in the passage from his Institutes (Vol 1, page 544) where he differentiates between the two-fold property of a heinous sin, namely, *first*, its capacity to cause the sinner to go to hell and, *secondly*, its capacity to cause exclusion from social intercourse. The former effect cannot be avoided when the sinful act is intentionally committed, but the second can be removed by the performance of penance and the sinner restored thereafter to social intercourse. Raghu Nandan does not hold that a person guilty of a heinous sin thereby cancels the tie of kindred which binds him to his relations. Stress, however, was laid upon a passage of the Dayabhaga (I, 31) in which Jimutavahana observes that sons have not a right of ownership in the wealth of the living parents but in the estates of both when deceased, and adds that this means "Not mere demise, but also the state of a person degraded, gone into retirement, or the like". This passage, however, is clearly of no assistance to the appellant, because it merely asserts that right of property is annulled by degradation. That this is the true import of the passage is clear from the Dayatatwa of Raghu Nandan (Chap. I, Paras. 9-11) where he points out with reference to the text of Narada quoted by Jimutavahana in the Dayabhaga (I, 32) and expounded in (I, 33) that sons are entitled to partition if the right of property of the parent be annulled by death or by degradation. This obviously refers to an entirely different problem. We are not now concerned with the question whether a person who has committed a heinous sin and has become an outcast may not only be excluded from inheritance (Dayabhaga Chap. V, Paras. 6-13) but may also lose all right of property, or whether such a comprehensive proposition can be reconciled with the view accepted by their Lordships of the Judicial Committee in the case of *Moniram Kolita* v. *Keri Kolitani* (13), nor need we determine whether the decision in *Sheonauth Ray* v. *Dayamayi Chaudhurain* (14), upon which much stress was laid by the appellant can be treated as well founded on principle, in so far as it ruled that an adopted son forfeits his rights in the estate of his adoptive father by reason of intercourse with a Mahomedan woman, subjecting him to the penalty of irrevocable expulsion from caste. The question now under consideration is of an entirely different character, we are called upon to determine, whether, when a woman lapses into prostitution the tie of her relationship with her kindred is severed so as to render it impossible for the kindred to claim her estate by inheritance. As already stated, the texts do not support the theory that the tie is so severed. No doubt, there is the opinion of Mr. J. C. C. Sutherland in his Synopsis of the Hindu Law of Adoption appended to his Translation of the Dattaka Mimansa and Dattaka Chandrika to the effect that the mother of an infant may give him in adoption even during the life-time of her husband who has permanently emigrated, entered a religious order or become an outcast, because being civilly dead he would be regarded as virtually deceased. No

(13) 7 I. A. 115; 5 C. 776; 6 C. L. R. 322.
(14) 2 Mac. Sel. Rep. 137.

authority, however, is mentioned in support of this proposition in so far as an outcast is concerned, on the other hand the passages in the Dattaka Mimansa (section IV, paragraphs 9, 10) and Dattaka Chandrika (section I, paragraphs 7, 31, 32) mentioned refer to cases where the husband has disappeared or has entered a religious order. But, even if there were any authority for the extension of the rule to the case where the husband has become an outcast, it might be defended possibly on the theory that the father by his expulsion from caste had been deprived of that right of guardianship over his child which alone would entitle him to assent to the adoption of the infant into a different family. In any event, Mr. Sutherland does not support his theory of civil death of an outcast by reference to any authorities and it is significant that, in the preface to his work, he candidly admits that the synopsis possesses no intrinsic authority whatsoever, and that of the propositions it contains many are dubious and some may prove erroneous. We take it, therefore, that the appellant has failed to establish the theory that when a woman lapses into prostitution, the tie of relationship which connects her with her kindred is thereby dissolved so as to make it impossible for the kindred to claim her *stridhan* property by inheritance by reason of the relationship in which they stand to her. It is obvious that the adoption of such a theory would have rendered it necessary for the Hindu Law-givers and commentators to provide a set of rules regulating succession to the property of a woman who has adopted the life of a prostitute. That prostitutes existed and were recognised in ancient Hindu society is clear from the passage of the *Mitakshara* to which reference has already been made (*Mitakshara*, Setlur's Edition, page 1105, Girish Chandra Tarkalankar's Translation, page 121). It is extremely improbable that, if the theory suggested by the appellants were well founded the doctrine would be left to be inferred from casual reference, and no provision would be made to regulate succession to the estate of a woman who has lapsed into prostitution. On the other hand, it may be conceded that cases of this description would rarely find their way into Courts: respectable people would deem it a degradation to acknowledge relationship with a fallen woman: much less would they be ready to claim property which represented the wages of her sin. It is remarkable that this feeling led Chanakya to lay down in his Arthasastra that the estate of women of this class taken by the King by escheat in the absence of heirs should be given away by him in charity (Arthasastra of Kautilya, Mysore Edition, page 161). But Chanakya, undoubtedly, contemplated that the estate would not reach the hands of the King till there was a complete failure of heirs. The same idea pervades a passage in the Vatasyayan Sutra (Jaipore Edition, page 347) where it is stated that the wealth of a fallen woman may be taken in gift by a Brahmin for religious purposes, if it does not reach his hands directly. But the position is entirely different when the kindred of a woman who has lapsed into prostitution lay claim to her estate upon her death. The mere fact of the degraded life she led did not sever the tie of relationship between her and her kindred and though she might have been disqualified as an heiress, there is no reason why her undegraded relations should not, if they are prepared to put forward the claim, take her *stridhan* estate by right of inheritance.

It has been earnestly contended, however, on behalf of the appellant that this view is directly opposed to what has been regarded as settled law in the Courts of this Province since 1843 and should on that ground alone be repudiated. We are clearly of opinion that this contention ought not to prevail. It is true that in the case of *Taramunnee Dassee* v. *Motee Buneanee* (3) it was held that the tie of relationship is severed between a married and respectable daughter and her mother when the latter adopts the life of a prostitute. This decision was founded upon an opinion of the *Pandit* of the Sudder Court which is supported neither by any statement of reasons nor by any reference to the original texts. On the other hand, in the Matsya Puran as quoted in the Sabdakalpadruma, Volume III, page 24, it is expressly stated that there may be fallen persons who cannot be forsaken, and as an illustration, it is said that although elder relations, who may have lapsed into prostitution or have otherwise fallen, should be abandoned, yet the mother should never be so treated, and the reason assigned for this preferential treatment is

that the mother who has borne and bred the child is the greatest of all relations. It is unfortunate that this decision of the Sudder Court, based on such doubtful authority, should have been subsequently accepted without question. *In the goods of Kamineymoney Bewah* (4); *Sarna Moyee Bewa* v. *Secretary of State* (5). But the position was doubted in *Bhutnath* v. *Secretary of State* (6); *Sundari Dassee* v. *Nemye Charan Daw* (7); *Tripura Charan Banerjee* v. *Harimati Dasi* (2) and in the referring order in the case of *Chhatur Kurmi* v. *Rajaram Tewari* (15). It is clear, therefore, that the course of decisions in this Court on the point since 1846 has not been uniform [*Hari Lal Singha* v. *Rup Manjori Burmoni* (16)]. In the Madras High Court, the decision in *Taramunnee Dassee* v. *Motee Baneanee* (3) was followed in *Sivasangu* v. *Minal* (8) which was accepted as good law in *Nara Sanna* v. *Gangu* (9). But in the later case of *Subbaraya Pillai* v. *Ramasami Pillai* (10), the learned Judges of the Madras High Court expressly dissented from the proposition that degradation on account of unchastity entails, in the eye of the law, complete cessation of the tie of kindred between the fallen woman and the members of her natural family, or between her and the member of her husband's family, observing that, in their opinion, the circumstance that in general it is open to an outcast to resume his former position after expiation (Viramitrodaya, Ch. I, section 52) strongly pointed to the view that degradation had the effect of rendering dormant at best the tie of kindred. [See Laws of Manu, XI, 60, 177-178, which prescribe the penance for the expiation of an adulterous woman, it is lighter or heavier according to the caste of the male offender. S. B. E.. Vol. 25, page 467. See also Vasistha XXI, 8, 12-13. S. B..E., Vol. 14, p. 112. Vishnu LIII, 8. S. B. E., Vol. 7, p. 174]. The same view has been adopted by the Allahabad High Court in the cases of *Bisheshur* v. *Mata Gholam* (17) and *Narain Das* v. *Tirlok Tewari* (11). In some of the cases, again, a question of competition between a degraded and an undegraded person has arisen for consideration and this in fact was the real question before the Sudder Court in *Tramunnee Dassee* v. *Motee Buneenee* (3), so also was the question directly in issue in *Sivasangu* v. *Minal* (8) and *Narasanna* v. *Gangu* (9). That question of preferential right does not require consideration in the case before us, and we need not consequently determine whether, as stated in *Subbaraya Pillai* v. *Ramasami Pillai* (10), the claim of the degraded heir may be preferred to that of the undegraded heir of equal degree on any "equitable principle."

The extent to which divergence of judicial opinion is possible in cases of this description is well indicated by the decision in *Rimprasad* v. *Subu Bai* (18). In that case, one Radha was legally married to one Mati Lal, but many years before her death she abandoned her husband, adopted the life of a prostitute and lived as the mistress of Raibhanji. Upon her death her property, which had been received by her from her paramour, was claimed on the one hand by the daughter of her sister and on the other by the son of the brother of her husband. The claimants were, both of them, undegraded but the defendant, the son of the husband's brother, resisted the claim of the plaintiff, the sister's daughter, on the ground that as a respectable woman she was not entitled to succeed by inheritance to the estate of her mother's sister who had become degraded by reason of life-long prostitution. The Judicial Commissioner declined to accept the contention that when a woman has lapsed into prostitution she becomes civilly dead with the result that the tie of relationship which connects her to her kindred is completely severed. He held that no tie of blood can be destroyed by unchastity, whatever personal disability may be imposed by express provisions of the law upon the person who has become unchaste; consequently, where inheritance is a right arising out of consanguinity the unchastity or degradation of the *propositus* or *proposita*, as the case may be, will not divert the descent of property, save where there is an express provision. In support of this view reliance was placed upon *Musammat Ganga Jati* v. *Ghasita* (19); *Advyapa* v. *Rudrava* (20) and *Koiyadu* v. *Lakshmi* (21) and doubt was expressed as

(15) 11 C. L. J. 124; 3 Ind. Cas. 374.
(16) 15 Ind. Cas. 137; 17 C. L. J. 459.
(17) 2 N. W. P. H. C. R. 300.
(18) 4 N. L. R. 31.
(19) 1 A. 46.
(20) 4 B. 104.
(21) 5 M. 149.

to the view adopted in *Ramnath Tolapattro* v. *Durga Sundari Debi* (22); *Ramananda* v. *Rai Kishori Barmani* (23) and *Sundari Letani* v. *Pitambari Letani* (24). The learned Judge, however, proceeded to hold that prostitution on the part of the wife during the life-time of her husband had operated to dissolve the marriage tie between them and that they had ceased to be husband and wife with the result that upon her death neither her husband nor any person claiming through him could take by inheritance her *stridhan* property. This view, it will be observed, is founded upon the theory that kindredship by blood stands, in the matter of dissolubility, upon an entirely different footing from the tie of marriage which, according to the learned Judge, is essentially and necessarily a contract though clothed with sacrament. The learned Judge very emphatically expressed the opinion that it would be anomalous to hold that a married woman, who has lapsed into prostitution during the life-time of her husband, is still a wife but that she has not a single conjugal right or claim attached to her wifehood, that her husband may think her as dead in respect of all rights given to her and all obligations imposed on him by the marriage, such as, maintenance, protection, society, and inheritance from him, while he retains all his rights as a husband including that of succession to her separate estate. From this point of view it was not difficult to reach the conclusion that where a Brahmin husband totally and finally abandons his wife on the ground of unchastity, inexpiable or unexpiated, so as to destroy all her present and future claims of him and his inheritance, the relationship of marriage is dissolved so far as it sustains the civil rights and obligations of husband and wife *inter se*. The same view was adopted in *Musammat Maharana* v. *Thakur Pershad* (25) where it was ruled that property acquired by an unchaste widow by prostitution cannot strictly be called her *stridhan* in the technical sense of a wife's or a married woman's property and that property so acquired goes to her illegitimate child and not to the members of her husband's family upon whom the widow had no claims whatever after she began to live with her paramour. It is not necessary for our present purpose to examine the question by no means free from difficulty as to the true nature of Hindu marriage and the still more difficult question whether the marriage tie is dissolved and the relationship of husband and wife annulled by the lapse of the wife into prostitution. Nor is it necessary to examine the further question whether assuming the marriage tie to be incapable of dissolution even by reason of prostitution on the part of the wife the sister's daughter or the husband's brother's son would be the preferential heir to property acquired by her as a prostitute. The learned Judicial Commissioner held that no Hindu Law-giver, with his high ideals of female chastity and of spiritual affinity between heir and *propositus* would place the husband in the list of heirs to the acquisitions of his fallen wife by and during her degradation.

In this view the Judicial Commissioner held that the plaintiff, who was governed by the Bombay School of Hindu Law, was entitled to what was described in *Manilal* v. *Bai Rewa* (26) as "*stridhan*" "improper" of her mother's sister, on the ground that the defendant as the son of her husband's brother, was either no heir at all or, if an heir, was bound to be postponed to the plaintiff.

Upon an examination of the original texts and upon a review of the judicial decisions on the subject we hold that the mere fact that a Hindu woman has adopted a life of a prostitute does not sever the tie which connects her to her kindred by blood and, that, consequently, the *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal School of Hindu Law.

It is conceded that, as held by the Division Bench, the plaintiff cannot successfully claim the arrears of rent purchased by him. The decree of the Court below must, consequently, be modified to this extent.

In this view, the decree of the Subordinate

(22) 4 C. 550.
(23) 22 C. 347.
(24) 32 C. 871; 9 C. W. N. 1003; 2 C. L. J. 97.
(25) 14 O. C. 234; 12 Ind. Cas. 778.

(26) 17 B. 758.

Judge must be affirmed, subject to the variation mentioned. The respondent will have his costs of the hearing as well before the Division Bench as before the Full Bench.

Decree modified.

ALLAHABAD HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 110 OF 1911.
March 12, 1913.

Present:—Justice Sir George Knox, KT., Mr. Justice Chamier and Mr. Justice Tudball.

DURGA KUNWAR—PLAINTIFF—APPELLANT

versus

MATRUMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage debt—Alienation by widow—Transferee's right to recover the debt—Legal necessity.

Where a Hindu widow transfers her right to recover a mortgage debt due to her husband, the transferee can maintain a suit to recover that debt during the life-time of the widow even though the transfer is without legal necessity.

Letters Patent Appeal against the following dissenting judgment of the Hon'ble Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji in First Appeal No. 131 of 1910, decided on the 8th of August 1911.

RICHARDS, C. J.—This suit was brought to recover a sum of Rs. 70,000, principal and interest, due under a mortgage, dated the 12th of June 1879. The mortgage was made in favour of Murlidhar by Tara Singh and Bahadur Singh. The principal was Rs. 4,000. The rate of interest was Re. 1-2 per mensem, compound interest. The bond in suit is alleged to have been sold to the plaintiff on the 21st of May 1909 in consideration of the sum of Rs. 7,500 by *Musammat* Parbati and *Musammat* Ganga Kunwar. *Musammat* Parbati was the wife of Murlidhar, and *Musammat* Ganga Kunwar was the wife of Rup Ram, the son of Murlidhar. Both the father and the son were dead prior to the execution of the sale-deed. It appears from the plaint itself that the property, which, it is now sought to bring to sale, had already been sold under a mortgage decree on foot of a prior mortgage, dated the 19th of February 1872. The decree had been obtained as far back as the year 1890. The decree-holders had purchased the property themselves and they have been in actual possession since some time between the years 1892 and 1895. The respondents are the representatives of these prior mortgagees. The plaintiff claims that when the suit was brought on foot of the prior mortgage neither Murlidhar nor Rup Ram were made defendants, and that accordingly they, as assignees of the bond of the 12th of June 1879, are now entitled to bring the property to sale on terms of paying to the respondents the amount, if any, due upon the mortgage of the 19th of February 1872. They claim that over a *lakh* is due on foot of the mortgage of the 12th of June 1879 but they relinquish the sum of Rs. 76,938-14-0 and sue to realise the balance, that is to say, the sum of Rs. 70,000.

The suit out of which the connected First Appeal No. 174 of 1910 arises was tried in the lower Court at one and the same time It was a suit in which the plaintiffs in the suit claimed as reversioners a declaration that the sale-deed of the 21st of May 1909 was void as against them. A number of issues were tried in this last mentioned suit. The learned Subordinate Judge held that the bond in suit became vested in Rup Ram after the death of Murlidhar, and that the plaintiffs, Sri Gopal, Hoti Lal and Pearey Lal were the reversioners. He found further that the sale of the 21st of May 1909 was made without legal necessity and with a view to deprive the reversioners of their right. The Court accordingly gave a decree in favour of the plaintiffs Nos. 2—4 declaring that the sale was void and ineffectual against them.

The learned Subordinate Judge also dismissed the plaintiff's claim in the present suit holding that inasmuch as the bond was sold without legal necessity and for the purpose of defeating the rights of the reversioners, the plaintiffs did not acquire by virtue of the sale any title to maintain the suit.

The plaintiff, *Musammat* Durga Kunwar, has appealed against the decree dismissing her suit and also against the decree in the connected appeal declaring that the sale was void against the reversioners.

It is difficult to understand why the owners of the bond in suit slept on their rights so long. There can, I think, be no doubt whatever that the purchase of the bond by the plaintiff was a speculative purchase. It is

impossible to know exactly how much of the consideration for the sale actually passed, or what was the arrangement between the vendors and the vendee. I think, however, that we are bound to assume that the plaintiff became the assignee of the bond with such rights and title as *Musammat* Parbati and *Musammat* Ganga Kunwar could under the circumstances give her. She is entitled to get a decree if she can make good her claim. Bearing in mind the facts of the case and the date of the institution of the connected suit, I think, there can be little doubt that the defendants in the present suit put forward the reversioners of Rup Ram to challenge the sale to *Musammat* Durga Kunwar, and that in all probability there was some arrangement between them. We can, however, hardly blame the defendants for using any weapon they can to retain the property in the absolute possession of which they have so long been. It has not been attempted to show that the finding of the Court below that the sale by *Musammat* Parbati and *Musammat* Ganga Kunwar was made without legal necessity is wrong. In fact the argument did not challenge the decision in the connected appeal, save to contend that the decree actually passed went a little too far, in that it declared that *Musammat* Durga Kunwar acquired no right to the aforesaid bond. It was urged that she had acquired some title. She had acquired title as against her vendors. This, it seems to me under the circumstances of the present case, is purely a matter of form.

The argument put forward on behalf of the plaintiff-appellant is as follows:—The widow represented the estate. She, undoubtedly, might have sued upon the bond and recovered the amount due therein without being liable to account to any one. Therefore the plaintiff as her assignee has the same right that she had and she can sue upon the bond. Furthermore, the sale by a Hindu widow is voidable, not void, and that, therefore, it cannot be questioned by the defendants in this suit. These were the points argued. It seems to me that it by no means follows that because a Hindu widow can sue on foot of a bond and give a good discharge to the mortgagor that her assignee has the same right. A Hindu widow can sue upon a bond and collect the debts due to the estate because she is an heir and represents the estate, in other words, by virtue of the fact that she is a Hindu widow and in possession as such. Nothing, I think, can be more clearly established than the proposition that a Hindu widow cannot alienate the property except for certain special purposes or legal necessity [See *The Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (1)].

It has, no doubt, been held that the reversioners cannot question the sale during the life of the widow save to the extent of getting a declaration that the sale is not to be binding on them and it is argued that the sale is voidable only and not void; the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2) is relied upon. That was a case in which the reversioners sued to recover possession of certain property in respect of which a Hindu widow had made a lease and the question was whether or not the suit was barred by limitation. It was there held that a Hindu widow could alienate subject to certain conditions being complied with, and that, therefore, the alienation was not absolutely void but was voidable at the election of the reversionary heir who might, if he thought fit, affirm it or treat it as a nullity. The Court was there dealing with the partial alienation made by the widow, *i.e.*, a lease which her successors might or might not adopt if they found it was made without authority. It seems to me, however, that the question whether or not an alienation by a Hindu widow is void or voidable is immaterial in the present appeal. It has not been suggested that there is any distinction as to the class of property which a Hindu widow is restrained from alienating. She has no more right to assign that part of the estate which consists of mortgagee rights than she has to assign the immoveable property strictly so called. In either case she or her assignee must show that circumstances existed which made the alienation a valid alienation.

In the present case the sale by the widow has been successfully challenged unless we set aside the decree in the connected case.

(1) 8 M. I. A. 529 at p. 551; 2 W. R. (P. C.) 61.
(2) 34 C. 329; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329 (P. C.); 34 I. A. 87.

It is said, however, that this is a question between the reversioners on the one side and the widow on the other, and that third parties are not entitled to raise the question of the validity or invalidity of the sale. I do not think that this proposition is sound. Suppose that a Hindu widow alienated mortgagee rights in a case in which it had to be admitted that she was not justified in making the alienation according to the Hindu law. Suppose that her assignee sued on the bond and recovered the full amount, from the mortgagor. Suppose further that afterwards the reversioners obtained a declaration that the sale was void as against them. Would not the mortgagor in such a case in a suit by the reversioners after the death of the widow be obliged to pay the mortgage debt a second time, save perhaps to the extent of the interest which had accrued during the life-time of the widow? Could not the reversioners say "the widow is now dead and as against us the sale is a complete nullity?" It seems to me that it could be argued with irresistible force that the assignee of the widow could not give a good discharge for the mortgage debt until after it was established that the sale was a sale which a Hindu widow was entitled to make for legal necessity or for a pious purpose. It seems to me that where it is or may be necessary for the protection of a third party to question the validity of an alienation by a Hindu widow, such third party is undoubtedly entitled to do so [See *Hazari* v. *Lallu* (3)].

I do not think that an unauthorised sale by a Hindu widow can clothe her assignee with the Hindu widow's right to represent the estate and collect the debts. It is possible that under certain circumstances it might be shown that the widow was driven to sell the mortgagee rights, as for example, if she had no means to institute a suit to recover the amount. In such a case, however, I think the transaction would be justified on the ground of necessity or perhaps on the ground that under the special circumstances of the case it was the only possible way of realizing the debt due to the estate. In such a case, I think, the Court, to be consistent, should hold that the whole estate had passed to the transferee and that the reversioners were absolutely bound by the transfer made by the widow. I would dismiss the appeal.

(3) 7 O. C. 181.

BANERJI, J.—The question in this appeal, which arises out of a suit for sale upon a mortgage, is whether an assignee of the mortgage from a Hindu widow, on whom the mortgagee rights devolved by right of inheritance, is entitled to maintain the suit, if the assignment was not made for legal necessity. The facts are these:—Tara Singh and Bahadur Singh executed the mortgage in question in 1879 in favour of Murli Dhar. Upon the death of Murli Dhar the mortgage devolved on his son Rup Ram, whose widow *Musammat* Ganga, jointly with *Musammat* Parbati, the widow of Murli Dhar, transferred the mortgage to the plaintiff on the 21st of May 1909. As *Musammat* Parbati had no right to the mortgage the transfer by her is of no consequence and the transfer must be deemed to be a transfer by *Musammat* Ganga, who alone was entitled to the mortgagee rights. It has been found by the Court below that the transfer was without legal necessity and this finding has not been challenged before us. It is by virtue of this transfer that the plaintiff is seeking to enforce the mortgage.

The defendants to the suit are the representatives of the mortgagors and certain purchasers of the mortgaged property in execution of a decree upon an earlier mortgage of 1872. The suit was contested by these transferees alone and they contended that the plaintiff had no right to sue. Murli Dhar, the person in whose favour the mortgage in suit was executed, was not made a party to the suit under the earlier mortgage and, therefore, he or his representative-in-interest has still the right as subsequent mortgagee to redeem that mortgage and then to sell under the mortgage in his favour. This is what the plaintiff seeks to do in this case.

The Court below has dismissed the suit apparently under the impression that the transfer of the mortgage of 1876 made by *Musammat* Ganga being without legal necessity is absolutely void and that, therefore, the plaintiff is not entitled to maintain the suit. This view is clearly erroneous. An alienation by a Hindu widow without justifying necessity does not render the alienation absolutely void but it is voidable

only. In any case it will hold good during the life-time of the widow. This has been so repeatedly held by their Lordships of the Privy Council that it is unnecessary to cite authorities. I may, however, refer to the recent case of *Bejoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2).

The mortgage which is sought to be enforced in this suit secures a principal sum of Rs. 4,000. The plaintiff has purchased it for Rs. 7,500. It has been found in the connected suit brought by the reversioners that she paid full consideration and that the sale is a real transaction. On this point there is no controversy in this appeal. The amount claimed by the plaintiff is Rs. 70,000. Apparently she is a speculator but that circumstance should not induce us to overlook the real question involved in the case. If she has a legal right to maintain the suit that right must be enforced. The decision of the case, in my opinion, depends on the nature of the estate held by a Hindu widow and her powers of alienation in respect of it.

The nature of a Hindu widow's estate was thus stated by their Lordships of the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (4) "According to the Hindu Law, a widow who succeeds to the estate of her husband in default of male issue * * does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one." Mr. Mayne describes it in the following terms:—"Her (the widow's) absolute right to the fullest benefit of her life-interest appears long to have been recognized * * A woman is in no sense a trustee for those who may come after her. She is not bound to save the income. She is not bound to invest the principal. If she chooses to invest it, she is not bound to prefer one form of investment to another form as being more likely to protect the interests of the reversioner. She is forbidden to commit waste or endanger the property in her possession, but short of that, she may spend the income and manage the principal as she thinks proper." (7th Edition page 840). She has no power absolutely to alienate the estate or a part of it, whether moveable or immoveable, except for certain purposes but if she alienates it the transfer is, in every case, valid during her life-time and will have full effect and operation till her death. The only distinction between an alienation for a legal necessity and any other alienation is that the former endures after her death and is binding on the reversioners, whereas in the case of the latter it has full force and effect till her death but may be avoided by the reversionary heirs of her husband after her death. From the operation of the above rule no class of property is exempt and it applies as much to mortgagee rights as to any other rights. Therefore, when a Hindu widow sells the mortgagee rights, which she inherited from her husband, but the sale was without legal necessity, the transferee, in my opinion, acquires all the rights which the widow had and could exercise during her life-time in respect of the mortgage. Such a transfer is not absolutely void and I do not know of any authority which declares it to be so. There can be no doubt that the widow herself could bring a suit to enforce the mortgage. It is equally clear that she could give a full discharge to the mortgagor. If she received the mortgage money from the mortgagor and gave him a discharge it would not lie in the reversioner to claim that money over again from the mortgagor. Her powers are not, as pointed out by Mr. Mayne, less than those of the manager of a family property. That a manager can give a complete discharge to the mortgagor is beyond controversy and doubt. Therefore, a Hindu widow also may do so. If she transfers her rights under the mortgage the transferee is, in my opinion, entitled to give a discharge to the mortgagor. If the mortgagor has obtained a discharge from the transferee he would not, any more than in the case of a discharge by the widow, be liable to the reversioner for the mortgage debt. The only right of the reversioner will be, as it seems to me, to prevent the widow, in the case of the widow, from wasting the corpus of the mortgagee estate, *i.e.*, the amount of the mortgage debt inherited by her, and in the case of the transferee, to claim the amount of the mortgage due at the date of the death of the last male owner of the mortgagee rights. This

(4) 5 C. 776; 6 C. L. R. 322; 7 I. A. 115.

point, however, I am not called upon to decide in this case as the reversioners are not parties to it and the contingency to which I have referred has not yet arisen. But I fail to see that there is any bar to the right of the transferee from the widow to enforce the mortgage. As the widow was entitled to do so, her transferee is, in my opinion, equally entitled. The transferees of the mortgaged property are in this respect in no better position than the mortgagor. Any other view is likely to cause hardship and in some cases would result in injury to the rights of the reversioners. Suppose the widow has not the means to defray the costs of bringing a suit to enforce the mortgage. If she cannot transfer it so as to give the transferee a right to sue upon the mortgage, a claim for sale may become time-barred and the mortgagee rights may become extinct. This will be to the prejudice of the reversioners. Again, if the widow has made an assignment of the mortgage she has no longer any right to sue on it. And if we hold that the transferee cannot sue, no suit can be brought upon the mortgage. The reversioner has no right to bring such a suit in the widow's life-time. The result will be that no one would be able to enforce the mortgage and if the widow lives for more than twelve years after the mortgage has become due the mortgage will become incapable of enforcement. For these reasons I am of opinion that the plaintiff is entitled to maintain the suit and I am unable to agree with the decision of the Court below on this point.

The plaintiff is, of course, not entitled to sell the mortgaged property unless she redeems the prior mortgage under which the defendants, first party, purchased it, or she may do so subject to the prior mortgage. There are other questions involved in the suit which the Court below has not decided. I would, therefore, allow the appeal and remand the case to that Court for trial on the merits.

The Hon'ble Mr. *Moti Lal Nehru* (with him Mr. *Gulzari Lal*), for the Appellants.

Nawab *Abdul Majid* (with him Mr. *Govind Prashad*), for the Respondents.

JUDGMENT.—The facts of this case as found by the Court below and which are not now contested before us are briefly as follows:—

Rup Ram, a separated Hindu, died, leaving a widow *Musammat* Ganga Kunwar and a mother, *Musammat* Parbati. One part of his estate was a debt secured by a simple mortgage over certain property. The widow and mother, without legal necessity, transferred this by deed of sale in favour of the present plaintiff-appellant who has brought this suit for sale, impleading as defendants:—

1. the mortgagors or their representatives.
2. the transferor of the bond, and
3. certain prior mortgagees who had sued upon their bond without impleading the puisne mortgagee and having obtained a decree for sale had, in execution thereof, purchased the property and obtained possession.

The mortgagors did not defend the suit. The vendors admitted the claim. The prior mortgagees contested it and the one defence with which we are concerned in this appeal was that the plaintiff had no right to sue as the sale was without legal necessity and the widow could not transfer her right to sue.

During the pendency of this suit, certain reversioners brought another suit against the two ladies and their vendee asking for a declaration that the sale in favour of the latter was null and void as against them, and that under it the vendee acquired no right to the bond. They claimed that their maternal grandfather Puran Mal and Rup Ram had been joint, and that on the death of the latter, Puran Mal became the sole owner of the joint family property, and on his death their mother, whom they also impleaded, became entitled to a life interest.

The two suits were heard together and the Court held, that Rup Ram was separate from Puran Mal and was the last male owner but that the plaintiffs, in the second suit, were the next reversioners as being *Bandhus*, that the transfer was without legal necessity and that the transferee acquired no right under the sale-deed. It accordingly decreed the suit of the reversioners *in toto* and dismissed that of the transferee, *Musammat* Durga.

The latter appealed in both suits and the appeals coming before a Bench of this Court the Judges who constituted that Bench

differed on the question of law which arises for decision in the case. The learned Chief Justice agreed with the Court below, Mr. Justice Banerji held that the widow at least transferred to the appellant her interest as a Hindu widow and she being still alive the transferee was entitled to sue and recover the debt, and that the reversioners were only entitled to a declaration in their suit that the transfer, as against them, was null and void.

The present appeal has been preferred under the Letters Patent.

In our view, the decision of Mr. Justice Banerji is correct.

In the circumstances, the suit of the reversioners is, from the point of view of their interests, suicidal. If the assignee cannot sue to recover the debt, the bar of limitation will prevent both the widow and the reversioners, who succeed her, from recovering the money. Their suit has, therefore, been brought really in the interests of the prior mortgagees.

It is not denied that the estate of a Hindu widow is more than a mere life-interest. She is an owner whose powers of alienation are restricted, vide *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2). In certain circumstances she can represent the estate and her acts will bind the reversioners.

She is entitled to enjoy and spend the whole income of the estate, though she can be restrained from wasting and destroying the corpus and there is nothing in law to prevent her from transferring her so-called life-interest. A transfer by her of the *corpus* of the estate without legal necessity and not for a pious purpose, is not void but is voidable by the reversioners and may be so declared at their instance. It cannot be denied that if she transferred immoveable property in this manner, her transferee would be entitled to hold and possess it during her life-time and to recover possession of it by suit as against a third party who was wrongfully in possession, *e. g.*, if the mortgage in the present instance had been usufructuary, her transferee would clearly have been entitled to sue for possession provided there was no bar of limitation.

In the present case, the widow is entitled to spend all income accruing on the debt after the death of Rup Ram and her transferee is "at least" entitled to recover this amount and to appropriate it to her own use.

It is impossible to hold, therefore, that the latter has no power to sue.

It may be that if the reversioner intervened in the suit of the assignee, the Court might pass such a decree as would protect their interest and the *corpus* of the estate but in the present case, though they are fully aware of the suit, they have not intervened to protect their own interest, on the contrary they have preferred the suicidal course of attempting to destroy the corpus by preventing the recovery of the debt.

We agree with Banerji, J., that the transferee acquired all the rights which the widow had, and could exercise, during her life-time in respect of the mortgage, one of those being the right to recover the debt. It is pleaded that if the mortgagors pay the debt they will be open to another suit by the reversioners on the death of the widow and may have to pay a second time. The widow is a party to the suit and the estate is duly represented and we do not think that there is any force in the argument. It is urged that the sale for Rs. 7,500 in the present case, of a debt amounting to over one *lakh* is on the face of it, a wasting of the corpus by the widow. We can express no opinion on this, at this stage nor are we called upon to do so. The value of the property mortgaged and the amount of the prior burden are two other material factors which would have to be considered in this connection. But the point does not arise for our decision. We, therefore, allow this appeal and set aside the decrees both of this Court and the Additional Subordinate Judge and remand the suit to the latter Court for decision on the merits.

The appellant will have her costs in this Court in any event including fee on the higher scale.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1192 OF 1911.

September 26, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

SRI MAHARAJA SRI RAJA VELUGOTI SRI GOPALA KRISTNA YACHANDRA BAHADUR, K. C. I. E. PANCHABAZAL MUNSABDAR RAJA OF VENKATAGIRI—PLAINTIFF—APPELLANT

versus

CHITTAMURA RAMALINGIAH—DEFENDANT—RESPONDENT.

Landlord and tenant—Rate for wet crop on dry cultivation—Clause "if wet crops raised on dry land by getting water in any way, wet rate as on adjoining dry lands payable, if valid.

A clause that "if in any year wet or paddy crops raised on the lands by getting water in any way I shall pay according to the same rate as is collected in the neighbouring villages for wet and paddy cultivation on dry lands," is a valid.

The words "getting water in any way" include cultivation by means of rain water.

The rate mentioned in the clause refers only to the rate actually prevailing. It need not necessarily be an enhanced rate.

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 140 of 1910, preferred against that of the Court of the Special Deputy Collector of Nellore, in R. S. No. 846 of 1910.

Mr. *S. Subramania Iyer*, for the Appellant.

Mr *T. V. Seshagiri Iyer*, for the Respondent.

JUDGMENT.—The question in the second appeal is whether the plaintiff, the Rajah of Venkatagiri, is entitled to additional rent against the defendant, his *ryot*, for three *faslis* at Re. 1, or Rs. 2 an acre. The defendant got possession of the lands in 1891 under orders passed on a *darkast* put in by him. Re. 1 was payable if he cultivated dry crops. Then follows a clause which has given rise to the disputes between the parties:—"If in any year, wet or paddy crops raised on the above lands, with any source of irrigation, I agree to pay according to the same rate as is collected in the neighbouring villages for wet and paddy cultivation on dry lands." The Telugu expression which has been translated into source of irrigation is * * * .

We do not think that the expression means any source of irrigation belonging to the *zemindar* like a channel or tank. It merely means getting water in any way. Wet crops were cultivated by the *ryot* by means of rain water. We think the expression is sufficient to cover a case where rain water is used for the cultivation of paddy. The rate agreed upon in case of paddy cultivation is "the same rate as is collected in the neighbouring villages for wet and paddy cultivation on dry lands." According to the finding of the Deputy Collector, which there seems no reason to question, the same rate was payable for dry lands in the neighbouring villages whether dry crops or paddy crops were raised. The rate, therefore, for paddy cultivation in dry lands in those villages was Rs. 2 but it was not an enhanced rate. We do not think the clause in Exhibit A necessarily refers to an enhanced rate in the adjoining villages but only to the rate prevalent in case paddy crop was raised in dry lands. That rate was Rs. 2. The parties to the document must have been referring to some rate prevailing in the neighbouring villages and as there was no enhanced rate in these villages in case of paddy cultivation in dry lands the reference must be taken to the actual rate payable in case of wet cultivation in dry lands. We think, therefore, that the plaintiff is entitled to the increased rate provided, namely, Rs. 2 an acre or one rupee in addition to the dry rate.

It is admitted that the plaintiff has already received from the defendant the rent due at Re. 1 an acre for the three years in question. The decree of the lower Courts must be modified by awarding to the plaintiff Rs. 117 the amount due on the thirty-nine acres in question for three years at Re. 1 per acre. The plaintiff will also have interest at 6 per cent. from the date of plaint till the date of payment. The parties will bear their own costs throughout.

Appeal allowed.

HOCK CHENG AND CO. *v.* THA KA DO.

LOWER BURMA CHIEF COURT.
FULL BENCH.
CRIMINAL REVISION PETITION No 220B OF 1912.
January 3, 1913.

Present:—Sir Charles Fox, Kt., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond and Mr. Justice Twomey.

HOCK CHENG & Co.,—APPELLANT
versus
THA KA DO—RESPONDENT.

CRIMINAL REVISION PETITION No. 221B OF 1912.

THE COLONIAL TRADING Co.—
APPELLANT
versus
MG. MYA THEE—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 405—*Breach of trust—Advances to brokers for supply of paddy—Absence of pro-notes—Undertaking to apply advances to purchasing paddy for advancing firm—Loan or trust.*

Where money was advanced to an accused on the undertaking that he should buy paddy at what rate he could and should sell to the advancing firm at the market rate on the day of delivery, the property in the money passed to the accused and his contract to use the money in a particular way did not operate to create a constructive trust.

The presence or absence of the pro-notes does not alter the character of these transactions.

As the accused had to make good the loss of money in any circumstances and as he had to bear any loss on a fall in the market price and to profit by any rise, the property in the money passed to him and no beneficial interest remained with the advancing firm.

FACTS.—In the first of these cases, the Western Sub-Divisional Magistrate, Rangoon, dismissed the original complaint by Hock Chong and Co., charging the accused with criminal breach of trust, relying on the ruling of the Chief Court in the case of *Wong Yone Wain* v. *Emperor* (1). The matter was taken up before the District Magistrate, who dismissed the application for revision of that order. In the second case, the District Magistrate dismissed the complaint of the Colonial Trading Co., charging Tha Ka Do with criminal breach of trust. Both the cases now came before the Full Bench on revision from the orders of the lower Courts discharging the accused in both matters.

Mr. *McDonnell*, for the Petitioners in both cases, said that the first was identical with the second case and any observation that he had to offer in the one would equally apply to the other case. These two cases were the echoes of important decisions given by their Honours in the case of *Nga Po Seik* v. *Emperor* (2), in which this Court had decided that certain decisions in previous orders were incorrect. He pointed out these two cases might be differentiated from the case of *Nga Po Seik* (2) and also from the case of *Wong Yone Wain* v. *Emperor* (1), which was decided by Mr. Justice Ormond and which was the original case in which difficulties arose. The difference might be summed very shortly thus. In *Nga Po Seik's* (2) and *Wong Yone Wain's* (1) cases, there were promissory-notes. In the present cases, there were no promissory-notes. Further than that, the agreement, Counsel thought, was identical. There was a receipt in both cases by the broker to the firm. He used the term "broker" in a popular sense, as their Honours knew that in the ordinary way he was not a broker But further than that, he thought it right to point out to their Honours that no admissions were made by him in respect of the transactions which took place between the parties. He did not, however, wish to place any reliance on that. There were paddy advances in *Nga Po Seik's* (2) and *Wong Yone Wain's* (1) cases. In the former case, three of the five Judges, who sat in Full Bench, regarded the execution of the promissory-notes as an important factor in the case. He should also mention that in the second case, their Honours considered the existence of the promissory-note as a very important factor tending to show that the money was a debt and not held on trust. Their Honours here could not go beyond the terms of the document. In the two cases cited, their Honours would see considerable reliance was placed on the fact that there was a debt re-payable on demand as shown by the written document There was an undertaking at the end of the agreement that the money would only be used for the purpose of purchasing paddy supplied to the firm. That undertaking, Counsel submitted, was sufficient in the absence of anything else to constitute a trust. Mr. Justice Robinson, in an *obiter dictum* in the course of his judgment in *Nga Po Seik* (2), stated that the mere fact that promissory notes were taken did not prove a lien, and even if a pro-note had been executed, he did say

(1) 6 L. B. R. 46; 5 Bur. L. T. 11; 13 Cr. L. J. 269; 14 Ind. Cas. 653.

(2) 6 L. B. R. 62; 5 Bur. L. T. 143; 13 Cr. L. J. 888; 17 Ind. Cas. 824.

that accused should be held as trustee. But he was the only Judge of the Full Bench who had distinctly held that the absence of the promissory note would not assist him.

THE CHIEF JUDGE said this was the real position of a so-called broker : he undertook to sell and deliver so much paddy to the miller and he got an advance for the purchase price.

Mr. *McDonnell* said it was so. If he might give an illustration, the position was very much the same as a man who gave his cook every day or say once a month a sum Rs. 150 for bazaar. At the end of the month if the cook were not to account for that sum but was to supply bazzar every day to his master, would not the servant in that case be liable for breach of trust if he did not account for the money ?

THE CHIEF JUDGE said the position was not quite the same, because in this case the so-called broker said he suffered a loss.

MR. JUSTICE TWOMEY :—The cook does not suffer any loss.

THE CHIEF JUDGE :—The broker has to pay for what he delivers at the market price for the day.

Mr. *McDonnell* said the agreement here was that the money should be used in a particular way and in no other way. Supposing that after the agreement were executed, instead of going to the District to buy paddy, the respondent had got on a British India steamer and left for Calcutta, would not a suit for injunction lie restraining him from dispensing all the money in any other way ? Counsel submitted that the Indian Trusts Act was worthy of more consideration than it would appear to have received so far; section 3 distinctly contemplated that the owner should have confidence reposed in him. Counsel based his case really, in the absence of a promissory-note, on the fact that there was an undertaking which constituted a trust.

Mr *Halkar*, on behalf of the Respondent in the first case, submitted that whether there was a promissory-note or whether there was specific purpose indicated, it did not bring the case within the definition of trust. It was only a matter of evidence. A promissory-note for the purpose would not make any difference unless the benefit went to a trustor. Their Honours would see from the judgment of Mr. Justice Robinson that there was a verbal loan and verbal trust. According to the definition of the section, dominion over property should remain with the trustor, though it was in the possession of trustee, and there must be a beneficiary. So that there were three parties, the trustor, the trustee and beneficiary. He submitted that dominion over the property remained with the person who received the advance In support of his submission, he cited *Emperor* v. *Girji* (3).

Mr. *McDonnell* briefly replied.

The respondent in the second case in answer to the Court as to why further inquiry should not be held in the case said he took Rs. 2,000 from the Colonial Trading Co. and he purchased with that money over one hundred thousand baskets of paddy. He suffered a loss of Rs. 3,290 on account of advances made to foreign merchants. A sum of Rs. 3,200 was still due to him.

JUDGMENTS.

TWOMEY, J.—In each of these two cases, a firm of millers advanced a sum of money (Rs. 2,000 in one case and Rs. 3,000 in the other) to the accused on his undertaking to buy paddy and sell it to the firm within a specified time (fifteen days in one case and three days in the other) and to use the money for no other purpose. The amount of paddy to be bought was mentioned as "about 2,000 baskets" and "about 3,000 baskets." The exact quantity was left indefinite and the price also was left indefinite and it was part of the bargain that the accused should buy at what rate he could and should sell the firm at the market price on the day of delivery.

In each case, the accused failed to supply paddy according to his undertaking or to account for the money, and the millers prosecuted him for criminal breach of trust. The District Magistrate held the cases were governed by the Full Bench ruling in *Nga Po Seik* v. *Emperor* (2) that the money was not entrusted to the accused in the sense contemplated in section 405 of the Indian Penal Code, and consequently that no offence had been committed under that section. In *Nga Po*

(3) 6 Bom. L. R. 1093; 1 Cr. L. J. 1109.

HOCK CHENG AND CO. *v.* THA KA DO.

Seik v. *Emperor* (2), it was held that the relation between accused Po Seik and the miller who advanced money to him was that of borrower and lender and that the money was not "entrusted" to him. If the money was lost while in the accused Po Seik's possession, it was he who had to bear the loss and not the miller. Po Seik was to make any profit he could on buying the paddy and re-selling it to the miller. If the price fell after Po Seik had bought the paddy, the loss on re-sale to the miller fell upon Po Seik for his contract, as in the present cases, was to sell the paddy to the miller at the market rate ruling on the day of delivery. I concur in the view of the majority of the Full Bench in *Nga Po Seik's* case (2) that there was no trust in the above circumstances. The property in the money passed to the accused and his contract to use it only in a certain way did not, in my opinion, operate to create a constructive trust in the money for the benefit of the miller. As pointed out by Robinson, J., loans are often made with conditions of this sort attached to them. A not uncommon example in this country was where a Chetty landlord advanced money to his Burmese tenants to enable them to buy paddy seedlings to plant upon the Chetty's land. It is never contended that the Chetty retains a beneficial interest in the money lent merely because there was an obligation that the money will be used only in bringing the Chetty's land under crop. The same may be said of an advance to a contractor for the specific purpose of building a house, a boat, or a carriage for the lender. There is no essential difference between such cases and that of the accused Po Seik in *Nga Po Seik* v. *Emperor* (2). There is no authority for holding that in any of these cases the mere contract restricting the use of the money suffices to create a trust. In *Nga Po Seik's* case (2), the money was really payment in advance of the price of paddy sold to the miller for forward delivery.

It is argued that the money was advanced by the miller only because of the confidence reposed by him in the accused on the strength of his undertaking, and that as that confidence was abused, there was a breach of trust. According to this view, the words "entrusted" and "trust," in section 405, would have to be construed in their loose popular sense as distinguished from their strictly legal sense, and such latitude was not permissible in interpreting a penal enactment. The illustrations to section 405 are sufficient to show that it is only in the strictly legal sense that the words are employed. The existence of an express or constructive trust must be proved as an essential ingredient of the offence. Looking to the accused Po Seik's liability to make good the loss of the money in any circumstances, and to the condition that he was to bear any loss on a fall in the market price and to profit by any rise, I think the property in the money passed to him and there was no trust.

The circumstances of the two present cases admittedly resemble those of *Nga Po Seik* v. *Emperor* (2) in all respects, except that Po Seik gave pro-notes for the money advanced to him while the present accused did not. In my opinion, the absence of pro-notes does not alter the character of the transactions. By taking a pro-note, the miller may be in a better position to recover the money in case of default. But whether a pro-note was taken or not, the transaction was in point of law a loan, the property in the money passes and no beneficial interest in it remains with the lender.

The only other ground urged in the application for revision was that the District Magistrate erred in going beyond the terms of the printed agreement in considering whether there was a trust. Even on the agreement, as it stands, I do not think the existence of a trust can be inferred. In any case, the District Magistrate's action in considering extrinsic oral evidence as to the conditions of the advanced appears to be fully covered by provisos 2 to 5 to section 92 of the Evidence Act. I would, therefore, dismiss the applications.

HARTNOLL, J.—The two references have been heard together. They only differ in that in one case a receipt was taken for the money and in the other there was no receipt. It is allowed that they only differ from the case of *Nga Po Seik* v. *Emperor* (2) in that whereas in that case promissory notes were executed, in these cases there were no promissory notes. It was further contended that the District Magistrate erred in going beyond the terms of the agreement in considering whether or not there was a trust. As

regards the absence of promissory-notes, my judgment in *Nga Po Seik's* case (2) covers these references and as regards the further contention, my views are expressed in the case of *J. Reid* v. *So Hlaing* (4). I, would set aside the orders dismissing the complaints and direct further inquiry into them.

ORMOND, J.—These are two applications in revision from the District Magistrate who discharged the accused in each case. The offence alleged in each case was that of criminal breach of trust.

The facts are similar in both cases. Money was advanced to accused by complainant for the purpose of buying paddy and the accused signed an agreement undertaking that the sum advanced will be used for no other purpose than the purchase of paddy. In one case, a receipt was given for the money, but not in the other. In neither case did accused execute a promissory-note. The District Magistrate has found that there was no trust, the transaction being a loan.

Counsel for petitioners contends that the fact of the absence of a promissory-note in these cases differentiates them from the case of *Wong Yone Wain* v. *King Emperor* (1) and also from the case of *Nga Po Seik* v. *Emperor* (2). In those cases, it was held that the transactions were loans and, therefore there was no trust. In my opinion, the District Magistrate has rightly applied those decisions to the present case. Petitioner's Counsel contends also that the District Magistrate should not have gone beyond the terms of the written agreement in considering whether or not there was a trust. In my opinion, the agreement in writing does not disclose a trust, and, therefore, Counsel's contention that the Magistrate relied upon extraneous evidence or matter in holding that the transaction was not a trust, does not apply to the case. And even if the document did amount to an admission of a trust, it would not be a contract, grant or other disposition of property within the meaning of section 92 of the Evidence Act. I would, therefore, dismiss both these applications.

FOX, C. J.—Money was advanced by the complainants in these cases on agreement identical in terms with the agreement in the case of *Nga Po Seik* v. *Emperor* (2) but in these later cases, no promissory-notes were taken from the respondents. The question is whether the money so advanced was held in trust by the respondents for the complainants. In my judgment, nothing in the agreement constitutes the person who signs it a trustee of the money advanced to him. The agreement does not appear to me to constitute more than contractual relationship between the parties to it Upon the judgments of the majority of the Judges of the Bench, both applications would be dismissed.

Applications dismissed.

(4) 5 L. B. R. 241; 3 B. L. T 124; 8 Ind. Cas. 952; 11 Cr. L. J. 738.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1686 OF 1912.

February 4, 1913.

Present:—Justice Sir Frederick Robertson, KT.

LEHNA—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Revision—Concurrent finding of two Courts - Insufficient evidence—Criminal Procedure Code (Act V of 1898), s. 439—Evidence—Statement of witness.

Though it is very unusual to interfere on revision on facts, but where the evidence is found insufficient, a conviction should not be allowed to stand.

A conviction should be based not upon what the Courts consider the witnesses ought to have said but upon what they actually do say; and if by reason of a witness having been won over, the evidence against the accused becomes too weak to justify a conviction, the case for the prosecution falls to the ground.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Divisional Judge of the Shahpur Division, dated the 7th day of October 1912, confirming that of the Magistrate, 1st Class, Lyallpur, dated the 31st day of July 1912, convicting the petitioner.

Mr *Nand Lal*, for the Petitioner.

JUDGMENT—The facts are given in the judgments of the lower Courts. I have examined the record very carefully in this case and although it is very unusual to interfere on revision on the facts, I am constrained to come to the conclusion that it has not been sufficiently proved that the accused was in possession of the animals in question with a view to their misappropriation.

In regard to the evidence of Dayal Singh, the lower Courts should have remembered

that the conviction should be based not upon what the Courts consider the witnesses ought to have said but upon what they actually do say and if by reason of a witness having been won over, the evidence against the accused becomes too weak to justify a conviction, such conviction cannot be based on an opinion of what the witness would have said if he had spoken the truth.

I think it cannot be said that the evidence on the record brings the crime home to the accused. I accordingly set aside the conviction and sentence and direct that the accused be set at liberty forthwith.

Petition allowed.

S. N. Dar,
Advocate High Court
Jammu & Kashmir
Srinagar

LOWER BURMA CHIEF COURT.

FULL BENCH.

CRIMINAL REVISION PETITION No. 252 OF 1912.

December 2, 1912.

Present:—Mr. Justice Hartnoll, Mr. Justice Twomey and Mr. Justice Ormond.

FATIMA—PETITIONER

versus

CAPTAIN McCORMICK AND ANOTHER —OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 354, 363, 376—Kidnapping—Rape—Alleged mixing up of witnesses for defence with those for prosecution—Preliminary inquiry—Indecent assault—Outraging of modesty.

Where a Magistrate is inquiring into the truth or otherwise of a complaint, he can examine all those who know about the matter and it is immaterial at what stage they are called as long as opportunity for cross-examination is allowed.

An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged.

To establish kidnapping, there must be evidence that the minor was taken out of the keeping of the lawful guardian without her consent.

Mr. *N. M. Cowasjee*, for the Petitioner.

ORDER.

HARTNOLL, J.—This is an application made to revise the order of the District Magistrate, Mergui, dated the 23rd August 1911, discharging one Captain McCormick under section 209 of the Criminal Procedure Code in an inquiry made by him as to whether he, the said McCormick, had committed an offence or offences punishable under section 363 $\frac{or}{and}$ 376 of the Indian Penal Code. It was filed on the 9th August last or nearly a year from the date of the order of discharge and therefore, on the face of it, it has been filed after a most unreasonable delay. Applicant explains that she is a widow in impoverished circumstances and that she has been waiting for the Government and the Police to act and that she has been trying through friends to get the Government to move in the matter. She says that she came to Rangoon and her Advocate, who had been engaged by friends, sometime ago wrote a petition for her to the Lieutenant-Governor, that her Advocate told her that the Lieutenant-Governor would not do anything for her and that he, the said Advocate, could not do anything more for her—that she had no means to engage another Advocate and had to return to Victoria Point—that now some of her co-religionists have helped her to engage Advocates. An alleged copy of the petition to the Local Government was shown to us at the hearing but it bears no date and so we have no information as to when it was presented nor as to when orders were passed on it. We are not satisfied that any good and satisfactory reason has been put forward to account for such an inordinate delay. The applicant allows that she came to Rangoon and petitioned the Local Government. It would have cost her very little more to have petitioned this Court. Nevertheless, we have heard her Counsel at length so as to see whether any injustice has been done and whether there is any good ground for re-opening the inquiry.

The case for the prosecution is that somewhere about April 1911, applicant made an arrangement with one Ma Son, the mistress of one Clarke, who lives at Pulo-Ton-Ton some miles from Victoria Point, with respect to her daughter, Ainah, a child of tender years, but who may be taken to be then under twelve years of age. The arrangement seems to have been that Ma Son was to keep Ainah and act as her mother as long as she stayed at Pulo-ton-ton but that if Ma Son left Pulo-ton-ton, Ainah was to be handed back to her natural mother. Applicant alleges that McCormick, who was a planter in the neighbourhood and whose Assistant Clarke is, came one day and took Ainah away without Ma Son's permission. She and her husband subsequently went to McCormick to get their daughter but were not allowed into his premises and were told that if they entered,

FATIMA *v.* CAPTAIN MCCORMICK.

they would be beaten or shot. So they went home. The husband was ill and could not go again. So two relatives, Fatima and Rahim, were sent to get the child. Fatima also took one Biba with her. When they arrived, McCormick was painting his house. He pushed Fatima outside bespattering her with paint and otherwise ill-treating her, and would not give up the child. The husband died some five days afterwards and did not see his child. The applicant laid her complaint to the Sub-Divisional Magistrate at Victoria Point on the 12th July 1911. The Magistrate handed over the complaint to the Police for preliminary investigation. On the 14th July, Inspector Sherard went to Mc Cormick's house and obtained possession of Ainah. She was on the evening of that day and on 15th July—the next day—examined by Daulat Ram, the Sub-Assistant Surgeon, who found her suffering from a purulent discharge from her vagina, which was not much in quantity, and that her hymen was ruptured. On the night of the 16th July, Ainah laid a complaint of rape before the Sub-Divisional Magistrate which was as follows:—

SWORN, States.—I was staying with Me Son. Me Son went upstairs. I was seated on the ground outside the house. Abu, a young boy, was with me. It was about 7 o'clock in the evening. The "tuan b'sar" (Captain McCormick) asked me to come with him. He lifted me and carried me in his arms. He walked with me to his house. When he got me inside, he locked me into the room for two days. After this, one day he sat down and placed my legs across his and he then had sexual intercourse with me. When his private part entered mine, it hurt me. I cried out. The "tuan" (Captain McCormick) then went downstairs and had a wash. He left me upstairs. He then put on a coat and taking me down to his trap ("Kreta") he placed me in it and drove off to Mr. Hall's place. He then left me down below and went upstairs and saw Mr. Hall. Afterwards he drove me back to his house. He then had his dinner. I also had dinner. After this, I slept upstairs in the house. The next day I was taken to John's house. I stayed in John's house three months. After this, the "tuan p'lit" (Police officer) came and took me away to Victoria Point where he made me over to my mother, Fatima. John's wife gave me medicine for the hurt that I had received from the "tuan". I was given medicine all the time. My private part used to be douched with water. A red medicine used to be put into the water and then my private part used to be douched.

Read over and acknowledged correct.

Mark of Ainah.

A. W. BUCHANAN,
Sub-Divisional Magistrate.

VICTORIA POINT, *the 16th July* 1911.

Inspector Sherard continued the investigation till the Superintendent of Police arrived. The latter officer made his investigation and found that no criminal offence under section 363 had been committed and that the charge of rape under section 376 was false. The Sub-Divisional Magistrate did not agree with the District Superintendent of Police and considered that *prima facie* cases under both charges were disclosed. He examined certain witnesses and then all the papers were submitted to the District Magistrate. The latter officer decided to hold a magisterial inquiry himself. The witnesses were brought up to Mergui from Victoria Point on the 19th August in charge of the Sub-Divisional Magistrate, Mr. Buchanan. The inquiry before the District Magistrate commenced on the 21st August and McCormick was discharged on the 23rd August.

The present application alleges that the Police investigation was held in an incorrect and improper manner, that the District Magistrate should not have held the inquiry as a fair and impartial inquiry could not be had before him since he was a friend of McCormick, that no attention was paid to the petition objecting to the inquiry by the District Magistrate nor to a letter sent to the Commissioner nor to two telegrams sent to the Lieutenant-Governor, that the interpreter used by the District Magistrate was a paid servant or agent of McCormick, that her objection to the employment of this interpreter was disregarded by the District Magistrate, that though applicant and her friends earnestly requested the aid of an Advocate to conduct the case and was led to expect that one would be provided by Government, no one was so provided nor did the Police conduct the case before the Magistrate, that some of McCormick's servants and dependents were called without the consent

of applicant as witnesses for the prosecution and they were not cross-examined on petitioner's account and that some of applicant's witnesses were not called at all though they were on her list of witnesses—witnesses who could speak of the circumstances of the said abduction—and were in the vicinity of the Court waiting to be called and that the Police failed in their duty in consenting to the trial or inquiry being thus conducted before the District Magistrate and in not filing an application to this Court to set aside the said inquiry as illegal. Revision was, therefore, asked for on the following among other grounds:—(*a*) that the said trial or inquiry was illegal *ab initio* in that the District Magistrate proceeded with it knowing that petitioner desired it to be transferred and had filed a petition to such effect; (*b*) that the said inquiry or trial was further illegal in that the District Magistrate did not call all the evidence which petitioner desired to call, and was ready and willing to call, the said witnesses being in attendance for that purpose; (*c*) that the Police having charge of the case and the said District Magistrate trying or inquiring into the matter allowed defence witnesses to give evidence in the case for prosecution and such witnesses were not cross-examined; (*d*) that the discharge of the respondent on the facts and in the circumstances was illegal and improper, (*e*) that the facts prove that the said case should be gone into '*de novo*'. In a subsequent affidavit filed on the 9th of this month—four days before the hearing—applicant filed an affidavit stating that she objected to the interpreter, Moosaji, interpreting and that she made her objection to the District Magistrate in Malay before the inquiry commenced and mentioning specific statements in her depositions as recorded by the District Magistrate which she said were not made by her to Moosaji. She also denied that the witness, Haji Rahim, was a relative of hers at all. She also says that she told the District Magistrate in Malay before the inquiry at Mergui began that she did not wish him to try the case and had no confidence in him.

I propose *firstly* to deal with the allegations made as to the interpretation, *secondly* to examine the case on its merits and see whether there is a case at present existing or whether a case can be made sufficient to charge McCormick with one or other of the offences of kidnapping or rape and *thirdly* to examine the allegations made as to irregularities and illegalities in the course of the inquiry.

The interpreter used was Musaji. At the hearing, Counsel referred to what was said of Musaji in the case of *Andrew* v. *Arnold*, (Criminal Sessions Trial No. 41 of this Court) The only means, therefore, of judging as to whether there is any truth in the allegations made as to the interpretation are applicant's affidavit, *secondly*, what appears from the records of the above mentioned case and *thirdly*, the surrounding circumstances. The record of Sessions Trial No. 41 shows that the permanent Malay interpreter was one Chean Gee who applied for leave on the 1st September 1911. Musaji was in the usual course of business appointed to act for Chean Gee. The appointment order was made on or about the 21st July, and was subsequently sanctioned by the Commissioner. The Sub-Divisional officer, Mr. Buchanan, himself said in S. T. No. 41 that it was his recommendation that Musaji should act for Chean Gee. But though the appointment had been made, at the time of the inquiry at Mergui, Chean Gee had not yet taken leave and so Musaji had not yet actually taken over charge. He, however, came up from Victoria Point and was interpreter at the trial. It is alleged that McCormick brought him up, but there is no evidence to that effect. On the contrary, Mr. Andrew, the District Magistrate in S. T. No. 41, swore that his expenses were paid by Government. There is nothing on the record to show definitely the exact circumstances under which he came up. Mr. Andrew said in S. T. No. 41: "When I went on the Bench, I had the witnesses mustered and called out their names to see whether they were all present. Mr. Buchanan and the interpreter Chean Gee brought them. Musaji was there; he was standing by the witness-box in the interpreter's usual place . . . . . I did not employ Chean Gee as interpreter because of what Buchanan had said about him in his letter of the 3rd July 1911." In this letter, Mr. Buchanan wrote that he believed Chean Gee had had something to do with suppressing the news of this case Mr. Andrew went on to say: "I thought Buchanan had brought Musaji there in response to my telegram,

. . . . . Buchanan must have known and seen that Musaji was acting as interpreter." There had been telegrams passing about the interpreter. The District Magistrate asked Mr. Buchanan to bring up one trusted by all parties. Mr. Buchanan replied that he could not do so. He finally wired that he would bring the Court interpreter. It is alleged that Musaji's relations with McCormick are such that he falsely interpreted. From Mr. Buchanan's evidence in S. T. No. 41, it appears that Musaji had been indebted to McCormick. He said in that case: "In July, McCormick showed me a document regarding the transfer of some land by Musaji to him for money due and, asked me whether it should be registered . . . . . If the land was transferred, the debt would be paid." Daulat Ram also says that McCormick told him that Musaji owed him Rs. 600. For reasons to be given later, I cannot implicitly believe this statement. It also appears that Musaji acted as a forwarding agent for McCormick but he also did so for Clarke and another planter Hall as well. The applicant says that she objected in Malay to Musaji interpreting before the inquiry commenced, the suggestion being that Musaji did not interpret correctly to the District Magistrate what she said. Mr. Andrew in S. T. No. 41 said: "No objection was made by any one to Musaji acting as interpreter. I will swear that the mother didn't." Mr. Andrew does not, however, know Malay. Applicant in her evidence in S. T. No. 41, after stating that she had objected to her case being tried in Mergui, went on: "I objected to his (Musaji's) being employed as interpreter. I told the Tuan in Malay. The Tuan got very angry and after that I was sent out of Court." This evidence would lead one in the ordinary course to believe that the District Magistrate got angry in consequence of the objection made. I suppose that the suggestion is that Musaji said something other than the real objection so as to make him angry. Now is it at all probable or likely that the applicant would have confined her objection in the manner stated? In S. T. No. 41, she said; "Mahomed Din is a big and influential man in Pulo-Ton-Ton. He has been friendly with me since the case was brought. He was helping me. He gave me money when my husband was very ill. After the case he brought me, my daughter and others to Rangoon. He paid all the expenses." Mahomed Din was in Mergui at the time of inquiry. So was Mr. Buchanan whom from the petition at page 4 of the record applicant regarded as her friend. If at the time of the inquiry, there was a real objection to Musaji, is it not in the highest degree probable that Mahomed Din would have been approached and that he would personally have approached the District Magistrate, also that Mr. Buchanan would have been approached to represent matters to the District Magistrate? It must be also taken into account that it is not until four days before the hearing in this Court that any specific allegations are made as to what the actual misinterpretation consisted of. In the copy handed to us that is said to be a copy of the memorial sent to the Local Government, the allegation is: "After the closing of the case, we have come to find out that the interpreter did not translate our evidence truly. He changed "no" for "yes" in Fatima's evidence," and this is a most indefinite one. Mr. Andrew in S. T. No. 41 of 1912 said: "To this day I do not know what Musaji did for McCormick or that he was a servant of McCormick . . . . During the inquiry there were no protests that Musaji was not interpreting correctly." The conclusion that I draw is, that no good and substantial grounds are given for thinking that Musaji misinterpreted or that objection was made to his acting as interpreter at the time. Would the mere facts that he was McCormick's forwarding agent, that he had been indebted to him—even that he was indebted to him at the time, though I do not consider this proved—be a sufficient ground for thinking that he would lend himself to false interpretation in a case of this kind? He was evidently considered to be a respectable and trustworthy person for the Sub-Divisional Officer Mr. Buchanan had recommended him as acting interpreter. There is no evidence to show that McCormick brought him up: on the contrary, according to Andrew, the Government paid his expenses. The exact circumstances as to why he came up are not explained; but he had been appointed acting interpreter.

It is possible that he came up with Chean Gee learning his work; but it is useless to enter into suppositions. It is to the highest degree improbable that, if objection was

made by applicant to the District Magistrate that the latter would not know that such objection had been made, and if such objections were to be made at the time, it is extremely probable that the District Magistrate would have been approached by Mr. Buchanan or Mahomed Din. Mahomed Din or applicant would have approached Mr. Buchanan.

Even in the memorial to the Local Government, there is no specific information as to what the alleged mistranslation consisted of, and no such is given till four days before the hearing of the petition. It seems to me that, even if the case was re-opened, the statements of the Malay witnesses made before the District Magistrate could not be disregarded on the ground that there has been false interpretation but that they would still have to be taken into consideration together with any grounds there are for thinking that there has been false interpretation and that these grounds are of the slenderest nature, indeed of so incredible a nature that I think that they should be practically disregarded. Further up to date, there have been no specific allegations as to whether any, and if so, what portions of Ainah's deposition to the District Magistrate are incorrectly translated. In the copy of the memorial, the allegation seems to be confined to Fatima's evidence.

I now come to a consideration of the merits of the case. In arguing them, Counsel referred not only to the trial record of the inquiry before the District Magistrate but also to the process record and more especially to the Police papers. It was not suggested that any fresh evidence or facts are forthcoming other than those that appear on the record. I will first deal with the charge of rape. The first witness for the prosecution was Ainah and her examination-in-chief was as follows:—

DEPOSITION OF WITNESS No. 1 FOR THE PROSECUTION.—The witness having been duly affirmed says—

My name is Ainah
My age is—don't know
I am by race a Malay
I profess the Mussalman faith
I was born at Pulo Ton Ton.
My Father's name is Malasa.

on oath
Interpreter
Musaji.

"I was left by my mother at Mr. Clarke's house. Me Son who lives there said she would adopt me. I stayed at Me Son's house for three weeks; then Captain McCormick took me to his house. I was outside the house when Captain McCormick lifted me up and carried me all the way to his house. This was a short time after the lamps were lit in the evening. When we got to the house he closed up all the lower storey and put me in a room. I was kept in this room all night and the door was locked on me. This was in the dining room. I slept in the dining room all night and next morning Captain McCormick came downstairs and I said I would go home. The Captain said I must not go home.

"The Captain then carried me upstairs; this was early in the morning, and took me into a room and had intercourse with me. I cried: then the Captain took me to the bath room and put medicine on my private parts. This medicine was red. He put some grains in a vessel and then poured water on and it became red. The medicine was applied by means of a long kind of rope string which had a hole in it (Pressed further as to the kind of implement used, witness describes something which I take to be a syringe). He gave me this medicine immediately after having intercourse with me upstairs. I was then taken to Ma Pe Yin's house, and I arrived there about 7 in the morning.

"I stayed in Ma Pe Yin's house about a fortnight. Ma Pe Yin used to give me the same kind of medicine as Captain McCormick did once a day. I was also given medicine to take internally from a bottle containing white medicine. While I lived at Ma Pe Yin's house, I nursed the baby. I said I wanted to go home, but Ma Pe Yin said I musn't leave the place. I did not go to Captain McCormick's house again. My mother never came to see me when I was at Ma Pe Yin's house. I was finally taken away from Ma Pe Yin's house by the Inspector. I now live at Pulo-Ton-Ton in the house of my aunt Fatima (my mother's sister), who is married to a Siamese whose name I don't know. I am contented there. I am now free from disease."

The next witness was Daulat Ram. This witness said that Ainah was suffering from rupture of the hymen and the orifice of the vagina was slightly lacerated. He went on to say: "The girl has been pro-

bably raped. I should say some man has had connection with her and partial penetration enough to rupture the hymen has taken place. I have rather modified my opinion given on the 18th July to Mr. Sherard (see Police papers) upon subsequent examination of the girl. I then said that the discharge was not due to hurt; now as the discharge went away of itself without treatment, I am of opinion that it probably proceeded from the rupture of the hymen." On the 18th July, this witness is recorded as having said to the Police: "In my opinion, penetration of the male organ, *i. e.*, the penis into the vagina of the girl in question could not possibly have taken place as she is too young and it would have been a physical impossibility but she may have been tampered with as the hymen is ruptured." He also said that the discharge was not due to hurt. He never said then that there was any laceration of the orifice nor did he say so in the first report. He also seems to have changed his opinion on a very important point and that is whether there could have been penetration or not. Fatima in her statement the next day said: "I was not minded to make a case over this but Mahomed Din and the Sub-Assistant Surgeon told me I must make a case." This is not one of the statements which in her affidavit she denies making. For these reasons, I am not disposed to completely credit Daluat Ram and so believe him when he said in Sessions Trial No. 41 that McCormick had told him that Musaji owed him (McCormick) Rs. 600. Be that as it may, Daulat Ram's evidence puts sworn testimony on the record that there could have been sexual connection with Ainah resulting in partial penetration sufficient to rupture the hymen. He also stated that in May as far as he remembered, he gave McCormick a bottle of Aletris Cordial used for uterine diseases in women, and a douche. He went on to say:—"Children do sometimes suffer from purulent discharges. Such discharges occasionally proceed from worms or uncleanliness" and talking of the injury to the hymen, hes aid:—"It might be caused by the insertion of any hard substance. It might be caused by the insertion of a glass syringe. The orifice of the vagina might be lacerated by the same means. It might be caused by masturbation."

The next witness was Fatima, the applicant and mother. Her statement is as follows:—

21st AUGUST 1911. Deposition of witness No. (3) for the prosecution. The witness, having been duly affirmed, says—

Interpreter Musaji. *on oath.*

My name is Fatima (i).
My age is—doesn't know.
I am by race a Malay.
I profess the Mussalman faith.
I now reside at Pulo-Ton-Ton.
I am by occuption a cultivator.
My father's name is—doesn't know.

I am the mother of Ainah, complainant. I do not know Ainah's age. I have no idea of Ainah's age. I gave Ainah to Me Son on the understanding that Me Son was to look after her as long as she stayed at Pulo-Ton-Ton; she was to hand Ainah back to me. This is about two months back from to-day. I gave Ainah to Me Son because Me Son asked for her: and also I was very poor and couldn't keep her. About two weeks after I had handed her over to Me Son, I was one day on my way back from Victoria Point when Me Son told me that Captain McCormick had taken her away. I then went to Captain McCormick's and asked for the child: but Captain McCormick refused to give her up. I met the Captain myself. He said:—"What do you want to take her away for: she is happy and well fed here," so I went away. I did not ask for money. I then went away. At this time, my husband was too ill to leave his bed. I then asked Fatima (ii), my husband's sister, to go and ask for Ainah, but Fatima (ii) came back without Ainah and said on her return that she had been kicked by Captain McCormick. At this time, I was big with child and couldn't move about. When I had got up from child-bed, I went to Victoria Point and reported the matter to the Sub-Divisional Officer and asked him to get my child back for me: and then the Inspector of Police brought Ainah to me. After she had been given back to me, Ainah complained that she was suffering from illness and that she had caught illness at Captain McCormick's house. Captain McCormick

had had intercourse with her and given her disease. I then took Ainah to the hospital and asked for medicine for her. The Sub-Assistant Surgeon told me to keep Ainah in Victoria Point for about six days and he would give her medicine to cure her: and so I kept Ainah in Victoria Point and had her treated. That is all. While Ainah was in the hospital, I went to Mahomed Din and asked him to make a case for me. I wanted to make a case of it because unless my daughter was declared innocent in a Court of Law, she would be ex-communicated on account of having had intercourse with Captain McCormick. It was Mahomed Din who told me this.

CROSS-EXAMINED BY COURT.—It is two months since I gave Ainah to Me Son. She came to McCormick's house about fifteen days after I gave her to Me Son. I know that you (*i.e.*, myself) stayed at Pulo-Ton-Ton when Captain McCormick was away. Ainah came to McCormick's house before you stayed at Pulo-Ton-Ton. I did not come and complain because I was heavy with child and couldn't move about. I did not dare to ask anybody else to complain as I was very poor. I asked Fatima (ii) and Biba to go and complain to the Deputy Commissioner, but they said they were afraid. Mahomed Din knew of Ainah being at McCormick's house when the Deputy Commissioner was at Pulo-Ton-Ton. I asked Mahomed Din to go: he said he could help me and would go. But whether he did or not, I can't say. I afterwards went and complained at the Sub-Divisional Officer's house at night.

CROSS-EXAMINED.—Mahomed Din and Basiah and Tu Mi Yein went with me. I asked the Sub-Divisional Officer to get me back my child. I said that McCormick had had intercourse with my daughter. (Witness is here pressed to say how she knew this when she had not seen her daughter: gives no satisfactory reply). Although I had known that I could take action under section 552, Criminal Procedure Code, to get my child back, I should still desire to prosecute Captain McCormick for rape and abduction as I was told by my co-religionists that if I didn't, I should be ex-communicated. I was told this by Mahomed Din, Baseh and La Wi.

CROSS-EXAMINED BY ACCUSED.—I have no property. My husband had bad health before he died. I do not enjoy very good health. I have six children. I find a difficulty in keeping my children. I have given away three or four of my children. I put Ainah to dance in the *pwe* on this account. For this reason I gave Ainah to Captain McCormick about two years ago. I received frequent presents of money, rice and food while she was in McCormick's house. I had nothing to complain of in the way she was treated before. Cassim did not give me presents of food about the time of my confinement. McCormick treated me very well before. I did go back satisfied when Captain McCormick told me that he was looking after my child and treating her well. It was Me Son who suggested that I should send Fatima to ask for the return of the child. I told Me Son what Fatima told me about being kicked when she got back. Me Son said that she dare'nt go either. I did not send anybody else to ask for the child. I was not particularly anxious to have her back. It was about fifteen days after sending Fatima (ii) to McCormick's house that I went to see the Sub-Divisional Officer. I had never been to his house before. It was Mahomed Din and the Sub-Assistant Surgeon who first suggested that I should visit the Sub-Divisional Officer's house at night. I went to the Sub-Divisional Magistrate at night and next day put in a petition. I consulted Mahomed Din before going to the Sub-Divisional Officer first of all. I got my child back the day after complaining to the Sub-Divisional Magistrate. Mahomed Din never told me not to put the child in Me Son's house. It is not permitted by Mussulman custom to give a child away to a person of another community. My husband had gonorrhœa and I have never caught it from him. I know the witness Ma Me. I have pounded rice with Ainah at her house. I did ask for gonorrhœa medicine from Ma Me, but I said it was for my husband, not for Ainah. I did not get the medicine. My daughter has never complained to me of difficulties in passing her water. Me Son did not tell me that Ainah had venereal disease after I handed her over. Baseh and Mahomed Din were present when Ainah told me that she had been raped by McCormick and the blood had come. It was in a house in Victoria Point that she told us

this. The Inspector handed over Ainah at his house. I did not at once ask my daughter what had happened: when we got to the house, she told me of her own accord. I spent about Rs. 25—30 on my husband's funeral. This was subscribed by my father and Mahomed Din. I also sold a buffalo. Me Son did not give anything. I did not ask Captain McCormick for a subscription. Neither Masalam nor Matapah were present when I gave over Ainah to Me Son.

BY COURT.—Ainah stayed in Captain McCormick's house about two months I think about two years ago. I took her away as my relations accused me of selling my children. For no other reason, Ainah has slept away from home dancing with the *pwe* company. My relatives looked after her. I did not go with her. I am not afraid of trusting Ainah in such company.

Read over and acknowledged correct.

G. P. ANDREW,—21-8-11,
District Magistrate.

FATIMA (i), RE-CALLED, ON OATH, STATES.—I was not minded to make a case over this, but Mahomed Din and the Sub-Assistant Surgeon told me that I must make a case. I did not know that the child was ill when she was in my hands whether she went dancing in a *pwe* or not.

Read over and acknowledged correct.

G. P. ANDREW,—22-8-11,
District Magistrate.

The next two witnesses were Fatima (ii) and Biba. They depose to going to McCormick to ask for the child and to his refusing to give her up, driving them away and kicking Fatima. Biba does not in her deposition go so far as Fatima (ii). It was objected that the District Magistrate did not consider the jacket bespattered with paint.

The next witness is Clarke and it is objected that, as he was clearly a defence witness, he should not have been examined at this stage. The objection that he was not cross-examined cannot stand as the record shows that complainant was offered cross-examination. There is no substance in the other objection. The District Magistrate was inquiring into the truth or otherwise of the complaint. It was his own inquiry as the Police had made up their minds that there was no case. He had to examine all those who knew about the matter and it seems immaterial under the circumstances at which stage they were called as long as opportunity for cross-examination was allowed. Clarke gave evidence in favour of McCormick stating that it was at his request that McCormick took Ainah to cure her of a disease in her private parts.

The next witness is Me Son. She has been believed by the District Magistrate and it is objected that she is untrustworthy, and that her first statements should have been gone into. I think that the objection is well founded. Her evidence is to the effect that McCormick with her consent took away the child so that it could be cured of its disease. Her first statement on the 14th July to Sherard when he went to get the child was that her mother told her that she had taken the child to John's house as she wished the child to live with John and his wife. On the 21st July, when examined by the District Superintendent, she is recorded as having modified her statement and saying: "Ainah stayed with me for about a fortnight when one night while Captain McCormick was talking to Mr. Clarke and I was upstairs at the time, she (Ainah) went away with him." She should certainly have been asked about these discrepant statements and asked to explain them and if she could not do so satisfactorily, the failure to do so should have been considered in deciding on the credibility of her statement or otherwise.

The next witness was Ma Pe Yin. She in her evidence said that Ainah was sent to her by McCormick who told her that there was something wrong with her, that he found she had a discharge and treated her for it. The same objection is taken with regard to this woman's evidence as with regard to Me Son and it is also to my mind well founded. She should have been asked to explain her first alleged statements. To Sherard she said on the 14th July that Ainah's mother had brought her to her (Ma Pe Yin) to look on her as a daughter but she then is recorded to have said that the girl was suffering from gonorrhœa. On the 19th July, she is recorded to have said to the District Superintendent that Ma Son came to McCormick's house and gave the girl to him saying that she was suffering from a woman's disease. It was also stated that the Police papers show that McCormick first said that he did not know

who brought the girl to Ma Pe Yin, and that this had been corrected to: 'I brought her" and that there was a subsequent correction to "it was I who first brought her" and that this should be inquired into and brought into evidence.

The next witness is Ma Me. She did not give any relevant evidence. To the Police she did not give any evidence in favour of the prosecution. Her statement was in favour of the defence. The next witness was Haji Rahim. He was believed by the District Magistrate. He says that Ainah's mother was his wife's sister and that seven days before Ainah was handed over to Ma Son, her father told him that she was suffering from venereal disease. It is now objected that this man is no relative of Fatima and was an employee of McCormick. There is some ground for thinking from the Police papers that this man was employed by McCormick to do contract work. The record does not show that applicant had an opportunity given her to cross-examine him and so his statement must be discarded. If applicant was given an opportunity, there has been an error in not noting it on the deposition.

The last witness was Mahomed Din. He says that when the Deputy Commissioner was staying at Pulo-Ton-Ton, and from the Sessions Trial No. 41 record this was in April, he went to see him on business and as he returned home, he saw Fatima who told him that her daughter was being kept at McCormick's house, that they would not give her up and that she wished to report this to him. He told her to make her complaint at Victoria Point and they parted company. He took Fatima to make her complaint on 12th July. He was there when the child was given to the mother and when the child was taken to the hospital. He allows that Government has given McCormick his land. The witnesses not examined were Rahim, Sahut, Bedin, Basir and Sunani, Ngwe Byu and Shean Gee. Rahim is Biba's husband and he, to the Police, corroborated his wife and said that Ainah was healthy when handed over to Me Son. For reasons I shall give, I do not see how his evidence would have helped the case. Being a man, how could he know Ainah's state of health? Sahut's evidence does not seem to me to help the case. He says that he met McCormick carrying Ainah to his house. He knows nothing of the circumstances under which Ainah left Me Son and does not say that Ainah was objecting. Sunani and Basir depose to Ainah's parents making a report to Masalam, the headman, shortly after McCormick took Ainah to the effect that he had abducted their daughter. In view of Fatima's deposition and Mahomed Din's connection with the case—matters into which I will enter later—I do not think that their evidence would have materially helped the case for the prosecution. Shean Gee's statement is of the vaguest description and Ngwe Byu describes how applicant and her husband came to the Court at Victoria Point about April and said that McCormick had taken their child to his house and would not give her back and that he was afraid to complain. He says the man came again a month afterwards and went away after waiting for some time. Bedin was Clarke's cook and says that he knew the girl was ill, when at Me Son's he saw her longyi had wet stains on it and that McCormick took her away telling Me Son that he wanted some one to teach him Malay. His statement supports the defence rather than the prosecution as it assumes an implied consent of Me Son when McCormick took the girl. There is one other witness who was not examined and that is Dr. Evers. I think that he certainly should have been examined but that it is not essential that he should be examined now. He examined the girl on the 29th July and his report is as follows:—

From Dr C. G. Evers, Civil Surgeon, Mergui, to the Sub-Divisional Magistrate, Victoria Point,—dated the 29th July 1911.

"Reference your letter No. 778, dated the 28th July 1911. I examined the girl Ainah on the morning of the 28th July 1911. Judging from her physical development and the number of her teeth, 24 in number, I am of opinion that she is between 11 and 12 years of age. She is childish in form, manner and appearance.

"The breasts are not developed and there is no hair on the pubes. There was no purulent discharge from the vagina.

"The hymen was ruptured.

"The vaginal canal was narrow and admitted the first two digits (points) of the index finger (lubricated) with some difficulty and gave rise to pain which made her cry. I was not able to introduce the finger further, as the

girl could not bear the pain. I was able to touch the tips of the cervix (neck) of the womb with the two digits introduced. The vaginal canal was probably a little more than two inches long.

"The vaginal canal is, in my opinion, too narrow and too short to admit the full length of the male generative organ.

"I am of opinion, therefore, she could not have lived as a prostitute. Your letter is herewith returned."

If he had been examined it seems very probable that he would have said the penetration was impossible and that would have finally disposed of the question of rape; but supposing he had said that there could be partial penetration, even then would a *prima facie* case of rape be established?

To review the evidence, the child Ainah reached her mother on the 4th July. No complaint of rape is lodged with the Sub-Divisional Magistrate until the night of the 6th July. Was it natural conduct on the part of the mother to wait for two whole days before she allowed her child to complain? Mahomed Din is with her when it is laid. Mahomed Din has taken the greatest interest in this case. He allows that Government has given McCormick his land. Though the child is said to have been kidnapped in April, no complaint is laid until July. The reason given is that applicant was confined of a child and that the father died. But the ordinary woman in this country as a rule does not take long over her confinement. And then again Mahomed Din knew in April as it was then that the Deputy Commissioner was staying at Pulo-Ton-Ton. He must surely have had free access to him. Since he took such an interest in the case in the end, why did he not do so in the beginning? May not his influence explain the evidence of Sunani, Basir and Ngwe Byu if it is correct?

He was perhaps preparing the case against the man who got his land. Assuming that Ma Son, Ma Pe Yin and McCormick have lied as the papers show, is that sufficient to establish a *prima facie* case of rape against McCormick? I think not. A *prima facie* case must be established on good and credible evidence on the part of the prosecution, and where is it? Not only is the report made very late after the girl reached her mother; but when it is made, it, on the face of it, gives a most improbable story. After this when she is examined by the District Magistrate, she gives a story that is very different especially as regards times. There seems to be no doubt that she was treated for a discharge in her private part. She says so and, so does the defence but Daulat Ram's evidence shows that this discharge need not have come from sexual intercourse. It is also shown that the hymen could have been ruptured from other causes than sexual connection and in the present case the child seems to have been douched. There is no evidence to show that the discharge was the result of gonorrhœa. Ma Son's statements in Court to the effect that she sent for Fatima and asked her to go for Ainah to some extent are in favour of the prosecution as they suggest an inference that all was not right and that the girl had been taken away without her consent but can such a conclusion be arrived at on a consideration of all the facts? Applicant says that Ma Son told her that McCormick had taken Ainah away. It may well be that Ma Son was merely telling Fatima what had happened and that with her consent McCormick had taken Ainah to treat her. Fatima in her deposition said, that when McCormick told her the child was happy, she went away. I have already held that there are the very slightest grounds, if any, for holding that there was any misinterpretation. It was urged that the witnesses some of them deposed or said to the Police that the girl was healthy when she went to Ma Son. In view of the suspicion that Mahomed Din may be working a false case, I am of opinion that sufficient credence could not be given to such evidence but even assuming that she was, could not the discharge have come on when she was with Ma Son and could not the hymen have been injured in the treatment or in any way other than sexual connection? The more I look at the charge of rape, the more I come to the conclusion that the charge must depend on the statements of Ainah, and on such statements, incredible in themselves and varying between themselves, made so late after her return to her mother, with Mahomed Din in the background who may be McCormick's enemy, I am of opinion that there is no *prima facie* case of rape disclosed against McCormick on

the evidence on the record of the District Magistrate's inquiry or on any evidence that can further be put on to it as disclosed by the other papers on the record.

As regards the case of kidnapping, to establish it must be evidence that the minor was taken out of the keeping of the lawful guardian without her consent. Now Ma Son was clearly one of the lawful guardians. Is it or can it be shown that Ainah was taken out of Ma Son's keeping without her consent? Ma Son said at the inquiry she consented. Can it be assumed, that, as she told lies before, she did not consent? I do not think so. If she had told lies, it goes to show that her evidence is untrustworthy. If so, it cannot be proved out of her mouth that she did not consent. By my finding on the first charge, I have found Ainah herself untruthful. The mere fact that McCormick refused to give her up to Fatima (ii) and Biba and also the applicant, if he did so, does not show that he took her without Ma Son's consent. The fact that he so behaved, if he did, may go to show that his behaviour was due to Ma Son's consent. If he had not got Ainah for a lustful purpose (and I have held that there is no ground for charging him for such a purpose), then why was he treating her as it seems clear he did? Does it not make his defence probable? and if his defence is true, is it not very probable that he had the girl to treat with Ma Son's consent even though for some purpose of their own, he, Ma Son and Ma Pe Yin tried to conceal the true facts at first? As far as Ma Son is concerned, I cannot hold that any *prima facie* case of kidnapping is established.

The argument was then raised that, as soon as Ma Son parted with the child, the natural guardianship of the mother arose and McCormick kept the child from her—that the mother was always the natural guardian even when the child was with Ma Son—that Ma Son only had the child for a limited purpose. Adopting this view and assuming that the position of applicant, Ma Son and Ainah was a position analogous to that of a parent, school mistress entrusted with a child, and the child itself, according to the agreement come to between applicant and Ma Son, I think that it may be taken applicant delegated to Ma Son the power to keep Ainah in, or restore her to health, and that being so, I do not think that in any case McCormick committed kidnapping, if with Ma Son's consent he took the girl to cure her. If he took her for an unlawful and immoral purpose, I think that he would have been guilty of kidnapping, as her mother never parted with the possession of her child to allow Ma Son complete control of the girl; but in such a case, section 373 would be applicable and as I have held, there is no evidence to support a charge of an unlawful and immoral purpose.

The last consideration is whether McCormick comitted kidnapping by detaining the girl in his possession. Fatima in her deposition says that when she asked for the child, McCormick refused to give her up saying that she was happy and well fed, and so she went away satisfied. This was quite a different story to what she said in her complaint, when she said that McCormick's boy said that he had given orders that no one was to enter or they would be beaten or shot. She also said in her deposition. "I was not minded to make a case over this but Mahomed Din and the Sub-Assistant Surgeon told me that I must make a case." "I should still desire to prosecute Captain McCormick for rape and abduction as I was told by my co-religionists that if I didn't I should be excommunicated. I was told this by Mahomed Din, Basir and La Wi." Then there is for consideration the great delay in making the complaint, a delay not, in my opinion, accounted for by the father dying and the mother being confined of a child in the interval, the more specially as Mahomed Din was conversant with the circumstances from April. I do not think it is even shown that Fatima was non-consenting. If it took place, there was a visit of Fatima (ii) and Biba; but if McCormick had the consent then of Ma Son and the mother, the fact that he did not hand the child up to Fatima (ii) and Biba would not in itself make him guilty of kidnapping. They were not the child's guardians. If he did treat them in the manner alleged, I am in no wise desirous of defending his conduct. It is for this Court to consider merely whether he was committing any criminal offence with regard to the child Ainah. I would hold that there is no "*prima facie*" case of kidnapping made out or that can be made out against McCormick.

There remain the other allegations to be dealt with; they are

(1) That the proceedings before the District Magistrate are illegal *ab initio*;

(2) That he should not have dealt with the case as he was a friend of McCormick;

(3) That he prejudged the case and should not have put McCormick on bail.

The first allegation is based on the provisions of section 526 (8) of the Code of Criminal Procedure. Now this sub-section does not apply to the case as far as the petition on page 4 of the Record is concerned. The petition is not worded in the terms of section 526 (8). It was presented to the Sub-Divisional Magistrate of Victoria Point in the mouth of July. Moreover, by section 526 (8) the powers of adjournment are to be exercised so as to allow a reasonable time for the application being made, etc., before the accused is called on for his defence. Here the accused never was called on for his defence. The applicant now says that she objected on the day of the hearing. In S. T. No. 41, Mr. Andrew said: "They never put in a single application in my Court bearing on the question." Applicant's bare statement after this length of time has no weight. The argument that the proceedings are bad *ab initio* cannot, therefore, prevail.

The next point is that the District Magistrate should not have dealt with the case as he is a friend of McCormick. I think that considering the petition at page 4 of the Record was before him, the District Magistrate should have asked applicant before he began the case if she desired a transfer and told her that, if she did, she would have to apply to this Court, and given her time to do so.

He could have asked her at Mergui or had her asked at Victoria Point before they all came up to Mergui.

But as to whether he should not have touched the case himself, I think that it was a matter between himself and his conscience. If he considered that he could not have dealt with it impartially, he should, of course, not have touched it, but if he considered he could, as far as the Record of S. T. No. 41 goes, I can see no reason why he should not have dealt with it. He says:—

"I always had work in connection with McCormick's grants and other grants down Pulo-Ton-Ton way and also in connection with laying out the roads, etc. There are no dak bungalows between Victoria Point and Maliwun. There is not a single Pongyi Kyaung or Zayat on the way. There are no houses or Zayats for a European except planters' houses. There are about 30 planters in the Mergui District. I have stayed in every estate in the District. I have stayed in every planter's house in the District."

The allegations that the District Magistrate prejudged the case seem to me to be quite unsubstantiated. The letters that passed between him and his Commissioner, Exhibits 1, 2, and 3, so far from showing that he prejudged the case go to show that he decided to hold a magisterial inquiry himself. His letter was written on the facts before him at the time he wrote it. The telegrams show that he even tried to get legal assistance for applicant. Exhibit H is quoted as showing that he prejudged the case. I cannot agree. He had to make up his mind in accordance with the Commissioner's decision on the papers before him at the time; but that does not mean that he could not approach the case with an open mind and decide on the evidence before him. One might as well say that a Sessions Judge always prejudges the case as he reads the committal records and Police papers before hearing the witnesses. He must form opinions after doing so; but he keeps an open mind and sometimes finds things turn out quite different to what he expected.

Lastly, I am unable to see that he was wrong in releasing McCormick on bail. An inquiry was going on under section 202, Criminal Procedure Code, and though the warrant was issued by the Magistrate, the District Superintendent wired that he had no objection to bail. McCormick was a European and there is no proper provision for the custody of under-trials at outstations.

It was finally urged on us that if we found no ground to re-open the inquiry under sections 376 and 363, yet that offences were established under section 341 or section 354, Indian Penal Code.

As regards section 341, Indian Penal Code, the remarks I have made go sufficiently to show that I do not consider it proved that there was any wrongful restriant.

I have found both Ainah and her mother untrustworthy and that it is not shown that

Ainah was not with McCormick and Ma Pe Yin without Ma Son's and the applicant's consent.

As regards a charge under section 354, Indian Penal Code, McCormick in the Police papers is recorded as having stated that he personally examined Ainah, and his statement in Court may perhaps be held to be an admission that he did so. It is not quite clear. In my opinion, if he did do so, he committed a very grave indiscretion and his conduct is quite indefensible; but the question is whether there can be established a case against him under section 354, Indian Penal Code. That section is:

"Whoever assaults, or uses criminal force to, any woman, intending to outrage, or knowing it to be likely that he will thereby outrage, her modesty, shall be punished etc." If his story is correct and there seems to be a great likelihood that it is, there was no intention to outrage. The other essential "knowing it to be likely etc.," may be said to be present if it could be shown that Ainah was non-consenting. In all criminal force there must be force *without the person's consent*. And the question here is whether Ainah consented. Section 90 says:—"A consent is not such a consent as is intended by any section of this Code, unless the contrary appears from the context if the consent is given by a person who is under twelve years of age." The question, therefore, is whether Ainah gave a free consent. Her age seems to have been between 11 and 12 years and so she would be capable of giving an intelligent consent. Her own statement is incredible and so nothing is to be obtained from it towards drawing an inference. If Mc Cormick took her to treat her and she went willingly as seems to be probable, it is extremely probable that she consented to his action especially considering the evidence that he had had charge of her two years before. One of the essentials of criminal force would then be absent and there would be no offence under section 354, Indian Penal Code.

In the result, I would dismiss the application.

ORMOND, J.—My view of the facts is shortly this:—No credence whatever should be given to the affidavit alleging wrong interpretation and which is filed 15 months after the case. If the allegation were true, Mahomed Din and Mr. Buchanan who were about the Court premises would undoubtedly have been informed and would have represented the matter to the District Magistrate; and in her memorial to the Local Government which was drafted by her Advocate when she came to Rangoon, Fatima would have categorically mentioned the statements in her deposition which she did not make, and would have stated in effect what her correct answers were. I can understand an unscrupulous interpreter inserting a "not" in the answer—"I was particularly anxious to have her back"—but Fatima in her affidavit denies making any of the eight statements to the Court as recorded in her deposition at the close of her evidence on the 21st July. And although in the 9th para. of the petition to this Court, Fatima states that she objected to the interpreter on the ground of his being a paid servant or agent of McCormick's, no allegation is made there against him of falsely interpreting. Moreover, if the interpreter falsely represented Fatima as saying that she gave the girl to McCormick about two years ago, why did he not represent Ainah who gave her evidence on the same day as making statements to the same effect? There can be no doubt that Mahomed Din is the prime mover in this prosecution; and as Government had given McCormick his land, there can be little doubt that he bore him a grudge. He is a well-to-do man and there is no reason why this application for revision should not have been made long ago.

An insight into the case may be gained by comparing Mahomed Din's evidence as to Fatima's attempt to get the girl back when the District Magistrate was staying in McCormick's house, with the statements and evidence of Fatima on the same point:—Mahomed Din states that he went to see the D. C. (*i. e.*, the D. M.) that he met Clarke there and on his way home he met Fatima crying by the roadside and she told him that her daughter was being kept at McCormick's house and they would not give her up, and that she wished to report it to him and that he told her to make her complaint at Victoria Point. Fatima in her complaint on the 12th July and also in her statement to the Police on the 13th July says that she went to McCormick's house to report the matter to the D. C. but was prevented from doing

so by Clarke; and on the way home, she met Mahomed Din and told him how she was prevented. On the 20th July, she states (to the Police) that she went to see the D. C. in McCormick's house but Clarke prevented her from seeing him, and later on she states that she met Mahomed Din on the road. "On one occasion when she was going to Ma Pe Yin's house (*i.e.*, a different occasion) when she asked him to go along with her and help her, he told her to go by herself as he was afraid." And on 21st August to the Magistrate, she says:—"I did not come and complain to you (the Magistrate when McCormick was away) because I was heavy with child and could not move about, Mahomed Din knew of Ainah being at McCormick's house when the D. C. was there. I asked Mahomed Din to go; he said he could help me and would go—but whether he did or not I can't say." Now if Fatima had in fact gone to see the D. C. at McCormick's house and had been frustrated by Clarke, she would undoubtedly have remembered it when giving her evidence to the Magistrate: but it seems to me to be clearly a piece of fabricated evidence learned up by the 12th July and forgotten by the 21st August and Mahomed Din must have originated it. The D. C. was at McCormick's house for four days in April and Fatima's child was not born until the 10th or 12th June. Fatima did not try to get her daughter back when the D. C. was at McCormick's house; she could not, therefore, have been really anxious to get her away from McCormick. The reason why the complaint at the instance of Mahomed Din was, not filed sooner was, I think, because the father Malassa whilst he was alive refused to make a case saying that the child could live where she liked. There seems to be no reason why Me Son should have made a statement to that effect (in her evidence to the Magistrate) unless it was true.

Now as to the charge of rape, the case for the prosecution is that Ainah was handed over in good health to Me Son with whom she stayed 10 days to three weeks: that McCormick then took her away and raped her, thereby giving her gonorrhœa and that she was then handed over to Ma Pe Yin. The medical evidence and statements show that the girl had a slight discharge on the 14th or 15th July which might have been gonorrhœa; that her hymen was ruptured which might have been caused by partial penetration of the male organ or by any hard substance, *e. g.*, the nozzle of a douche etc.; that the injuries must have been inflicted more than 15 to 20 days before the 14th July but that it was impossible to tell how long before. Even if the girl was in good health when she went to Me Son, the injuries etc., might have been inflicted whilst she was at Me Son's before McCormick took her away. There is only the girl's evidence to implicate McCormick, and her complaint and evidence are so inconsistent and contradictory on material points that it would be altogether unsafe to place any reliance on them. On the other hand, the fact that the girl had stayed with McCormick for two months about two years previously when her mother took her away, only because her relations accused her of selling her children, would go to show that on this occasion McCormick in taking the girl was actuated by philanthropic motives, *viz.*, of curing her.

The fact too that no complaint was laid until two days after the girl had been restored to her mother, is not what one expects if it were a true case. Fatima in her complaint of the 12th July says she wants her daughter back so as to be able to tell whether she has been meddled with. The natural thing to do would have been to have ascertained from the girl what had happened and then at once to have filed the complaint; and the medical examination would have followed. Mahomed Din, who was present when Fatima filed her complaint on 12th July, was also present when the girl was restored to her mother at the Inspector's house on the evening of the 14th July; and from the record in the Arnold case to which Counsel has referred (for the purpose of showing facts which could he proved if this application were granted), it appears that Mr. Buchanan was also present; and he there says that Fatima immediately insisted upon a medical examination. Ainah in her deposition says:—"I did not tell my mother what had happened to me before I was taken to the hospital . . it was the doctor (Sub-Assistant Surgeon) from whom my mother got her information."

As to the charge of abduction:—If the charge of rape is not supportable, the story of the defence must, I think, be accepted; *i.e.*, that McCormick took the girl in order

to cure her. The girl had been given to Me Son for so long as Me Son should remain in the neighbourhood—an indefinite period. Fatima had given away three or four of her children and had given Ainah to McCormick two years previously. Counsel for the petitioner admits that Me Son must have connived at or consented to the taking away of the girl by McCormick, and McCormick might reasonably have supposed that Me Son had authority from the mother to give him the girl on this occasion in order to be cured of her ailment. And the mother, though she knew a day or two afterwards, that McCormick had taken the child, made no real attempt to get the child back until after the death of her husband, when she was prevailed upon to do so by Mahomed Din. In my opinion, if this application were granted, there would be no reasonable possibility of the prosecution obtaining a conviction on either of the above charges or for any minor offence; and I would dismiss the application.

As to the Magistrate not transferring the case and not giving the prosecution an opportunity of obtaining an order for a transfer from the Chief Court:—no doubt, if the Magistrate had asked the complainant if she wished to make such an application, it would have tested her *bona fides* but it is sufficient to say that the prosecution had ample time after it was known that the Magistrate was to take up the case, to apply to the Chief Court for a transfer, and no application was made to the Magistrate at or before the hearing for an adjournment to enable the complainant to make such an application. The other points have been fully dealt with by my learned colleague Mr. Justice Hartnoll with which I agree.

TWOMEY, J.—I concur generally in the views expressed by my learned colleagues. I wish to add a few remarks on some of the salient points which it is desirable to emphasize.

In the first place, the delay in applying for revision of the District Magistrate's order of 23rd August 1911 throws grave doubt on the applicant's good faith. She is a poor jungle woman and a widow; but it is not the case that she was unsupported. On the contrary, it is clear that her well-to-do co-religionists helped her freely throughout the proceedings. She and they must have learnt soon after McCormick's discharge that the only way to get the case re-opened was to present an application to this Court. The delay of nearly a year betrays the inherent weakness of the case against the accused; and we cannot overlook the significant fact that the application was filed only after the prosecution in the Arnold case had begun. In view of this delay, it would manifestly be unjust to harass the accused by a further inquiry into the charges against him unless we had the strongest grounds for thinking that a miscarriage of justice occurred.

As regards the interpreter Moosajee, I find it impossible to believe that Fatima raised any objection at the time. If she really feared that Moosajee, by reason of his business relations with McCormick, would misinterpret her evidence, she would not have contented herself with protesting to the District Magistrate in Malay a language which, she knew the District Magistrate did not understand, but would have represented the matter through Mahomed Din or Mr. Buchanan. In any case, she would have made her objection known to the District Magistrate immediately after her examination. Mr. Andrew's evidence in the Arnold case shows that no objection to the interpreter was made by Fatima or anyone else. I can only regard the allegation as the result of an after-thought. In her deposition to the District Magistrate, Fatima made many admissions damaging to the prosecution, and to challenge the correctness of the interpretation was the only way to destroy the effect of these admissions.

Fatima's allegations that she begged the Deputy Commissioner not to try the case and that he stromed at her, are not probable. In this matter also, it is unlikely that she would have contented herself with an oral application to the District Magistrate. There was ample time to put in a formal application under section 526, Criminal Procedure Code, and from the neglect to do so, the District Magistrate had good reason to believe that the complainant acquiesced in his hearing the case. It is true that at that time he had the two petitions, one in Malay forwarded by the Sub-Divisional Magistrate and one in Burmese forwarded by the Commissioner. He ignored these petitions, and he explains that he did so because he did not regard them as genuine, at any rate so far as Fatima herself was concerned The District Magistrate's view on this point is supported

by Fatima's own evidence in the Sessions Trial. The petitions purport to bear her cross marks; but in her evidence she said that she put her thumb marks on them after dipping her thumb in some "medicine." They bear no thumb impressions and it seems doubtful, therefore, whether she really saw them at all. It may well be that they were sent by Mahomed Din and the other signatories to the Malay petition of their own accord. It is clear that the District Magistrate was not moved to postpone the inquiry under section 526 with a view to an application for transfer being filed in this Court.

But, assuming that in view of the two petitions he ought to have asked Fatima if she wanted a postponement for this purpose, it is desirable to consider whether there was any prospect that such an application to this Court would have been successful. The only grounds for such an application would be that the District Magistrate was a close friend of Mc Cormick's and that the District Magistrate, after saying he would employ a Pleader for Fatima, failed to do so. She may not have understood that the District Magistrate's failure to engage an Advocate for her was due to the Commissioner's refusal to sanction the expenditure. But she probably did understand it for the Sub-Divisional Officer was asked to acquaint her with the fact on the 12th July. At any rate, she had no reason to think that the District Magistrate wished to deprive her of legal assistance. She and her friends had ample time to engage an Advocate at Mergui. To my mind, it would be absurd to hold that the circumstances could give rise to any reasonable apprehension that the District Magistrate would not deal impartially with the case. *Secondly*, as regards the District Magistrate's friendship with the accused, the relations between them were investigated in the Sessions case, *King-Emperor* v. *Arnold* (1), where this matter was directly in issue. It may be assumed that if the Chief Court had made inquiry into the matter on a petition for transfer, the facts proved in the Arnold case would have been brought to notice and nothing more. From Mr. Andrew's evidence it appears that he was on the same footing with McCormick as with the 20 or 30 other planters in this district. Mr. Andrew made McCormick's acquaintance in the course of official business. He stayed in McCormick's bungalow once for four or five days when McCormick was absent in Penang. The absence of dak bungalows, Zayats and the like accommodation renders it necessary for the Deputy Commissioner to accept the planters' hospitality. Mr. Andrew had in fact stayed from time to time with every planter in the district. It is plain that there was no such intimacy as would render it improper for the District Magistrate to hold the preliminary inquiry. To decide otherwise would be tantamount to preventing the District Magistrate from inquiry into criminal charges against any of the planters in his district. On the facts elicited in the Arnold case, I think this Court would have refused an application for transfer. There is nothing in the facts to show that the District Magistrate was likely to be prejudiced in McCormick's favour, and, furthermore, any apprehension on Fatima's part that the District Magistrate was so prejudiced would in the circumstances be unreasonable.

At the hearing, it was suggested to us that the District Magistrate prejudged the case and in support of this argument the learned Advocate pointed to the telegraphic correspondence between the District Magistrate and the Commissioner about the employment of a Pleader for Fatima. The District Magistrate recommended that a Pleader should be retained because "the complainants are ignorant people and require assistance." He told the Commissioner that he did not think the rape charge could be substantiated, but that the charge of abduction remained. He was directed not to employ an Advocate "if he believed the rape charge to be false." He thereupon informed the Sub-Divisional Officer that the Commissioner declined to sanction the employment of an Advocate for the prosecution. We are asked to infer that the District Magistrate believed the charge of rape to be false before he began the inquiry. Mr. Justice Hartnoll has dealt with this matter and I agree in his remarks. Mr. Andrew had to decide provisionally on the records before him. He construed the orders as prohibiting the employment of an Advocate unless there appeared to be a *prima facie* case of rape.

(1) 5 Bur. L. T. 239; 13 Cr. L. J. 877; 6 L. B. R. 129; 17 Ind. Cas. 813.

FATIMA *v.* CAPTAIN MCCORMICK.

He had the Police inquiry and the Police Superintendent's report that the case was false. It was plain that if the Commissioner had that report before him, he would have definitely refused to sanction expenditure for a Pleader and the District Magistrate rightly decided in the circumstances that he had no authority to incur the expenditure. His letters and telegrams to the Commissioner show that so far from prejudging the case, he preserved an open mind and kept his judgment in suspense until he examined the witnesses himself.

The action of the District Magistrate in ordering the release of the accused on bail is also referred to as indicating prejudice. Mr. Justice Hartnoll has dealt with this point and I have only to add that the warrant of arrest was clearly unnecessary. There was no reason to fear that McCormick would abscond, and Mr. Buchanan's letter of 19th July (the date of the warrant) to Mr. Finnie shows that the warrant was issued for no such reason. That letter bears out the view of the Police Superintendent that Mr. Buchanan had "lost his head." Mr. Buchanan clearly suffered from the delusion that McCormick was too dangerous a person to be left at large and that if not kept under lock and key, he would go about shooting people with his revolver. It is clear I think that the District Magistrate had abundant reasons for ordering the man's release on bail.

There are other circumstances which strongly confirm the view that the District Magistrate was anxious to probe the facts carefully and to do justice. When the Police report came before him, it was open to him to dismiss the complaint under section 203, Criminal Procedure Code, on a consideration of the complainant's statement on oath and the Police papers.

In the circumstances, the decision of the District Magistrate to hold a judicial inquiry himself was certainly not that of an officer who had prejudged the case. The benevolent, if mistaken, effort to obtain sanction for a Pleader for Fatima is a further indication of his impartial attitude.

Turning to the actual charges against McCormick, I think it is evident that he at first made false statements in defence to the Police. He denied bringing the girl Ainah to his house. The witnesses Ma Son and Ma Pe Yin also told lies on his behalf when they were first examined. McCormick, no doubt, got wind of the impending charge of kidnapping and perhaps feared that it would be sufficient for a conviction to prove that he took the girl away even though he did so with the intention of treating her medically. His first impulse was, therefore, to deny taking the girl at all. It is at least doubtful whether his contradictory statements to the Police would be relevant against the accused, and in any case the lies he told the Police are not really material now. He admitted to the Magistrate that he took the girl away, and the essential question is as to his intention in doing so. If he took her for an improper purpose, it would be kidnapping even if Me Son consented. For that would be a violation of the mother Fatima's right as natural guardian. In making over the child to Me Son, it cannot be presumed that Fatima gave Me Son authority to part with the custody of the child for improper purposes. If, on the other hand, McCormick took the girl, as he says he did, merely to treat her medically for a certain discharge, that would not be an infringement of the natural guardian's right, for it may be assumed that Fatima would have approved of it. The case, therefore, stands thus. Either McCormick took the child intending to subject her to sexual intercourse and did actually outrage her, or else he took her with the lawful purpose of treating her medically. In the former case, the charge of kidnapping would fade into insignificance beside the more heinous charge of rape; while in the latter case there would be no kidnapping at all. In other words, if the charge of rape fails, the charge of kidnapping also falls to the ground.

In support of the rape charge, we have the girl Ainah's own statements and the medical evidence. Ainah on different occasions gave different and conflicting accounts of the circumstances of the alleged rape and she is plainly an untrustworthy witness. The evidence of the medical officer, Daulat Ram, at the magisterial inquiry favours the view that the girl was raped by some one, but it is open to strong suspicion as it is inconsistent with earlier statements of the same witness,

in which he said that penetration could not have possibly taken place as the girl was too young. He did not qualify his earlier statement by saying that partial penetration could have occurred. He merely said that the girl might have been "tampered with" as the hymen was ruptured, adding that the insertion of douche would account for this: the Civil Surgeon was not examined by the District Magistrate; but his letter to the Sub-Divisional Magistrate on 29th July shows the nature of the evidence he would be prepared to give. His opinion was that complete penetration was impossible. His remarks as to the pain caused merely by inserting the finger suggest further that even partial penetration would result in serious injuries to so young a girl and it is hard to believe that all trace of such injuries would have disappeared even after the lapse of three or four months.

It is equally hard to believe that if the girl had been treated by McCormick in the manner described by her, the matter could remain secret for several months, or that the whole neighbourhood would conspire to shield McCormick from punishment. During the period of three months or longer which Ainah spent at Ma Pe Yin's, there is no proof beyond the girl's bare statement that she was under any restraint. During part of that time McCormick was away at Penang, and he asked the Deputy Commissioner to occupy his empty bungalow, a strange act of bravado on McCormick's part if the girl Ainah was then recovering from the effects of rape in Ma Pe Yin's house close by. Fatima's alleged visit to demand the girl would be before McCormick went to Penang but would be after the alleged rape. Fatima did not press her demand when McCormick assured her that Ainah was happy and well fed with him. The Deputy Commissioner actually stayed at the house for a few days while Ainah was at Ma Pe Yin's. No body said a word to him about Ainah. Mahomed Din, who was on the worst of terms with McCormick saw and spoke to the Deputy Commissioner but mentioned nothing about this case of kidnapping and rape although he knew that Ainah was at Ma Pe Yin's place then and must almost certainly have known if the girl had been outraged. If there had been any foundation for such a charge, Mahomed Din would not have been slow to inform the Deputy Commissioner for McCormick's discomfiture.

Seeing that the girl herself is untrustworthy, that the evidence as to her physical state is insufficient to support a charge of rape, and that charge is, moreover, improbable in itself, I think the District Magistrate was right in disbelieving it. The charge of rape being untrue, there is no adequate reason to reject the accused's explanation that he brought the girl to his house to treat her medically. This explanation accounts for all the facts proved in evidence. In considering McCormick's motive in taking the child, it must be remembered that according to the record the child was given to McCormick by her mother about two years earlier and that the child then stayed two months with McCormick. She was withdrawn from McCormick's care only because Fatima's relations accused her of selling her children. It is not suggested that McCormick had any improper motive in taking the child on that former occasion when she was only 9 or 10 years old. So also there is no *prima facie* probability that he acted from an improper motive in the present instance. McCormick's conduct in examining the girl privately deserves strong condemnation but I am unable to see that it amounted to a criminal offence.

I agree with my learned colleagues and with the District Magistrate in thinking that the charges against McCormick originated in the breast of Mahomed Din who bore McCormick a grudge. It appears that Ainah's father Malassa refused to bring a charge against McCormick; but after Malassa's death, Fatima was persuaded by Mahomed Din to lay a complaint. She was in great straits at the time and would be specially susceptible to Mahomed Din's influence. She admitted to the Magistrate that it was Mahomed Din's influence. She admitted to the Magistrate that it was Mahomed Din and the Sub-Assistant Surgeon, Daulat Ram, who prevailed on her to take proceedings. She was not particularly anxious to get her daughter back as she was too poor to support the child. She had no mind to bring a case against McCormick at all. She was told if she did not do so, her co-religionists would ex-communicate her for allowing her daughter to stay with McCormick. She, therefore, brought

the charge of kidnapping egged on by Mahomed Din and two days after the recovery of the child, she brought the charge of rape under the same influence. Fatima was nothing but a puppet in the hands of Mahomed Din who played upon her fears and thereby for motives of his own induced her to bring these charges.

I concur in thinking that we should dismiss the petition without calling on the respondent to show cause.

Petition dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 134 OF 1912.

November 28, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

CHENNAPPA BASAPPA—ACCUSED.

Bombay Prevention of Gambling Act (*IV of* 1887), s. 12 *a*)—*Public place*—*Murgi-Swami Math at Haveri.*

The Murgi-Swami Math at Haveri, in the Dharwar District of the Bombay Presidency which is enclosed in a compound wall, is off the highway, is managed by a Swami as trustee for the Lingayet community who has power to keep people out if he chooses, and is not a public place within the meaning of section 12 (*a*) of the Bombay Prevention of Gambling Act, 1887.

Criminal reference made by the District Magistrate of Dharwar.

GROUNDS—"The whole case turns on whether the Murgi-Swami Math at Haveri is a public place within the meaning of section 12 (*a*) of the Act. The Math is enclosed in a compound wall and is off the highway. It is managed by a Swami presumably as a trustee to the Lingayet community and though it is open to all Lingayets and to other castes subject to certain restrictions, it is apparently the fact that the Swami can keep people out if he chooses. In *Emperor* v. *Hussein Noor Muhammed* (1), Jenkins, C. J., has laid it down that a public place means 'a place of the same general character as a road or thoroughfare.' A Math such as is described above can hardly be said to partake of such general character. The case, therefore, does not fall under section 12 of the said Act."

JUDGMENT.—We agree with the learned District Magistrate that the Math in which the card-playing in this case was carried on cannot be regarded as a public place within the meaning of the Bombay Prevention of Gambling Act IV of 1887. We must, therefore, set aside the convictions of the accused and direct their acquittal and discharge. The fines, if paid by them, should be refunded to them.

Conviction set aside.

(1) 8 Bom. L. R. 22; 3 Cr. L J. 216; 30 B. 348.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEALS NOS. 514 TO 518 OF 1912.

August 19, 1912.

Present:—Mr. Justice Hartnoll and Mr. Justice Young.

PO LAN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR.

Penal Code (*Act XLV of* 1860), *ss.* 71, 364, 365, 387—*Abduction in order to extort money*—*Wrongful confinement necessary consequence*—*Murder not necessary*—*Relatives put in fear of death to abducted person in order to extort money*—*Separate sentences.*

Where a person is abducted in order that money may be extorted from his relatives, a conviction under section 365 of the Penal Code would be justifiable, because though the main object was to extort money, yet it necessarily followed that the abductor had the intent to secretly and wrongfully confine him. Section 364 of the Penal Code would not apply, as it does not follow as a matter of course that the abducted person was in danger of being murdered. And if, in order to compel the relatives of the abducted person to ransom him, they are put in fear of death of the victim, the provisions of section 387 of the Penal Code would be applicable. But, regard being had to the first part of section 71 of the Penal Code, separate sentences cannot be passed under both sections 365 and 387 of the Code.

Queen-Empress v. *Aw Wa*, 1 L. B. R. 33, followed.

Courts must administer the law as they find it, though punishment provided by law for a crime may be insufficient.

JUDGMENT.

HARTNOLL, J.—On the night of the 4th increase of Pyatho last (23rd December 1911), Maung Pein, son of one Maung Tun, and Maung Tun's cooly Maung Po Lin were sleeping at Maung Tun's threshing floor outside the village of Kayu-chaung

when they were seized and blindfolded by a gang of men and taken away. After going some little distance, Maung Po Lin was released with instructions to go to Maung Pein's father Maung Tun, and to tell him to bring Rs. 3,500 to Titidusan. Maung Po Lin told Maung Tun as requested. Maung Tun relates how he went to Okkan and borrowed Rs. 2,000 on the 5th increase. The next day—the 6th increase—he went to Titidusan with the Rs. 2,000 but found no one. He went again in the evening without result. On the 8th increase, Tun Hla and Nawa brought him three threatening letters, two of which Tun Hla states he found on Maung Tun's land fastened in a cleft bamboo and one of which Nawa states that he found near his threshing floor. The one Nawa found threatens Nga Pein with death unless the ransom Rs. 3 500 were paid. The other two purported to come from Nga Pein though they were not in his handwriting and are to the effect that he will have to die unless ransomed. Maung Tun made another attempt by going to the place appointed —Gindeiksan—but nothing transpired. The same night, owing to the action of Maung Shwe Ya, Ywathguyi of Sibin, a village in the vicinity, Maung Pein was rescued. There was a hut outside Sibin occupied by another Maung Tun the inmates of which Maung Shwe Ya suspected. He made inquiries accordingly. In the evening of the 8th increase, he saw appellant Maung Shein in the village and questioned him. Maung Shein is the cousin of Maung Tun's wife—the Maung Tun who lived in the suspected hut. Maung Shwe Ya had information that on the 8th increase he had been with three other occupants of the hut. Maung Shein then admitted that he, Po Lan, Ya Gyi, Po Thwe, Pan Nyun and Po Kyaw had abducted Maung Pein, that he and Ya Gyi, Po Lan, and Po Thwe had gone to demand the ransom and that Pan Nyun was watching Maung Pein in the Kangale jungle. Maung Shwe Ya sent out a party to arrest Pan Nyun and find the boy. This party did not find the boy at the spot indicated in the Kangale kwin but on the way they met Pan Nyun, Po Kyaw and Shwe Nyun Gyi. These men were taken to Maung Shwe Ya. Pan Nyun and Po Kyaw were arrested. Shwe Nyun Gyi offered to point out the boy and was sent off with a party to do so. He pointed out Maung Pein who was in the bed of a creek about 100 feet from where the first party had already been. The lad was in a sitting position with his arms tied tight behind his back round a sapling. He was blindfolded and insufficiently clad. It was the cold weather. He was in a great state of exhaustion He lost his senses before he reached the village, and certain of the witnesses think that he could not have survived much longer. Maung Po Kyaw has been offered a pardon and he incriminates the appellants. Shwe Nyun Gyi also incriminates Po Kyaw and Pan Nyun ; but there is reason to think as he pointed out the lad that he was concerned. Po Kyaw's wife Ma Pwa Thin and Maung Tun, the occupier of the house, also incriminate the appellants. At Sessions, Maung Tun did not do so except by implication ; but before the Committing Magistrate he did and his deposition before the latter Court was admitted as evidence at the trial under section 288 of the Code of Criminal Procedure. Now Po Thwe and Pan Nyun are Maung Tun's sons. Po Kyaw is his son-in-law. Maung Shein is his wife's cousin. Po Lan and Ya Gyi are his coolies. Po Lan, Ya Gyi, Pan Nyun and Po Kyaw live in his hut and Po Thwe in a hut near by. Nga Shein lived in the neighbouring village of Sibin. Po Kyaw was clearly in the crime for he produced on the 9th increase a concertina and umbrella taken away when Nga Pein was abducted. I can see no good reason for doubting that Po Kyaw has substantially told the truth. There must have been a gang to have taken away the two men. Nga Shein when questioned implicated the same men as Po Kyaw. When his information was acted on, Pan Nyun and Po Kyaw are found near where Nga Pein was recovered. It is natural that those who lived with Po Kyaw and his relatives should be involved. A handkerchief left at the scene of the abduction is identified by Po Thaung, an independent witness, as belonging to Po Thwe. It is of a distinctive character having a crochet border. I believe Maung Tun's statement made before the Committing Magistrate. He is not likely to have

implicated his sons, cousin and coolies unless they were in the abduction. As regards Ma Pwa Shin, it must be remembered that, though she is Maung Po Kyaw the informer's wife, she is sister to Po Thwe and Pau Nyun and related to Maung Shein. The defence is a denial but it is not substantiated in any trustworthy manner. It seems to me proved that all the appellants took part in the abduction of Maung Pein and in the subsequent extortion. As regards the extortion, section 34 of the Indian Penal Code applies.

Maung Po Lan has been convicted under sections 364 and 387 of the Indian Penal Code. He has been previously convicted under sections 379 and 380, and he was sentenced to transportation for life for each offence, the sentences to run concurrently. The other four appellants have been convicted under section 364 of the Indian Penal Code and sentenced to transportation for life.

Section 364 is in the following terms: "Whoever kidnaps, or abducts, any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, etc., etc." In the present case, it has been found that appellants abducted Maung Pein in order that he might be so disposed of as to be put in danger of being murdered. After the most careful consideration, I have come to the conclusion that the section is not applicable. Maung Pein was abducted in order that he might be held to ransom. If it was a necessary consequence that he would also be so disposed of as to be put in danger of being murdered it might be held that there was the double intent and that section 364 would apply as well as one of the extortion sections when the demand for ransom came to be made. For instance in this class of crime which is of recent growth in Burma, there is always present the intent to cause the person abducted to be secretly and wrongfully confined and so section 365 can always be held to apply as well as the appropriate extortion section, for it is always a necessary consequence of the abduction. But it is not a necessary consequence of the crime that the victim is always in danger of being murdered, and so that intent has always to be proved. Unfortunately, the character of the crime is such that victims are sometimes murdered owing to such reasons as the victim identifying the abductors, or the abductors being enraged at not getting the ransom required; but it cannot be said that the abduction is always in order to murder or so dispose of as to be in danger of being murdered. That may be an indirect consequence in certain instances. The main object of the abduction is in order to obtain money. In a case I decided a few days ago, a little girl was abducted and kept hidden in a forest the whole day. She was released in the evening when ransom was paid. As far as the evidence went, she was never in danger of being murdered during the period of her incarceration. I am, therefore, unable to hold that section 364 is applicable in this case. Maung Pein was abducted in order to extort money from his relatives and as it did not follow as a matter of course that he was in danger of being murdered, the conviction under section 364 cannot, in my opinion, stand. A conviction, however, under section 365 is justifiable as though the main object was to extort money yet it necessarily followed that the abductors had the intent to secretly and wrongfully confine him. But under section 365 the maximum sentence is seven years' rigorous imprisonment and according to the learned Sessions Judge such a term is not sufficient in a case of this nature. It is, therefore, a question for consideration as to whether another section as well as section 365 cannot be made applicable to Maung Ya Gyi, Pau Nyun, Po Tawe and Nga Shein so that an extra sentence can be imposed on them. They were charged under section 387 and that section is clearly applicable to them. Its terms are: "Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death, or of grievous hurt to that person, or to any other, shall be punished, etc. etc." and extortion for the purpose of this case is "Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property commits extortion." The four men can clearly be convicted under section 387; but the question arises whether,

having in view the provisions of section 71 of the Indian Penal Code and the explanation to section 35 of the Code of Criminal Procedure, two sentences can be passed. The question was discussed in the Full Bench Ruling *Queen-Empress* v. *Aw Wa* (1). The first part of section 71 of the Indian Penal Code is: "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided." In the present case, was the abduction a part of the offence under section 387? The abduction was in order to commit extortion. It commenced the process of putting Maung Pein's relations in fear of death to Maung Pein and to my mind is part of the facts constituting the offence under section 387. Illustration (*b*) to section 383 is very apposite in considering the present facts. I would, therefore, hold that the facts of the case come within the rule stated in the first part of section 71 of the Indian Penal Code and that being so, there cannot be separate sentences passed under both sections 365 and 387. It may be that the appellants other than Po Lan in the present case and persons charged in similar cases may not receive sufficient punishment for crimes of this nature and in this respect I am inclined to agree with the learned Sessions Judge for in the present case Maung Pein was wrongfully confined for four days and nearly died and in similar ones there is grave danger of murder and sometimes murder; but the Courts can only administer the law as they find it. If the State considers the punishment for this kind of crime insufficient there can be legislation.

I would reverse the conviction on Maung Po Lan under section 364 and set aside the sentence passed on him under that section. I would confirm the conviction on him under section 387. As he is liable under section 75 of the Indian Penal Code to enhanced punishment and appears to have been the ring-leader in this crime, I would confirm the sentence of transportation for life passed under section 387. As regards Po Thwe, Pan Nyun, Ya Gyi and Nga Shein, I would alter the convictions on them to convictions under section 365, Indian Penal Code, and alter their sentences to sentences of seven years' rigorous imprisonment.

YOUNG, J.—I concur.

Sentences altered.

(1) 1 L. B. R. 33.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 40 OF 1912.

June 24, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

SHEOPAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 413—Joint trial by first class Magistrate—Appealable sentence against one of accused—Right of appeal of other accused.

If at a joint trial of two or more persons by a first class Magistrate, an appealable sentence is passed against any one of them, all the persons convicted have the same right of appeal even though their sentences may be of the kind against which an appeal would be barred by section 413 of the Criminal Procedure Code, if the trial had not been joint.

Ba Thaw v. *Emperor*, 9 Cr. L. J. 356; 4 L B. R. 354, relied upon.

Reg. v. *Kalubhai Meghabhai*, 7 B. H. C. R. 35, Cr., not followed.

Appeal against an order of the Sessions Judge of Hardoi, dated 4th April 1912.

Mr. *S. N. Sinha*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—It appears that three persons, *viz.*, Mohan, Jhamna and Sheopal, were convicted of theft under section 379, Indian Penal Code, by Shah Zahir Alam, first class Magistrate, on the 29th of February 1912. Mohan was sentenced to undergo three months' rigorous imprisonment and Jhamna was awarded one month and Sheopal was fined Rs. 20, or in default was to undergo one month's imprisonment. Sheopal preferred an appeal to the Sessions Court at Hardoi on the 3rd of April 1912, which was summarily rejected on the 4th of April 1912, on the ground that no appeal lay from a sentence of fine of Rs. 20. Sheopal has filed the present application in revision under section 435 of the Code of Criminal Procedure. He challenges the order of the learned Sessions Judge and contends that an appeal does lie. The order of the lower

Court summarily rejecting the appeal of the applicant was presumably passed under section 413 of the Code of Criminal Procedure. It has to be seen whether that order can be justified on the language of the said section. A person convicted by a first class Magistrate has the right to appeal to the Court of Session under section 408 of the Code of Criminal Procedure. That right is limited by the provisions of section 413 of the Code. The learned Judge has construed section 413 to mean that where a person convicted by a first class Magistrate is sentenced to a fine not exceeding Rs. 50, the prisoner has no right of appeal even though his comrades in the trial with him may have been sentenced to imprisonment exceeding one month or to fine exceeding Rs. 50. The applicant, on the other hand, argues that, if several persons are tried jointly and convicted and one or more of them are sentenced to imprisonment exceeding one month or to fine exceeding Rs. 50 and others are sentenced to imprisonment not exceeding one month or to fine not exceeding Rs. 50, the latter also have the right of appeal. The contention for the applicant is based on the language of section 413 of the Code of Criminal Procedure. It is said that the law does not say that a person sentenced to imprisonment for a term not exceeding one month or to a fine not exceeding Rs. 50 is precluded from appealing but distinctly sets forth the sentence passed in the case as the test whether the case is appealable or not. It, therefore, follows that in the joint trial of several persons if one of them gets an appealable sentence, the others will have the right of appeal even though their sentences may not impose imprisonment exceeding one month or fine exceeding Rs. 50. The learned Counsel for the applicant in support of his contention relies upon the case of *Ba Thaw* v. *Emperor* (1). In that case, a Full Bench of Chief Court of Lower Burma held that "if, at the joint trial of two or more persons by a first class Magistrate, an appealable sentence is passed upon any one of them, all those convicted have the same right of appeal, even though their sentences may be of the kind against which appeal would have been barred by section 413 of the Code of Criminal Procedure, if they had been tried singly."

There is very little case-law on the point. We have been referred to only one case more. It is the case of *Reg.* v. *Kalubhai Meghabhai* (2). In that case, the Sessions Judge took the view that the applicant is contending for. But the High Court, without giving any reason, reversed the Sessions Judge's order.

We think that the Chief Court of Lower Burma has placed the right construction on section 413 of the Code of Criminal Procedure. We, therefore, set aside the order of the learned Sessions Judge and direct that the appeal of Sheopal be admitted and disposed of according to law.

Order set aside.

(1) 9 Cr. L. J. 356; 4 L. B. R. 354.

(2) 7 B. H. C. R. 35 Cr.

LOWER BURMA CHIEF COURT.

CRIMINAL MISCELLANEOUS APPLICATION NO. 38 OF 1912.

September 26, 1912.

Present:—Sir Charles Fox, Kt., Chief Judge.

G. W. HENDERSON—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 497—Bail in non-bailable cases—High Court's power to release on bail—General law to be followed as a rule—Exceptional circumstances.

Section 497 of the Criminal Procedure Code of 1898 says nothing about taking into consideration the likelihood or unlikelihood of an accused person absconding, or any other matter except whether or not there are reasonable grounds for believing that the accused is guilty of the offence charged against him.

Magistrates are bound to follow the provisions of section 497 in dealing with the question of admitting a person to bail who is accused of a non-bailable offence.

Although a High Court is not limited within the bounds of section 497 and has absolute discretion in the matter, yet as the Legislature has placed the initial stage of dealing with crimes upon Magistrates and has in effect enacted that persons accused of non-bailable offences shall be detained in custody except when, in the opinion of the Magistrate, there are no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is as a rule bound to follow the general law and to depart from it only under very special circumstances, especially in the initial stages of a case,

JATINDRA NATH *v.* EMPEROR.

Mr. *Dawson*, for the Applicant.

The *Government Advocate*, for the Crown.

JUDGMENT.—I understand that the accused was arrested by the Police because the uttering of four forged currency notes (each for Rs. 1,000) was traced to him. He is charged with an offence punishable under either section 489B or section 489C of the Indian Penal Code. He was brought before a Magistrate and the Police applied for a remand to complete their investigation. The accused applied to the District Magistrate to be released on bail pending the investigation and trial. The District Magistrate refused the application. The part of the Magistrate's order which mentions that the accused had made contradictory statements appears to me to have been unfortunate, as possibly tending to prejudice the accused in his defence when he comes to be tried. It is still more unfortunate that statements, as to the accused having made contradictory statements, should have been published. The statements could only have been made to a Police officer or officers, and the law is that no self-incriminating statements by an accused to a Police officer, such as contradictory statements must tend to be, can be proved against an accused person at his trial.

One of the offences charged against the accused is non-bailable, consequently the District Magistrate was bound, under section 497 of the Code of Criminal Procedure, to refuse to release the accused on bail if there appeared to him to be reasonable grounds for believing that the accused had been guilty of the offence charged against him.

The other part of his order shows that the Magistrate considered in effect that the tracing of the four forged notes to the accused afforded reasonable ground for believing that he had been guilty of the non-bailable offence charged against him.

In my judgment, the District Magistrate was justified in his conclusion and in refusing to release the accused on bail

Certain *dicta* of Judges in England on the subject of releasing on bail have been referred to as showing the governing principles on the subject, but in this country any case in which the subject arises must be decided in Magistrate's Courts in accordance with what the Legislature has enacted in section 497 of the Code of Criminal Procedure until that section is altered by the Legislature. The section says nothing about taking into consideration the likelihood or unlikelihood of the accused person absconding, or any other matter except whether or not there are reasonable grounds for believing that the accused has been guilty of the offence charged against him.

It is, no doubt, the case that a High Court is not limited within these bounds, and that it has absolute discretion in the matter, but the Legislature having placed the initial stage of dealing with crimes with Magistrates, and having in effect enacted that persons accused of non-bailable offences shall be detained is custody except when there are, in the opinion of the Magistrate dealing with a case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court, in my judgment, is bound to follow the general law as a rule, and not to depart from it except under very special circumstances, especially so in the initial stages of a case. I see no such circumstances in this case, and I dismiss the application.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1746 OF 1912.

February 24 1913.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

JATINDRA NATH CHAKRAVARTI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Restoration to possession—Time when order to be made—Whether to be made simultaneously with order of conviction—Notice to accused if necessary.

It is not essential in law that an order restoring possession, should find a place in the actual judgment. It must be immediate, that is directly arising out of the judgment of the Court convicting in the case and without any fresh materials having in the meantime been produced.

Mohan Theta v. *Raichand Basui*, 4 C. W. N. 308, explained.

Narayan Govind v. *Visaji*, 23 B. 494 and *Mohunt Luchmi Dass* v. *Pallat Lall*, 23 W. R. Cr. 54, followed.

Before an order under section 522 is made, the accused is in law not entitled to any notice.

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Therefore, such an order passed four days after the conviction of an accused, on the express findings in the judgment without any fresh materials and without any notice to the accused, is competent and not without jurisdiction.

Rule against the order of the Deputy Magistrate of Krishnaghar, dated September 19th, 1912, directing the Nazir to restore possession, under section 522 of the Criminal Procedure Code, to Poresh Nath Rakhit, of the disputed land from which he had been forcibly dispossessed by Jotindra Nath Chakravarti and others.

Babus *Atulya Charan Bose* and *Bir Bhushan Dutt*, for the Petitioners.

Babus *Manmotha Nath Mukherji* and *D. N. Bagchi*, for the Opposite Party.

JUDGMENT.—This was a Rule upon the District Magistrate of Nuddia to show cause why the order of the Deputy Magistrate of Ranaghat under section 522, Criminal Procedure Code, should not be set aside on the ground that it was passed without any notice to the petitioner, and not simultaneously with the order of conviction.

Were this a question of first impression, we should be inclined to hold that under the law as it now stands, no notice was necessary to the other side inasmuch as the order for restoration of possession arises immediately out of the findings of the Magistrate in his judgment and is amenable to appeal. Under clause (*d*) section 423, Criminal Procedure Code, we should also be inclined to hold that the word "simultaneous" must be taken to be equivalent to "immediate" in its real sense, that is, directly arising out of the proceedings without any fresh decision on facts not before adjudicated upon being imported. It is obviously impossible that any two orders, whether delivered by word of mouth or in writing, can be in the physical sense simultaneous.

The only questions that remain are whether it is essential in law that the order restoring possession should find a place in the actual judgment and whether the defendants, by the subsequent passing of an order immediately arising out of that judgment without their knowledge, as is alleged, have been deprived of their right of appeal.

As regards the first point, there is some conflict of opinion in the various High Courts in India. In the case of *Mohan Theta* v. *Raichand Basui* (1), the Court held that an order under section 522 must be made simultaneously with the order of conviction. No reason is given for their conclusion but Stanley, J., who delivered the judgment, said that according to his recollection the question had come before Prinsep, J., and himself and they held that it must be so made. The learned Judges say they are prepared to follow that ruling which is also supported by the view taken by the Sessions Judge who made the reference in the case of *Ram Chandra Boral* v. *Jityandria* (2).

As regards this, we may remark that it does not appear that the unreported judgment was before the Court and the note of Sir Henry Prinsep in his Commentaries on section 522 of the Code of Criminal Procedure shows that he was of a contrary opinion. He says:—"An order under section 522, Criminal Procedure Code, is not in continuation of the former proceedings of the trial, in which conviction was bad, and may be made on the application of one of the parties after such conviction." In the reference made by the Sessions Judge in *Ram Chandra Boral's* case (2), after pointing out that there must be a limit to the time after which such an order can be passed, the learned Judge says:—"One very important reason in favour of taking this view is that whereas orders under sections 517, 518 and 519 of the Code are subject to appeal, revision and reference, there is no such special provision with regard to an order under section 522". This was held in the case of *Ram Chandra Mistry* v. *Nobin Mirdha* (3), but it was pointed out in the case of *Gourhari Gope* v. *Alay Gopini* (4) that this ruling is now obsolete as clause (*d*) section 423 of the present Code of Criminal Procedure provides for the making by an Appellate Court of any consequential or incidental order that may be just and proper.

The ruling in *Mohan Theta's* case (1) does not, therefore, appear to be based on any principle or authority under the present Code, and as the word "simultaneous" has no meaning, if strictly applied, we can only take that ruling to mean that the order under

(1) 4 C. W. N. 308.
(2) 25 C. 434; 2 C. W. N. 305.
(3) 25 C. 630; 2 C. W. N. 225.
(4) 29 C. 724; 6 C. W. N. 713.

section 522 must be 'immediate' that is directly arising out of the judgment of the Court, convicting in the case and without any fresh materials having in the meantine been produced.

This would meet the objection of the learned Sessions Judge in *Ram Chandra Boral's* case (2) that there must be some limitation to the time within which the order must be passed.

In the latest reported case, *Bhagat Shaha* v. *Siddique Ostagar* (5), the question was as to the power of an Appellate Court to pass an order under section 522 and one of us who delivered the judgment in that case said:—"We do not think it necessary to discuss the divergence of opinion between this Court and the Bombay Court, in *Narayan Govind* v. *Visaji* (6), as regards the time at which such an order should be passed, but we may say that were we to agree with the view taken by the Bombay Court, the want of jurisdiction in the Appellate Court would thereby be rendered still more clear; for the Bombay Court says that the order made under section 522, Criminal Procedure Code,.....is an independent order, and may, therefore, be made subsequent to the date of the conviction of the offender and need not be made at the same time as the conviction. If that is so, the Court which had the conviction before it on appeal obviously had nothing whatever to do with the order under section 522 and could not pass an independent order directing restoration of the property." This latter proposition seems doubtful in view of the amended section 423 (*d*) but it would not affect the soundness of the decision in the Bombay case.

We accept the authority of this Court cited by Mr. Justice Ranade in the case of *Mohunt Luchmi Dass* v. *Pallat Lall* (7) "that the foundation of the order should be the finding of the Court," but that does not mean that the order should be contained in the judgment or be passed before the judgment is signed.

In the case of *In re Batakala Pottiavadu* (8), it was held that the conditions precedent that must exist before an order can be made under section 522 are:—(1) some person must have been convicted of an offence "attended by criminal force" and (2) some person must have been dispossessed of immoveable property by such force.

There is, therefore, really no conflict between this Court and the other Courts if the somewhat doubtful and inadequate ruling in *Mohan Theta* v. *Raichand* (1) is interpreted in the light of common sense and the plain meaning of words.

Eliminating the unfortunate and unintelligible term "simultaneous" and following the decision of all the Courts that the order under section 522 is an independent order and taking as our authority the clear and intelligible doctrine laid down in *Mohunt Luchmi Das* v. *Pallat Lall* (7), we have only to see in this case whether the order had for its foundation the findings of the Court in the judgment of conviction.

It is perfectly clear that it had. It was passed four days after on the express findings in the judgment and without any fresh material and it seems to us to have been a competent order. It will be observed that where the Code intends that an order should be passed at the time of passing sentence, as in section 106 and other sections, it says so in terms. This is a very strong argument for a reasonable construction being placed on section 522 without in any way opening the door to delay or to any order which is not strictly based on the findings in the judgment of conviction. As regards the second point, it is urged that the defendants were in Jail and when they preferred their appeal against the conviction, they had no knowledge of the order under section 522 and, therefore, did not appeal against it. It is only necessary to point out that under the amended section 423 (*d*), it was not necessary for them to appeal. The Appellate Court could pass any order for consequential relief that was just or proper. The appeal was dismissed and was brought in revision to this Court which refused to interfere with the conviction and sentence but held that inasmuch as the Sessions Judge in appeal had not had the order under section 522 before him, there would be no bar to the petitioners making an application in revision against that order.

That application is now before us and the only objection taken to the order is, not that

(5) 39 C. 1050; 16 C. W. N. 811; 16 Ind. Cas. 176; 13 Cr. L. J. 608.
(6) 23 B. 494.
(7) 23 W. R. 54 Cr.
(8) 26 M. 49; 12 M. L. J. 447.

it is wrong on the merits, or does not follow the judgment of conviction, but that it is without jurisdiction because it was passed without notice and not simultaneously with the conviction.

The plea that the Magistrate had no jurisdiction to pass such an order being *functus officio* was not entertained by the learned Judges who issued this Rule. We do not think the petitioners have been in any way prejudiced by want of notice to which they were in no way entitled under the law.

Had there been any merits in their appeal, the order would have been rescinded with the convictions either by the Sessions Judge or this Court.

The Rule must, therefore, be discharged upon both points and the order under section 522 upheld.

Rule discharged.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 82 OF 1912.

July 25 1912.

Present:—Mr. Eales, J. C.

NGA PO TEIN—APPELLANT

versus

EMPEROR- RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 350, 537—No demand or refusal—Omission of Magistrate to ask accused whether he would exercise right—No material irregularity or failure of justice.

Section 350 of the Criminal Procedure Code, 1898, confers on an accused person the right to demand a re-hearing of evidence, and does not actually prescribe that the Magistrate shall ask the accused. Where there is no demand or refusal but merely an omission to exercise the right reserved by proviso (*a*) to section 350, the accused is not necessarily materially prejudiced, nor is a failure of justice occasioned by the omission, the error being one which is curable under section 537 of the Criminal Procedure Code.

Amir Khan v. *Emperor*, 3 P. R. 1903 Cr., followed.

Queen-Empress v. *Po Min*, U. B. R. 1897-1901, I, 187, distinguished.

The mere fact that an accused stated before a Magistrate at the time of the framing of the charge that he did not wish the witness to be re-called, should not deter the Magistrate's successor from acting under section 350.

Appeal from the order of the District Magistrate Minbu.

Mr. *H. M. Lutter*, *Government Prosecutor*, for the Crown.

JUDGMENT.—This is an appeal by one Po Tein, against the conviction and sentence of five years' rigorous imprisonment passed upon him by the District Magistrate, Minbu, under section 392-75 of the Indian Penal Code.

Appellant was unrepresented, and Mr. Lutter appeared for the Crown.

The proceedings show that the complainant, one Mi Se Po, went out on the 8th June 1911 to pick mushrooms, and when she had got a little way from the village, she was set upon by a man who took her two earrings from her, threatening her with violence if she called out. As soon as the accused left her, Mi Se Po ran to her village and met Maung Nyun and Kya Zan and complained to them what had happened. The two men went with her and she pointed out a man. They called out to this man to stop, but he went on, and so they ran after and caught him up. What followed is only possible in a country like Burma where crimes such as these are not uncommon. Instead of immediately arresting the accused, they parleyed with him, and tried to get back the property, and while Mi Se Po and Tha Zan went away a little to the side, Maung Nyun spoke to the man. He said he had thrown away the earrings and offered to look for them. While this was going on, another man, Tha Su, came up. The three then, as the earrings could not be found, made some attempt to arrest the man, but he ran off. That evening, a further search was made, and one of the earrings was found at the scene of the alleged robbery. The accused was not arrested at the time, and it was not till November that he was arrested at Pakokku.

The evidence against the accused depends upon the identification by the complainant who had never seen him before, and by the witnesses, Maung, Nyun, Kya Zan and Tha Su. The two former of these three men said they had both known him slightly before, while the 3rd witness, Tha Su, states that he had known the accused all his life.

All four identified the accused as the man whom the complainant charged with having committed the robbery, and it is noticeable that the woman, in her report to the Police, mentioned Po Tein's name and said that she knew it because that was the name by which the other witnesses had called him.

NGA PO TEIN *v.* EMPEROR.

In his grounds of appeal, the appellant states that he could not have committed the robbery as he was elsewhere in the Yaw country, and he complains that the District Magistrate did not call his witnesses. Before the District Magistrate, when he was charged, he called no witnesses for the defence, and merely stated that if he were guilty, he ought to have been arrested at once.

There are two points to be considered in this case. I find that the District Magistrate, Mr. Christie, who took all the witnesses except the complainant, Mi Se Po, adjourned the case in order that Mi Se Po might be examined, because she could not appear on the day when the case was called, as she was in childbirth at the time. However, he charged the accused because he obviously considered that the evidence was sufficient to support the charge, and he fixed the case for hearing on the 10th of April. In the meantime, he was transferred and succeeded by Captain Lord. Captain Lord examined Mi Se Po and passed orders in the case. There is nothing on the record to show that he either asked the accused if he wished to re-call the witnesses or whether the accused asked them to be re-called. It is on the record that accused, when charged by Mr. Christie stated to Mr. Christie that he did not wish the witnesses to be re-called, but this, I think, should not have deterred Captain Lord from acting under section 350, Criminal Procedure Code.

The accused has not made this a ground of appeal, and, therefore, there is no reason to believe that he asked that the witnesses for the prosecution, whom Mr. Christie had heard, might be re-called, or that Captain Lord refused to re-call them. As the accused was not represented by a Counsel, it is probable that he did not know his rights under section 350, and, therefore, did not exercise them. There is no leading case in Upper Burma which is on all fours with the present case. The only case that I can find is that of *Queen-Empress* v. *Po Min* (1). In that case, it was laid down that it is "the duty of the Magistrate as a matter of practice in these cases to warn the accused and to record in the proceedings the fact that they have been so informed." But *Po Min's* case(1) is not on all fours with the present case, because it was held that section 350 did not apply, for in *Po Min's* case(1), the proceedings, and not the Magistrate, were transferred.

The learned Government Prosecutor urged that the accused had had a perfectly fair trial, and that there was no material irregularity or failure of justice in the present case such as would justify the case being quashed and a re-trial ordered. He has quoted a recent case of the Punjab Chief Court, *Amir Khan* v. *Emperor* (2), which is exactly on all fours with the present case, and where it was held that where there was no demand or refusal but only an omission to inquire from the accused whether he wished to exercise the right reserved by proviso (*a*) to section 350, the accused had not been materially prejudiced, nor was a failure of justice occasioned by the omission, but that the error was one which was curable under section 537 of the Criminal Procedure Code.

I have carefully considered the matter, and I have gone over the evidence, and I am of opinion that there is no reason to believe that the accused was really materially prejudiced by the omission of the Magistrate to ask him whether he wished to exercise his privilege under section 350 (*a*), Criminal Procedure Code. Section 350 confers the right on the accused person to demand, and does not actually prescribe that the Magistrate shall ask the accused.

I think that in these circumstances, the omission of the Magistrate did not necessarily prejudice the accused. I do not think myself that it would have been at all likely that the witnesses would have varied their statements, or that any further cross-examination would have shaken their evidence. That being so, I consider that the proceedings are not necessarily invalidated, and I proceed to try the appeal on its merits.

I have read the evidence, and the strangeness of the story told by the prosecution is, I think, proof that it is a true one. That the villagers, instead of arresting the accused at once, should parley with him and attempt to get back the earrings, is by no means unlikely, yet it is not a story which would have been put forward in a concocted case.

I believe that the identification of the accused is correct, and that the accused did rob Mi Se Po.

(1) U. B. R. 1897—1901, I, 87.

(2) 3 P. R. 1903 Cr.

EMPEROR *v.* RAMA LALA.

As regards the allegation made in appeal that the witnesses for the defence were not called, I think that, as he told Mr. Christie, he did not wish to call any witnesses, it need not be considered. It would have been in any case very difficult for him to prove an *alibi*, considering that he got into trouble when he went to the Yaw country.

I, therefore, uphold the conviction, and in the circumstances, the sentence is by no means heavy, and I dismiss the appeal.

Appeal dismissed.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 372 OF 1912.
December 5, 1912.
Present:—Mr. Justice Batchelor and Mr Justice Rao.
EMPEROR—PROSECUTOR
versus
RAMA LALA—APPLICANT.

Penal Code (Act XLV of 1860), *s.* 339—*Wrongful restraint—Obstruction to passage of cart—No obstruction to person passing.*

Section 339 of the Penal Code requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong defined by the section is a wrong against the person and is not completed where the person is at liberty to go in any direction he pleases.

Therefore, a person cannot be said to be wrongfully restrained, when, though himself unobstructed, he is hindered from driving a bullock-cart through a passage.

Criminal application from conviction and sentence passed by the Additional District Magistrate of Surat, confirming the conviction and sentence passed by the third class Magistrate of Jalalpore.

Mr. *Manubhai Nanabhai*, for the Applicant.

JUDGMENT.—In this case, the accused has been convicted of wrongful restraint under section 339, Indian Penal Code, and sentenced to a fine. On appeal to the Additional District Magistrate, Mr. Sedgwick, the conviction was upheld. The learned District Magistrate, however, finds as a fact that the person said to have been obstructed was still able to proceed across the passage in question. That being so, we do not think that he can be said to have been wrongfully restrained, seeing that the definition under section 339 requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong here defined is a wrong against the person, and is not completed where the person is at liberty to go in any direction he pleases. That is the case here on the facts found by the Magistrate, and it appears to us to be immaterial that the person, though himself unobstructed, was hindered from driving a bullock-cart through the passage. We must, therefore, make the rule absolute, set aside the conviction and sentence and direct that the fine, if paid, be refunded to the accused.

Rule made absolute.

EMPEROR *v.* NGA SAN WEIN.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.
CRIMINAL REVISION PETITION No. 574 OF 1912.
September 17, 1912.
Present:—Mr. Eales, J. C.
EMPEROR—PROSECUTOR
versus
NGA SAN WEIN AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 403 (4), 439—*Revision—Order of acquittal—Court acquitting without calling any evidence at all.*

As a general rule, the High Court will not interfere with an order of acquittal, but it will do so where such an order is passed without examining the witnesses for the prosecution, on the mere denial of the accused that he was guilty.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—This case has been sent up by the District Magistrate, Kyaukse, and the grounds are fully set out in the accompanying order drawn up by him.

When sending the case up to me, the District Magistrate called upon the respondents to show cause why the acquittal should not be set aside and a re-trial ordered. I have read their defence, and I have had the advantage of hearing the Government Prosecutor. It has already been laid down by

my learned predecessor in the case of *Po Han* v. *Ngi Tha Le Ni* (1) that as a general rule, the High Court will not interfere with an order of acquittal, but it has the power to do so, and there can be no doubt that this power may be properly exercised in particular cases, and that where a trial has been held without jurisdiction, it appears to be very proper that an order for revision should direct a new trial. The present case is not on all fours with the case quoted. Here there is no question of jurisdiction raised. The only question is, whether or no the procedure of the Magistrate was so irregular and so illegal as to cause a failure of justice. The proceedings show that the Magistrate convicted ten of the accused on their own admissions. As regards the two other accused, the respondents in this case, who were sent up under section 10 of the Gambling Act because they denied they committed the offence, the Magistrate, though it would appear there were witnesses ready in attendance for the prosecution, acquitted them on the ground that he did not think that the evidence against them was forthcoming. This reason is a thoroughly illogical and unsatisfactory one. It was the duty of the Magistrate to see if there was any evidence, and if there was any, to see if it was sufficient to give him grounds for forming an opinion—in which case even if his decision was wrong, there would be no ground for ordering a fresh trial. But to pass orders without even calling the witnesses for the prosecution, to convict some of the accused on their own admissions, and to let the others off, simply because they denied the charge, without calling any evidence at all, does not seem to me to be in consonance with the plain directions of the Criminal Procedure Code. For these reasons, I think that there may have been a miscarriage of justice brought about by the irregularity and the illegality of the Magistrate's procedure.

I, therefore, set aside the acquittal as against these two respondents, and order that the case be re-tried.

Case remanded.

(1) U. B. R. (1897-1901) I, 91.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 958 OF 1912.

November 16, 1912.

Present:—Mr. Justice Beadon.

MUHAMMAD ISHAQ—ACCUSED—PETITIONER

versus

MUQIM-UD-DIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Powers of Appellate Court—Order of remand without jurisdiction—Subsequent proceedings void—Court of Subordinate Judge—Judge transferred from District—Court of the Judge taking over charge not identical.

Section 195 of the Criminal Procedure Code merely enables an Appellate Court to grant sanction which has been refused, or to revoke sanction which has been granted: it has no power to remand an application for fresh decision. Where an order of remand is *ultra vires*, all subsequent proceedings in consequence thereof are a nullity.

Though there is a class of Courts called Courts of Subordinate Judges, there is no Court of a Subordinate Judge as a permanent Court with a perpetual succession of Judges, and on the transfer of a Sub-Judge from a District, the Court of the Sub-Judge who takes over the pending work is not identical with the Court of the Sub-Judge, who has been transferred.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Hissar Division, dated the 5th March 1912, confirming that of the Magistrate, 1st class, Rohtak, dated the 20th January 1912, granting sanction to prosecute the petitioner.

Mr. *Sundar Das*, for the Petitioner.

Lala *Shamir Chand*, for the Respondent.

JUDGMENT.—In proceedings under section 195, Code of Criminal Procedure, sanction to prosecute the petitioner was refused by Lala Har Sukh Rai, Sub-Judge, and on appeal, the Divisional Judge set aside this refusal and remanded the application for sanction and for fresh decision.

The application then came before Lala Murari Lal, Sub-Judge, who granted sanction and an appeal from this order has been rejected by the Divisional Judge on the ground that he could see no reason to revoke the sanction.

The alleged offences under sections 193, 471 and 465, Indian Penal Code, in respect of which sanction has been given, have reference to evidence given in a suit in which the present petitioner was the plaintiff and this suit was decided by Lala Chuni Lal, Sub-Judge, at Rohtak, on the 19th December 1910.

NGA TUN E *v.* EMPEROR.

As regards the appeal from the order of Lala Har Sukh Rai refusing sanction, section 195, Code of Criminal Procedure, only enables the Appellate Court to grant sanction which has been refused, or to revoke sanction which has been granted—and it appears to me, therefore, that the Divisional Judge had no power to remand the application for fresh decision. This view is supported by *Beni Pershad* v. *Sarju Pershad Thakuria* (1) and if the order of remand was *ultra vires*, it could not give jurisdiction either to Lala Har Sukh Rai or to Lala Murari Lal to re-open the application and to grant sanction.

Apart from this, there appears to be another reason why Lala Murari Lal could not grant sanction.

In *Phina Singh* v *Empress* (2) ,it was held that though there is a class of Courts called Courts of the Magistrates of the 1st class, there is no Court of a Magistrate of the 1st class as a permanent Court with a perpetual succession of Judges; and that on the transfer of a Magistrate from a District, the Court of the Magistrate who takes over the pending work is not identical with the Court of the Magistrate who has been transferred.

It seems to me that the same argument must be applied to the Courts of Subordinate Judges and it follows that the Court presided over by Lala Murari Lal was not identical with the Court presided over by Lala Har Sukh Rai, or with the Court presided over by Lala Chuni Lal.

For these reasons, I set aside the order granting sanction on the ground that the order was passed without jurisdiction.

Petition allowed.

(1) 33 A. 512; 9 Ind. Cas. 982; 8 A. L. J. 429; 12 Cr. L. J. 174.
(2) 25 P. R. 1889 Cr.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 523 OF 1912.

August 12, 1912.

Present:—Mr. Justice Hartnoll and Mr. Justice Young.

NGA TUN E—APPELLANT

versus

EMPEROR—RESPONDENT.

Accomplice—Confession—Retracted confession—Value of—Evidence Act (*I of* 1872), *ss.* 30, 114, 133.

There is nothing in law to prevent the conviction of an accused on the uncorroborated and retracted confession of an accomplice, if it be believed against him. Such a confession should, however, be approached with the greatest caution and care and should be subjected to the most anxious scrutiny in deciding on its truth or falsity so far as it incriminates any person other than he who made it. Yet, if after applying every test to it that is available and remembering that it cannot be sifted by cross-examination, that by it one criminal is incriminating another and all other similar considerations, the Judge still believes it to be true as against that other or others, it is the duty of the Judge to act upon it.

Queen-Empress v. *Ashutosh Chuckerbutty*, 4 C. 483, 3 C. L. R. 270, dissented from.

Emperor v. *Kehri*, 29 A. 434; A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360, approved.

Appeal against the punishment of death inflicted by the Sessions Judge of Prome, in Sessions Trial No. 47 of 1912 on an offence under section 302, Indian Penal Code.

Mr. *De Glanville*, for the Appellant.

JUDGMENT.

HARTNOLL, J.—On the afternoon of February 21, last, a little boy of about $3\frac{1}{2}$ years old, named Nyi Bu or Po Shein, met his death by drowning in the Mingan tank not far from Mongon village. Two lads, Aung Sein, whose age is estimated to be from 12 to 14 years and Po Tun, whose age is some 8 years old, have been convicted of the murder of Maung Nyi Bu. The appellant, Nga Tun E, 25 years old, had also been convicted of the murder and sentenced to death. The case against him is that he instigated the lads to do the deed and stood by to see that it was done, so that he was actually present. The evidence against him was that of the confessions of Aung Sein and Po Tun and that of three other persons Ma O Le, the mother of Nyi Bu, Maung Tha Din, the step-brother of Nyi Bu and Maung San Dun. Ma O Le states that she saw Tun E on the evening of the murder come running from the direction of the Mingan tank and that she suspected him of

the abduction of her child. She says that she was near the village gate at the time and that it was then just getting dark. Maung Tha Din says that when the child was missed, he went to look for him into the fields north of the village and that he then saw Tun E coming hurriedly from the direction of the Mingan tank. He thought his conduct in thus coming alone was suspicious, and he says that it was after sunset. Maung San Dun says that on the evening in question he was returning from Paukkaung and on his way saw Maung Tun E on the road side to the south of the Mingan tank looking towards the tank. He then heard the sound as of a child crying in some jungle to the north-west of where he was and about a stone-throw from him. He looked round and saw nothing suspicious and so went on. He says that the time was then just before sunset. This man does not belong to the village of Mongon, that of the murdered boy, but he was from Okshitgon. He had been twice convicted of causing hurt. He says that he did not hear of the murder until February 23rd and that on the 28th he went to Paukkaung, where he saw Ko Kaing at the witness shed, who told him that Tun E and the two lads were in custody. He then mentioned what he had seen and two days later was sent for and examined. The learned Sessions Judge has believed the testimony of this man. I see that Okshitgon his village is about a call from Mongon. He has so deposed in the committal proceedings. As his village was so close to Mongon, the probability was that on February 23rd, when he heard of the murder, he would also hear of who were the accused and yet he says that he kept reticent until February 28th. Further his testimony as to the time does not agree with that given by the lads; the latter making the time of the occurrence 3 or 3 30 P. M., the time of cooking the evening meal. Maung San Dun said that he saw Maung Tun E just before sunset, considerably later. Under such circumstances, considering how easy it is to get false evidence in this country, I hesitate to accept his statement, though it may be true. It must, therefore, be discarded.

There are, therefore, against Tun E the statements of Mah O Le, and Maung Tha Din and the confessions of Aung Sein and Po Tun. The conviction, if it is to be upheld, must, therefore, practically rest on the confessions, as the statements of Mah O Le and Maung Tha Din were corroboration of the slightest. These confessions have also been retracted. It was urged at the hearing that the confessions could not in law be considered at all against Tun E and the case of the *Empress* v. *Ashootosh Chuckerbutty* (1) was relied on as authority for that argument. With all due respect to the learned Judges, who decided that reference, I am unable to agree with certain of the opinions expressed by them. Section 30 of the Evidence Act says:—"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons, is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." The word "consideration" has been the subject of discussion and as was held in the case above referred to, I am unable to see how a confession can be taken into consideration in any other way, except as evidence. In the case of *Chit Tun* v. *Emperor* (2), the learned Chief Judge held, giving weighty authority, that a man can be legally convicted on his own uncorroborated confession when confession is believad, even though it be retracted. It is the same section in the Evidence Act which gives the power to take into consideration a confession against the man who made it as well as against those who were co-accused with him. If, when believed, even though uncorroborated and retracted, it can be taken into consideration for the purpose of convicting the man who made it, I am unable to see why it cannot be taken into consideration for the purpose of convicting the co-accused. The word "consideration" should scarcely be given the same meaning in each instance. I, therefore, cannot agree with the opinion of Jackson, J., in the Calcutta ruling referred to above, that an accused person, other than he who had confessed, could not lawfully be convicted upon such confession alone, nor ought he to be convicted on the ground of such confession corroborated by substantial evidence unless the circumstances constituting the corroboration, would, if believed to exist, themselves support a conviction. The matter was discussed also in the case of *Emperor* v. *Kehri* (3), where the Calcutta

(1) 4 C. 483; 3 C. L. R. 270.
(2) 1 L. B. R. 238.
(3) 29 A. 434; A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360.

case above referred to was referred to and differed from in certain particulars. In this case, Richards, J., said: "This High Court has decided that an accused person can be convicted on the unsupported evidence of an approver. I can imagine many cases in which it would be impossible for the Court to disbelieve a confession, and I can see no reason why a Court could not legally convict an accused person on the unsupported evidence afforded by the confession of a co-accused. At the same time, I think that it is very seldom that a Court would or ought to convict on the unsupported evidence afforded by the confession of a co-accused or the evidence given by an accomplice." It seems to me that in law there is nothing to prevent the conviction of a man on the uncorroborated and retracted confession of a co-accused, if it be believed against him, but that, on the other hand, the law permits this to be done. The main point for consideration when confessions, are dealt with for the purpose of consideration against co-accused, either by themselves unsupported by other testimony or taken together with other corroborative evidence, is the weight that should be attached to them. They have to be approached with the utmost caution and care. In considering the evidence of an accomplice witness, which, in the great majority of cases, cannot be accepted without corroboration, the Court has the advantage of his being cross-examined. His evidence is also given on oath or on solemn affirmation. Again, there is a great difference between a man confessing and incriminating himself and his confessing and incriminating other people. All these and cognate matters have to be recollected when confessions implicating co-accused are being dealt with for the purpose of considering the guilt of such persons. Where there is other good and supporting evidence, a confession, when taken into consideration against a co-accused, becomes a link in the chain of evidence, if after the most careful consideration, it is believed and that is the manner in which it was used in the case of the *Emperor* v. *Kehri* (3). But where it is unsupported by other testimony, it is obvious that the most anxious care and scrutiny should be applied to it in deciding on its truth or falsity respecting the incrimination of others than the one who made it. Yet if, after applying every test to it that is available, and remembering that it cannot be sifted by cross-examination, that by it a criminal is incriminating others than himself, and all other similar considerations, the Judge still believes that it is true as against another or others than the man who made it, it seems to me to be the duty of the Judge to act on it, and with the greatest respect to the eminent Judge, Garth, C. J., who delivered his opinion in the case of the *Empress* v. *Ashutosh Chakraburty* (1), I am unable to agree with him, when he said that no Court ought to convict a co-accused on a confession unsupported by other testimony, and, that if a person was convicted on such evidence, whether by a Jury or otherwise and were to appeal, the conviction ought to be set aside. Such a rule seemed to me to amount to legislation and it is not the function of the Courts to legislate, but to carry out the law as it stood. Section 30 of the Evidence Act, in my opinion, permits, as far as the law is concerned, a confession to be taken into consideration against a co-accused, even to the extent of convicting him on it, though it is unsupported by other testimony. The real difficulty as I have stated is the consideration of whether it is true against co-accused, and in the great majority of cases, it is obvious that the Court cannot come to the conclusion that it is so true beyond all reasonable doubt; but if in an exceptional case it does, it seems to me to be the duty of the Court to act on such conclusion.

Applying the views I have expressed to the present case, I think that it would be unsafe to uphold the conviction of Maung Tun E on the confessions of the two lads. I can see nothing in the evidence to show that they were improperly obtained or were made otherwise than voluntarily, but I hesitate to accept them as I think that Maung Tun E may have been wrongly put into them. Both the lads must have been very precocious and forward to have done what they did, and so might be quick to jump at an idea that would tend to minimise their own degree of guilt. If Maung Tun E's name had not been given, what would have been the clear and apparent reason for the murder? Robbery—the obtaining of Maung Nyi Bu's ornaments, which were

of value. The murder was committed on February 21. Maung Tun E was suspected that night. The boys were examined by Maung Po, the Ywathugyi and Nyi Bu's father, that night and again the next day. They did not confess until the day after. Aung Sein is Tun E's nephew. They may have been asked about Tun E and may have heard that his movements were suspected and that may have put it into their heads to incriminate him to minimise their guilt. It must be remembered that the Court was dealing with abnormal minds, when those were the minds of boys of 12 or so and 8, who can commit such a brutal murder as this was. They might be telling the truth in incriminating Tun E, but they may not. I am, therefore, of opinion that this conviction cannot be upheld. I would, accordingly, set it aside and acquit Tun E and direct that he be set at liberty as far as this case is concerned.

YOUNG, J.—The facts of the case are fully set out in the judgment of my learned colleague and I agree that the corroboration of the confession is so slight that the conviction of the appellant, if upheld at all, would have to be maintained on the retracted confessions of his co-accused. In my opinion, the confession in question is not so convincing as to raise the question whether it would be permissible to convict the accused upon it alone, and without expressing any dissent from the views of my learned colleague, I prefer to defer consideration of the point till it actually arose. I agree with the order proposed.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 161 OF 1913.

March 12, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Mullick.

ABBASH ALI AND ANOTHER—ACCUSED —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Appeal, Criminal—Appellate Court bound to peruse record—Perusing judgment only, if sufficient—Criminal Procedure Code (Act V of 1898), s. 423.

When, in a criminal appeal, no one appears on behalf of the appellant, the Court must peruse the record. A decision upon a perusal only of the judgment appealed against is not legal.

Rule against the order of the Sessions Judge of Sylhet and Cachar, dated November 27th, 1912, affirming that of the Sub-Divisional Magistrate of Hailakandi, dated October 14th, 1912.

FACTS.—The case for the prosecution was that the complainant purchased some land in 1318, B. S. from one Haidar Meah, which was described in the deed of sale by metes and bounds as belonging exclusively to the vendor, Haidar Meah; and that on May 30th 1912, the complainant's party started ploughing the land when the accused came up with *lathis* and assaulted them.

The accused alleged that the disputed land was the joint property of Haidar and the accused, that the accused were ploughing the land when the complainant and several others came up and beat them. They also brought a cross case against the complainant.

The case was tried by the Sub-Divisional Officer of Hailakandi, who came to the conclusion that it was a case of disputed possession. He acquitted the accused of the charge of rioting, but convicted them under sections 325, 114 of the Indian Penal Code, and sentenced them to six months' rigorous imprisonment each.

On appeal, the Sessions Judge of Sylhet, without perusing the record, upheld the conviction and sentence. His judgment is given below:

"No one appears for the appellants. I have read the judgment. It is clear that there was a fight over the possession of land arising from Isab Ali's purchase of Haidar Meah's $\frac{1}{4}$th share in certain land owned by him and appellant Abbas and his attempt to take possession. It is proved that in the fight the four appellants beat Isab Ali severely causing him injuries amounting to grievous hurt and the circumstances suggest that they were the aggressors. They are, therefore, not protected by the right of private defence. The conviction and sentences on Abbas Ali and Ujir under section 325 read with section 114, Indian Penal Code, are upheld and also the order under section 106, Criminal Procedure Code, on the other appellants."

The accused obtained this Rule on the ground that the learned Sessions Judge

ought to have perused the evidence and come to a finding upon the facts independently of the judgment of the first Court.

Babu *Ambika Charan Das*, for the Petitioners.

JUDGMENT.—This was a Rule to show cause why the appeal of the petitioners should not be re-heard on the ground that the learned Sessions Judge ought to have perused the evidence and come to finding of facts independently of the judgment of the first Court. The lower Appellate Court was bound by section 423 to peruse the record. The learned Sessions Judge says:—"I have read the judgment. It is clear that there was a fight over the possession" and so on. There is nothing to show in this judgment that he had perused the record nor is it so stated in the explanation submitted to this Court.

We, therefore, make this Rule absolute and send back the case so that the appeal may be re-heard.

Rule made absolute.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 151 OF 1912.

May 13, 1912.

Present:—Mr. Justice Rattigan.

PIRBHU DIAL—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 537—Sanction to prosecute—Absence of sanction—Sanction losing force by lapse of time—Failure of justice—Penal Code (Act XLV of 1860), ss. 467, 471, 477—Forgery—Using forged document—Separate sentences.

A person who is convicted of having forged a document should not be punished both under section 467 and under section 471 of the Penal Code even though he made use of the document.

Queen-Empress v. *Umra Lal*, 23 A. 84; A. W. N. (1900) 205; *Mokand Lal* v. *Emperor of India*, 26 P. R. 1901 Cr., followed.

Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under sections 467, 471 and 477, Penal Code.

Absence of the sanction under section 195 of the Criminal Procedure Code or the sanction having become ineffective under clause (6) of section 195, does not entail the reversal of a conviction unless it is shown to have occasioned a failure of justice.

In re H. M. Abdul Razack Sahib, 11 Ind. Cas. 590; 10 M. L. T. 82; 21 M. L. J. 753; 12 Cr. L. J. 406; *Perumalla Nayudu* v. *Emperor*, 31 M. 80; 17 M. L. J. 533; 2 M. L. T. 493; 6 Cr. L. J. 382; *Sunder Dosadh* v. *Sital Mahto*, 28 C. 217; 5 C. W. N. 291, referred to.

The fact that an objection as to absence of sanction was taken at the beginning of the trial before a Magistrate would not of itself indicate that a failure of justice has occurred though as laid down in the explanation to section 537 of the Criminal Procedure Code it is a point to be considered.

Under section 195 of the Criminal Procedure Code, sanction to prosecute was granted for perjury and forgery on the 14th August 1909; complaint was filed on the 20th idem and on the 23rd, a warrant for the arrest of the accused was issued. On the 27th October 1909, sanction was revoked on appeal. The accused was discharged on the 2nd November 1909. On the 15th January 1910, the Chief Court on revision set aside the order revoking the sanction and ordered a re-hearing of the appeal. The appeal was re-heard and on the 4th April 1910, sanction for perjury was revoked but it was upheld for forgery. On the 14th May 1910, the accused applied to the Chief Court for revision. On the 13th July 1910, another complaint was filed in the Court of the Magistrate. On the 3rd December 1910, the application for revision was rejected. On the 7th April 1911, the complainant's Pleader appeared before the Magistrate and stated that the complainant wished to proceed with the case. On the 8th June, the complainant was examined and a warrant was issued for the arrest of the accused:

Held, that the sanction could not be said to have lost its force on account of the time occupied in the above mentioned proceedings.

When a person, holding a sanction to prosecute, brings his complaint before a Magistrate within six months from the date of sanction, the subsequent delay of the Court does not affect the cognizance of the case.

Appeal from the order of the Magistrate, 1st class, Delhi, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated 29th February 1912, convicting the appellant.

Mr. *Beechey*, for the Appellant.

Mr. *Broadway*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant Pirbhu Dial, (aged 53), lately librarian of the Delhi Bar Library, has been convicted by the Magistrate, 1st class, Delhi, (exercising powers under section 30, Criminal Procedure Code) of offences punishable under section 467 (forgery of a valuable security), section 471 (using a forged document), and section 477 (fraudulent destruction, etc., of a valuable security) of the Indian Penal Code. He has been sentenced to two years' rigorous imprisonment (including one month's solitary confinement) in respect of each offence, the sentences to run consecutively, and he has,

through his learned Counsel, Mr. Beechey, preferred an appeal to this Court. The learned Counsel has addressed me at some considerable length both upon the merits and upon the legal questions involved and I have also had the advantage of hearing Mr. Broadway in support of the conviction. Mr. Broadway frankly conceded at the outset that the Magistrate was in error in awarding separate sentences for the various offences of which he had convicted the appellant and there is authority for the proposition that a person who is convicted of having forged a document, should not, though he makes use thereof, be punished both under section 467 and under section 471—*Queen-Empress* v. *Umrao Lal* (1); *Mokand Lal* v. *Emperor of India* (2). Furthermore, in the present case (as will appear hereafter) the act of the appellant which constituted forgery and was the basis of his conviction under section 467 was the same as the act which amounted to fraudulent destruction or defacement or cancellation and was the basis of his conviction under section 477 and it was an error on the part of the Magistrate to treat the act as constituting two separate offences for which separate sentences could be awarded. In any event, therefore, the sentences under section 471 and section 477, Indian Penal Code, cannot stand and must be set aside.

With these preliminary remarks, I proceed to deal with the appeal before me.

Briefly stated, the facts are as follows:—On the 17th April 1899, Kesho Ram mortgaged four houses with appellant Pirbhu Dial, the consideration being the sum of Rs. 800, re-payable with interest at a specified rate in two years. Of these houses, one (hereinafter described as the "Katha house") was at the time of this mortgage already under mortgage with Lachoo Mal (D. W. No. 1) and it is not denied that appellant paid off Lachoo Mal's mortgage and obtained from that person his mortgage-deed (Exhibit P-9) and also, apparently, a lease executed by a tenant in Lachoo Mal's favour.

On the 3rd January 1900, the Katha house was sold to one Bulaki Das (P. W. No. 4) for Rs. 1,000, and it is an admitted fact that on the same day a sum of Rs. 400 principal and Rs. 72 interest, were paid to Pirbhu Dial. It is also admitted that on the same day an endorsement was made on the back of the appellant's mortgage-deed, to the following effect:—

"*Mubligh char sau rupia asal minjumla is rehn nama piunche 3 January* 1900 *babat makan Katha.*" This endorsement was written by appellant and his signature is appended to it. At some time subsequently to the writing of the endorsement, the words *babat makan* Katha were scored through with a pen (but not so as to render them illegible) and just after the words *is rehn nama* and a little above them the words *ke amantan* were added.

The prosecution allege that these alterations were made by appellant at some later period—probably after the death of Kesho Ram and without the knowledge of Kesho Ram or any one else concerned. The theory for the Crown is that Bulaki Das, at the time when he bought the Katha house, paid Pirbhu Dial the sum of Rs. 472 in consideration of which Pirbhu Dial, though not without hesitation, released the said house from the charge which he held over it, and endorsed on the back of his mortgage-deed the words as above set forth without the subsequent alterations. The defence theory is that it was Kesho Ram and not Bulaki Das who paid appellant the Rs. 472, that appellant never agreed to release the Katha house from his mortgage, that the Rs. 472 were paid to him simply as a deposit (*amanat*), the understanding being that Kesho Ram would redeem all the houses very shortly afterwards; and that it was in order to make the intentions of the parties quite clear that the additions and alterations were made with the consent of Kesho Ram, and at the very time when the endorsement itself was written. The Magistrate has for reasons given by him accepted the prosecution evidence and has disbelieved the story told by the appellant; and his two witnesses Ram Nath and Abdul Ghafur. After full consideration of the evidence on the record and of Mr. Beechey's arguments in support of the defence theory, I am obliged to agree with the Magistrate's conclusions but before I give my reasons for finding appellant's guilt established, I must refer to the contention strenuously urged by

(1) 23 A. 84; A. W. N. (1900) 205.
(2) 26 P. R. 1901 Cr.

Mr. Beechey that the whole of the Magistrate's proceedings were null and void, as the sanction for prosecution under section 195 upon which he purported to act, had lost its force before the present prosecution was instituted. In order to understand this argument, it is necessary to set out in chronological order, the facts upon which it is based. In June 1905, Pirbhu Dial instituted a suit in the Court of the Additional District Judge at Delhi for the recovery of Rs. 500 principal and interest, due on his mortgage-deed and he impleaded as defendants the representatives of Kesho Ram, the latter being then dead. In this suit, Pirbhu Dial claimed to have a charge over the Katha house as well as over the three other houses. He lost his suit and on 24th June 1909, *Musammat* Man Kaur, widow of Kesho Ram, applied to the Additional District Judge for sanction to prosecute Pirbhu Dial for perjury and forgery. Sanction was duly accorded on the 14th August 1909, a written complaint was filed before the Magistrate on the 20th August 1909 and on the 23rd of the same month, complainant was examined in accordance with the provisions of section 200, Criminal Procedure Code, and a warrant was thereafter issued for the arrest of Pirbhu Dial.

On the 25th August 1909, Pirbhu Dial appealed to the Additional Divisional Judge praying that the sanction for his prosecution might be revoked. His appeal was accepted and the sanction was revoked on the 27th October 1909. On the 2nd November 1909, an order was passed discharging him and granting a refund of his bail.

Complainant applied to the Chief Court for revision of the order of the Additional Divisional Judge, dated 25th October 1909 and on the 15th January 1910, the Chief Judge accepted the application, set aside the said order and remanded the record to the Additional Divisional Judge for disposal of the appeal before him on the merits.

The Additional Divisional Judge, in compliance with the said order, proceeded to hear the appeal and on the 4th April 1910 revoked the sanction given by the Additional District Judge for prosecution of Pirbhu Dial for perjury, but maintained the sanction so far as it related to his prosecution for forgery.

Pirbhu Dial now applied on the 14th May 1910 to this Court for revision of the order last mentioned and in the meantime on the 13th July 1910, a second complaint was filed by complainant, *Musammat* Man Kaur, in the Court of the District Magistrate. Before action could be taken on this latter complaint, all further proceedings were stayed by this Court's order dated 22nd July 1910.

On the 3rd December 1910, Pirbhu Dial's application for revision was rejected. It would seem that complainant's Counsel in the Chief Court was aware of the rejection of that application, but no intimation of it was received by the Magistrate before whom the second complaint was pending. On the 3rd April 1911, the Magistrate's notice was drawn to the fact that no order had been received from the Chief Court since the order staying proceedings and complainant's Pleader was sent for to explain matters. He appeared before the Magistrate on the 7th April 1911 and stated that complainant wished to proceed with the case and requested that the record should be sent for from the Chief Court. From this last mentioned date till the 29th May 1911, the Magistrate's office was endeavouring to trace the record of the case and on the 8th June 1911, complainant appeared before the Magistrate and was examined for the second time. Thereafter a warrant was issued for arrest of the accused on the 29th June 1911.

Section 195 (6) of the Criminal Procedure Code provides that "no sanction shall remain in force for more than six months" and the contention of Mr. Beechey is that the only sanction in this case is that given by the Additional District Judge on the 14th August 1909, and that the mere fact that this sanction was subsequently modified by the Additional Divisional Judge's order of the 4th April 1910, does not affect the period of limitation which began to run from the date of the Additional District Judge's order (14th August 1909). In support of this proposition, the correctness of which I see no reason to doubt, the learned Counsel refers to *In re Muthukudam Pillai* (3). It appears that after that sanction was granted by the Additional District Judge, a complaint was filed before the Magistrate on the

(3) 26 M. 190; 2 Weir 200.

20th August 1909, and the complainant was examined and a warrant issued for appellant's arrest on the 23rd August 1909. Mr. Beechey does not deny that in these circumstances, there would have been a sufficient compliance with the provisions of section 195 (6) of the Code, but he argues that the effect of the order of the 3rd November 1909, discharging appellant, was to set aside all prior proceedings and that, consequently, we must take it, that no complaint had been filed and no examination of complainant had taken place and no warrant for appellant's arrest had issued—at all events in law—at the time when the Additional Divisional Judge (on the 4th April 1910) maintained the sanction in part. I confess I find it very difficult to understand this subtle argument. If the effect of the order of 3rd November 1909, was as Mr. Beechey contends, it must surely follow that the sanction given by the Additional District Judge on the 14th August 1909, was equally set aside, with the rest of the proceedings. If so, then the only sanction in the case would be that given by the Additional Divisional Judge on the 4th April 1910, and as I shall presently show the filing of the second complaint on the 13th July 1910, (*i.e.*, within six months of the 4th April 1910), would save the sanction from expiring by lapse of time.

But if the sanction given by the Additional District Judge was not affected by the order of discharge, because the latter order itself was *ex necessitate rei* set aside as an implied consequence of this Court's order of the 15th January 1910, then I fail to see on what ground it can be urged that the proceedings of the 20th and 23rd August 1909, must be regarded as completely wiped out.

In my opinion, once the order of the Additional Divisional Judge was set aside and the appeal remanded to him for decision on the merits, the order of discharge must also be taken to have been set aside as a necessary consequence, it having been founded on an order which had been modified. Assuming, however, that the order of discharge wiped out all proceedings prior to its date including (as I think must be included) the order of the 14th August 1909, I must then hold that the only sanction in existence thereafter was that given by the Additional Divisional Judge on the 4th April 1910. Mr. Beechey then contends that as the complainant was not examined after that date and as process did not issue to appellant until the 8th June 1911 (or more than a year after the grant of sanction), the sanction had lapsed and no proceeding could be had thereon. The learned Counsel admits that a complaint was filed somehow or other on the 13th July 1910, but he contends that the mere filing of a complaint does not constitute the institution of a prosecution and that the true meaning of clause (*c*) of section 195 of the Code is that a prosecution must be instituted within six months, *i.e.*, that process must issue to the accused person within that period for a prosecution cannot be deemed to commence until such process is issued. In support of this contention, Mr. Beechey refers to *Golap Jan* v. *Bhola Nath* (4) and *De Rozario* v. *Gulab Chand Anundiee* (5), the relevancy of which is not very apparent, as they deal with the question whether a person against whom no process has been issued can sue for damages for malicious prosecution. On the other hand, it has been definitely laid down by a Division Bench of this Court that when a person holding a sanction to prosecute brings his complaint before a Magistrate, as he has done all that in him lies to bring such complaint under the cognizance of the Magistrate, it cannot be successfully contended that subsequent delays and irregularities of the Magistrate's Court resulting in the postponement of the trial for over six months leave the case as one not yet under the cognizance of the Magistrate; *Sardar Jawala Singh* v. *Moui Din* (6). Here, as in that case, a written complaint was duly lodged with the Magistrate within six months from the 4th April 1910, when sanction was accorded by the Additional Divisional Judge, and for all subsequent delays those primarily responsible were the appellant himself in the first instance and the Court at a subsequent stage. I hold, therefore, that looked at from every point of view, the trial of the appellant was good and valid so far as section 195 of the Criminal Procedure Code is concerned and that the Magistrate's proceedings were based

(4) 15 C. W. N. 917; 38 C. 880; 11 Ind. Cas. 311.
(5) 37 C. 358; 6 Ind. Cas. 877.
(6) 28 P. R. 1887 Cr.

on a sanction which was in force at the time when the complaint (whether of the 20th August 1909 or of the 13th July 1910) was lodged.

But as I cannot find that the appellant has been in any way prejudiced and that the delays that have occured have been in the main attributable to him, I should not feel justified in setting aside the trial and conviction, even if it were established that the proceedings of the Magistrate were based on a sanction which had become ineffective by lapse of time. There is ample authority for the proposition that the entire absence of the sanction required by section 195, does not entail the reversal of a conviction unless it is shown to have occasioned a failure of justice [*In re H. M. Abdul Razack Sahib* (7), *Perumalla Nayudu* v. *Emperor* (8) *Sunder Dosadh* v. *Sital Mahto*(9)] and section 537 (*b*)of the Criminal Procedure Code applies as much to a case in which a sanction has been granted and has become ineffective under clause (6) of section 195 as to a case in which no sanction has been granted at all [*Emperor* v. *Panchan* (10).] I would only add that the fact that this objection was taken at the beginning of the trial before the Magistrate, though it is, as laid down in the explanation to section 537, a point to be considered, does not of itself indicate that a failure of justice has occured. Mr. Beechey certainly pointed out nothing on the record which could suggest any such failure of justice and I cannot find any evidence of such.

I accordingly overrule the preliminary objection and proceed to deal with the appeal upon the merits.

I have already stated the two different stories and the crucial question really is whether the sum of Rs. 472 was paid to Pirbhu Dial by Kesho Ram at his own house (as he alleges) or whether it was paid to him at the Bar Library by Bulaki Das, as the prosecution assert. In support of the defence story, we have the statement of the appellant and the evidence of his two witnesses Ram Nath and Abdul Ghafur. On the other hand, we have the evidence of Bulaki Das and Makhan Lal. Which of these two stories is true? In my opinion regard being had to all the circumstances and the probabilities of the case, the actual facts are as stated by Bulaki Das. My reasons are as follows. In the first place, it is admitted that the endorsement *as originally written* made no mention of an *amanat* or deposit and that the money was said then to have been received *babat Ratha makan*, on account of the Katha house. Why this reference to the Katha house if, in point of fact, the money was received merely in deposit and as a preliminary payment of the whole of the money due on the mortgage.

Then, if there was no question at the time about partial redemption and it was well understood between Kesho Ram and Pirbhu Dial that the money was paid merely as a preliminary payment and was to be kept in deposit, what reason was there for appellant's reluctance to accept the money? He himself and all his witnesses depose to the fact that it was only after considerable persuasion that he was induced to accept it. This reluctance is easily intelligible if once it be conceded that the money was paid in order to release the Katha house from the charge, which appellant had over it, but it is difficult to understand if appellant's story is true and the understanding all through the negotiations was that no release of the house was ever contemplated and the money was paid by Kesho Ram merely as a deposit.

Again, if the understanding was that the money was paid merely as a deposit and that the balance was to be paid in a few days, what reasonable explanation can be given of appellant's subsequent conduct? The balance was not paid and yet, so far from appellant taking any action in the matter, we find him accepting two further mortgages in June 1901 and May 1903 from Kesho Ram in respect of the equity of redemption of three other houses and mention being made in those deeds of the sales of the Katha house to Bulaki Das. The Magistrate is not quite correct in saying that in these deeds reference is made to the release of the Katha house. That is not so, but reference is undoubtedly made to the sale of that house to Bulaki Das and if appellant's story is true, I can hardly believe that he would quietly have submitted to the non-payment of the balance money about

(7) 11 Ind. Cas; 590; 10 M. L. T. 82; 21 M. L. J. 753; 12 Cr. L. J. 406.

(8) 31 M. 80; 17 M. L. J. 533; 2 M. L. T. 493; 6 Cr. L. J. 382.

(9) 28 C. 217; 5 C. W. N. 291.

(10) A. W. N. (1901) 151.

which he was, as he says, so anxious in January 1900. So far from insisting on the payments of the balance, he keeps the Rs. 472 in his possession, accepts two further mortgages from Kesho Ram, and does not attempt to enforce his mortgage against all four houses until 1908, and then only after the death of Kesho Ram. I find it impossible to reconcile this extraordinary conduct on his part with the explanation which he gives of the transaction of January 1900, when the Katha house was sold to Bulaki Das.

Further, it is in the highest degree improbable that Bulaki Das who knew of the mortgage subsisting on the Katha house would not insist on Kesho Ram paying off the charge. He swears that he did so, and that he accompanied Kesho Ram when the latter paid the money to appellant and this is exactly what the ordinary man who was buying a house upon which there was a mortgage would do.

It is urged by Mr. Beechey that the evidence to the effect that appellant was paid in the Bar Library and that he had his mortgage and other deeds then all ready for the completion of the transaction is absurd as Bulaki Das had had no previous talk with appellant about the contemplated sale. But it is abundantly proved that appellant was well aware that the house was being sold to Bulaki Das, and I have no doubt that Kesho Ram had succeeded in inducing him to give up his charge and to bring his papers to the library and thus receives his money, and on the other hand, I cannot believe that Bulaki Das would pay the whole of the purchase money over to Kesho Ram and take no step to see that the house was released from the mortgage.

In favour of appellant's, story it may be urged that the alteration of the endorsement is palpable and that no attempt has been made to conceal it. This is true, but it would have been difficult to make an alteration of it, which would not have escaped detection and it must be remembered that the deed was not produced until after the death of Kesho Ram, who alone could give direct evidence in disproof of the allegation that the alteration was made with his consent.

Another point urged by Mr. Beechey was that the appellant retained in his possession the original deed of mortgage in favour of Lachhu Mal, and the lease executed by tenant of the house in favour of that person. I am not impressed with this argument. Bulaki Das having secured the endorsement on the appellant's mortgage deed, would not trouble himself about any previous mortgage deeds held by appellant, and as to the lease, he tells us that he had no occasion to question appellant about it, as the tenant died a few days after the sale of the house. Taking then all the circumstances into consideration, I am of opinion that the Magistrate was fully justified in accepting the evidence of Bulaki Das and Makhan Lal in preference to that of Ram Nath and Abdul Ghafur and in convicting the appellant of forgery. It is contended that his act could not possibly cause loss to the complainant and that the only person likely to be damnified would be Bulaki Das. This is not so, but in any event I fail to see how that fact affects the guilt of the appellant. He made a false part of a document with intent to support his claim to a charge over the Katha house and whether the person he intended to damnify was the complainant or Bulaki Das is immaterial. His clear intention was to cause wrongful gain to himself, by securing a charge over property to which he was not entitled and to defraud Bulaki Das of property to which that person was entitled without payment of any money to appellant. In point of fact, if appellant had succeeded in his fraud, he would most certainly have caused loss to Kesho Ram's representatives, as they would have been liable to Bulaki Das and would have had to make good to the latter, the Rs. 472 paid by him through Kesho Ram for the discharge of the debt charged upon the Katha house.

For the reasons given, I uphold the conviction of the appellant in respect of the convictions and offence under section 467, Indian Penal Code, but I set aside the sentences under sections 471 and 477.

The appellant is an elderly man who has hitherto enjoyed a good reputation and I think that I am justified in reducing the sentence passed for the offence under section 467 to one year's rigorous imprisonment with one month's solitary confinement. He must now surrender to his bail and undergo this sentence.

Sentence altered.

CHANDAN SAHU *v.* BHADAI RAI.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1649 OF 1912.
February 25, 1913.
Present:—Mr. Justice Coxe and Mr. Justice N. R. Chatterjea.
CHANDAN SAHU—PETITIONER
versus
BHADAI RAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 119—Discharge of person informed against on ground that Police report of date mentioned in proceedings not in existence—Mistake of date—Second proceeding based on report of real date, if barred.

Proceedings were drawn up against the petitioners and terminated in their discharge under section 119 of the Criminal Procedure Code. The proceedings purported to have been based on a Police report dated July 27th, 1912, and the Magistrate discharged the petitioners on the ground that no such report was in existence. The Police report was dated July 29th, 1912, but in the proceedings by mistake, July 27th, 1912 was put down. Another Magistrate drew up the present proceedings against the petitioners on the Police report of July 29th, 1912:

Held, that as the present proceedings were based on a Police report which was not the foundation of the former proceedings, these proceedings were not invalid.

Rule against the order of the District Magistrate of Mozaffarpur, dated October 14th, 1912, directing the petitioners to execute bonds on their personal recognizance of Rs. 2,000 each and two sureties each in Rs. 1,000 to keep the peace for one year.

Mr. *J. N. Roy*, Counsel, and Babu *Surendra Nath Ghoshal*, for the Petitioner.

Babu *Manmotha Nath Mukherjea*, for the Crown.

JUDGMENT.—This was a Rule on the District Magistrate to show cause why the order binding down the petitioners to keep the peace should not be set aside, *firstly*, on the ground that proceedings were bad inasmuch as the petitioners had been already discharged under section 119 of the Criminal Procedure Code and *secondly*, on the ground that the petitioners should have been given more opportunities for the examination of their witnesses. It appears that proceedings were drawn up against the present petitioners and terminated in their discharge under section 119 of the Criminal Procedure Code. These proceedings purported to have been based on a report, dated the 27th July 1912 and the Magistrate discharged the petitioners on the ground that no such report was in existence. His words are—"Now as the information upon which action was taken in the proceedings sent to me for disposal refers to the report of the Sub-Inspector dated the 27th July 1912, which apparently has no existence, I discharge the accused under section 119 of the Code of Criminal Procedure." As a matter of fact, the report of the Police which should have been referred to and on which proceedings should have been based, was dated the 29th July 1912 and the Magistrate seems to have thought that this difference in the dates was sufficient to invalidate the whole proceedings before him. Thereafter, another Magistrate drew up the present proceeding on the report of the 29th July 1912.

It is contended on behalf of the petitioners that the report of the 29th July 1912 is really one and the same as the report referred to in the former proceeding and that the present proceeding is invalid inasmuch the petitioners have been discharged under section 119. On behalf of the Crown, it is contended that section 119 has no application inasmuch as the present proceedings are based on a report which was not the foundation of the former proceedings. It appears to us that this contention is unanswerable. When it was decided in the former proceedings that the case must fail simply and solely on the ground that the report of the 29th July 1912 was not the basis of those proceedings, it cannot now, we think, be contended that this report really formed the basis of those proceedings which terminated in the discharge under section 119. According to that order, no proceedings were taken on the report of the 29th July 1912 and the order of discharge was not passed in any such proceeding. This may seem a somewhat technical view but the petitioner seeks relief on the ground of a mere technicality and in the substantial merits of the case there is no reason why the petitioners should be relieved of the proceedings against them on the strength of a mere clerical error. We accordingly hold that the first ground must fail.

As regards the second ground, we think that on the facts of the case the petitioners should have a further opportunity of adducing evidence and the Rule is made absolute to that extent and to that extent only. The case will go back to the Magistrate and

be disposed of after that opportunity has been given.

Rule made partly absolute.

BOMBAY HIGH COURT.
CRIMINAL REVISION PETITION No. 383 OF 1912.
December 5, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
EMPEROR—PROSECUTOR
versus
GULAM AHMED ALI SAHEB—ACCUSED.

Sanction to prosecute granted by District Judge—Conviction of accused—Appeal before same officer as Sessions Judge—Practice—Power to hear appeal—Penal Code (Act XLV of 1860), s. 193.

A Judge gave sanction for the prosecution of the accused on a charge triable under section 193 of the Penal Code. The accused was tried for that offence and convicted of it. The appeal against the conviction came up before the same Judge in his capacity as Sessions Judge:

Held, that the Judge was legally competent to hear and decide the appeal, as the question before him, when he was moved to sanction the prosecution, was a totally different question from that which would present itself when the appeal would be argued.

Emperor v. *Gaspar D'Silva*, 6 B. 479 and *Queen-Empress* v. *Sarat Chandra Rakhit*, 16 C. 766, followed.

Mr. *K. N. Koyajee*, for the Accused.

JUDGMENT.—In this case, the District Judge, Mr. Boyd, acting as District Judge, gave sanction for the prosecution of the present petitioner on a charge triable under section 193, Indian Penal Code. The petitioner has been tried for that offence and has been convicted of it. He has preferred an appeal against the conviction and the appeal is now pending before Mr. Boyd in his capacity as Sessions Judge of the District. Application being made to Mr. Boyd for the transfer of the appeal to another Court, the learned Judge declined to move in the matter and relied upon this Court's decision in *Empress* v. *Gaspar D'Silva* (1), which was followed by the Calcutta High Court in *Queen-Empress* v. *Sarat Chundra Rakhit* (2). We think that the learned Judge was right, and that the cases cited by him are good authority for the proposition that he as Sessions Judge is legally competent to hear and dispose of this appeal. Nor for ourselves do we see any reason at present why he should not do so. The question before him when he was moved to sanction the prosecution was a totally different question from that which will present itself when the appeal is argued. We think, therefore, that Mr. Boyd should hear and decide the appeal, unless he himself feels embarrassed in the matter by reason of his former order. In case he is conscious of any such embarrassment, he will, no doubt, communicate with this Court when the requisite action can be taken. At present, we see no reason to interfere, and we discharge the Rule.

Rule discharged.

(1) 6 B. 479.
(2 16 C. 766.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 773 OF 1912.
January 29, 1913.
Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.
SANTA SINGH—CONVICT—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Evidence Act (I of 1872), s. 27—Incriminating statement of accused in Police custody while pointing out or producing instrument with which or spot where offence committed—Blood stains on zemindar's clothes—Police diaries to be used in interest of accused—Criminal Procedure Code (Act V of 1898), s. 162.

Incriminating statements by way of confession, made by an accused person while in Police custody when producing or pointing out articles connected with the commission of a crime, are inadmissible under section 27 of Act I of 1872.

The statement of an accused that he buried the weapon of the offence in a certain place is relevant but not the part of that statement that it was the weapon with which he had committed the crime. So also the statement that he would point out a certain spot and the evidence that at the spot indicated blood stains would be found would be admissible, but not the part of that statement that it was at this spot that he had committed the crime.

Where the accused produces the article himself, though the fact that he actually produced it at a particular place may be proved, yet the accompanying statement to the effect that he buried it there is inadmissible in evidence.

Queen-Empress v. *Komalia*, 10 B. 595, followed.

SANTA SINGH *v.* EMPEROR.

Where an accused person has throughout consistently refused to make any confession before a Magistrate and against whom there is practically no evidence at all, his incriminating statement under section 27 of Act I of 1872, must necessarily be received with the greatest caution and suspicion, although deposed to by respectable Police Officers and the village authorities.

The Police diaries etc. should be referred to under section 162 of the Criminal Procedure Code, 1898, in the interest of the accused person for checking the evidence of the prosecution witnesses to see how far their statements can be relied upon.

Blood stains on a *zemindar's* clothes are very seldom incriminating.

Appeal from the order of the Sessions Judge, Amritsar, dated the 14th November, 1912, convicting the appellant.

Mr. *Beechey*, for the Appellant.

Mr. *Bevan Petman*, Government Advocate, for the Respondent.

JUDGMENT.—The appellant, Santa Singh, a *Jat* aged 25, has been convicted by the Sessions Judge, Amritsar Division, (agreeing with the opinions expressed by the assessors) of having murdered one Vir Singh, *Jat*, aged 30, on the night of the 31st July 1912. He has been sentenced, under section 302, Indian Penal Code, to death and from this sentence he has, through his Counsel, Mr. Beechey, preferred an appeal to this Court. His case also comes before us under section 374, Criminal Procedure Code, for confirmation of the capital sentence. The murder is alleged to have been committed at a spot not far distant from the *abadi* of *Mauza* Chhina Wichla Kila in the Ajnala Tahsil of the Amritsar District, and in connection with it another *Jat*, by name Ujagar Singh, a resident of *Mauza* Khurmanian in the Amritsar Tahsil, was also charged before the learned Sessions Judge. This latter person was, according to the first report made to the Police at 7-30 A.M., on the 1st August, the only man connected with the murder whose identity was then known, but he has been acquitted by the Sessions Judge on the ground that there is no evidence whatever on the record against him. The case against Santa Singh, appellant, may be briefly summarised as follows:—

He and Vir Singh, the deceased, became partners in cultivation of a certain field about March or April 1912, and as the evidence shows attended to the cultivation of this field in company upon many occasions both by night and by day. On the night of the 31st July, Santa Singh came to the house of Sundar Singh (P. W. No. 2), deceased's father, and he and the deceased proceeded together to their field which was to be irrigated that night from the canal. The pair, undoubtedly, went to the field, and later on Santa Singh came running back to the village, and at the outskirts met Chuhar Singh, (P. W. No. 10) and Jiwan (P. W. No. 11), to whom he gave the information that Vir Singh had been murdered by five persons. Chuhar Singh deposes that Santa Singh mentioned no one by name as being concerned in the murder, but upon this point Jiwan Singh contradicts him and asserts that the name of Ujagar Singh was mentioned. Both witnesses state, however, that they suggested raising an alarm, but that Santa Singh would not do so, an assertion which, in view of the admitted fact that Santa Singh proceeded straight way to the house of deceased's father and at once told him that his son had been murdered, is palpably false, and was obviously intended to prejudice Santa Singh in the eyes of the assessors and the Sessions Judge. In this connection, we would note that the statements made by these two witnesses to the Police are very different from their subsequent depositions before the Sessions Judge. According to the Police diary (to which we have referred for the purpose of checking the evidence), Chuhar Singh told the Police that when Santa Singh met Miru and Jiwan he said:—"Vir Singh has been cut into pieces by the offenders at the War Wala well. Let us go there and ascertain all about the matter. I have come here running being afraid of them."

The statement proceeds:—"When we asked him who had cut the deceased into pieces, he said he knew the name of no one but Ujagar Singh son of Buta Singh, Jiwan sweeper, and I said, we will not go as we are afraid of the offenders cutting us also into pieces, as they have weapons with them." This statement was corrobated by Jiwan Singh and we see no reason to suspect that it was incorrectly recorded. But Chuhar Singh, when giving evidence in Court, alters his statement very materially and clearly endeavours to prejudice the defence by stating (1) that Santa Singh

mentioned no one by name, a point upon which he is contradicted not only by his statement as recorded in the diary, but also by Jiwan (P. W. No. 11) and (2) that Santa Singh was averse from raising an alarm whereas (if the diary is to be accepted) it was Santa Singh who actually suggested to Chuhar Singh and Jiwan that they should return with him to the scene of the crime. We refer to this matter particularly as the learned Sessions Judge has apparently accepted it as a fact against the appellant that he did not raise an alarm. It is, however, admitted that Santa Singh proceeded without delay to the house of Sundar Singh and told the latter that five persons including Ujagar Singh, had killed his son. Sundar Singh, accompanied by Santa Singh and others, then proceeded to the spot where they found the deceased's body and head lying separate. Later on, Sundar Singh, Santa Singh and some others went to the *thana*, distant seven miles from the village and there reported that Ujagar Singh and four other persons unknown, had murdered Vir Singh. This report was, undoubtedly, based upon the information given by Santa Singh, but in the course of it, Sunder Singh himself gave reasons for suspecting Ujagar Singh as the principal person concerned. He told the Police that there had been civil and criminal proceedings between him and Ujagar Singh, that the latter had threatened to kill him or his son, and that, but recently, he had set fire to his stack of wheat (*khilwara*). The Police investigation began promptly and the Sub-Inspector visited the scene of the murder where he found the head lying severed from the trunk in a sugar-cane field which belonged to the deceased and Santa Singh. According to the Sub-Inspector's entry in the diary, this field was covered over with water and no marks of blood were found on the ground. In the course of the inquiry suspicion eventually attached to Santa Singh and on the 7th August, he was arrested. On the 10th August, he is alleged to have pointed out to the Police the place where he had burried the *chhavi* with which the murder had been committed and also the actual spot where Vir Singh had been killed. At the latter spot, it is said that blood stains were noticed and that the earth and grass were collected and sent to the Chemical Examiner for inspection and examination. Santa Singh's *chadars* had also been sent to that officer on the 6th August and the report received by the Police was that blood colouring matter was found on the *chadars*, on the said *chhavi* and on the *chadars*. The prosecution allege that Santa Singh is the man who actually murdered Vir Singh and that he did so because (1) Vir Singh had had a *liaison* with a woman whom Santa Singh had married by *chadar andazi*; (2) he had reason to suspect that Vir Singh had actually poisoned his brother Jowala Singh, in March 1912 and had endeavoured some years ago to poison him and the members of his family.

In support of the prosecution story, it is urged (*a*) that Santa Singh was the man last seen in the company of the deceased; (*b*) that he gave a false story as to the commission of the murder: (*c*) that he practically admitted his guilt to the *Zaildar* Isher Singh, (P. W. No. 6), the *Surbarah Zaildar* (Krishen Singh, P. W. No. 8) and the *Sufaidposh*, (Harnam Singh, P. W. No. 7), inasmuch as he informed these persons that he would point out the places where he had committed the murder and where he had hidden the weapon with which he had committed it; (*d*) that he produced the *chhavi* (Exhibit P. 2) which was found to have colouring matter of blood upon it; (*e*) that his *chadars* were discovered, on examination to have such matter upon them; and finally (*f*) that at the spot which he is said to have pointed out as the actual scene of the murder, the earth and grass were also found to have such matter upon them.

In our opinion, formed after careful and anxious consideration, the guilt of the appellant has not been so clearly and conclusively established as would justify us in upholding his conviction and the grounds urged in support of the finding of the Sessions Judge do not prove the case against him. We will proceed to discuss these *seriatim*.

(1) The first question that naturally arises is whether the appellant had any apparent *motive* for murdering his partner. Upon this point, the learned Government Advocate was obliged to admit that the case for the prosecution was decidedly weak, and his own suggestion was that it was possible that appellant had had a sudden quarrel with deceased and killed him in a fit of rage. The obvious reply to this theory (which was

seemingly urged for the first time before us) is that the murder was committed with a *chhavi* or a *gandasa* and that it is in highest degree improbable that Santa Singh would have had any such instrument at hand, unless he had premeditated murder. An agriculturist proceeding at night time to water his field would not carry any such weapon, and had Santa Singh done so, Vir Singh would in all probability have been suspicious. The prosecution in the Sessions Court, seeing this difficulty, had not propounded any theory as to a sudden quarrel, and the suggestion was that the appellant had some days previously hidden the *chhavi* in the field for use subsequently. But this theory pre-supposes that appellant had carefully planned the murder, and that again presupposes that he had some motive for putting Vir Singh to death, now what is the motive that is said to have impelled him to commit this murder? Admittedly since April last deceased and Santa Singh had been partners in cultivation. They had on various occasions, both by day and by night, gone out in company to attend to their field and from the very fact, that Vir Singh went with Santa Singh on the fatal night, seemingly without suspicion, it is clear that he had no reason to fear Santa Singh and that the latter was believed by him to be his friend, nor again, did deceased's father at first entertain any suspicions of Santa Singh. On the contrary he readily accepted the story told by the latter and was prepared to believe that Ujagar Singh was the real murderer. All these facts tend to show that the deceased and his father had no reason to believe that Santa Singh was their deadly enemy and that he was but waiting for an opportunity to kill Vir Singh. It is suggested, however, that the deceased had had intrigue with appellant's wife, and that he was suspected of having attempted to poison appellant and his family and of having actually, poisoned Jawala Singh, appellant's brother, (see the evidence of Sundar Singh, Bhagat Singh and Wadhwa Singh, P. W. No. 5, the latter, however, admitting that he heard of the suspicions about the poisonings only during the investigation of the present case).

We are not impressed with the evidence upon these points. Deceased's father, Sundar Singh, (P. W. No. 2) has had to admit that Santa Singh turned out from his house the woman with whom Vir singh was supposed to have had an intrigue and that this occurred in *Chet* of last year, or, in other words, at some time prior to Santa Singh entering into partnership with Vir Singh. We can hardly believe that Santa Singh entertained any feelings of resentment against Vir Singh with regard to his relations with this woman who appears to have been of loose character. The evidence as to Santa Singh suspecting Vir Singh of attempting to poison him and his family is of the vaguest possible character. *Musammat* Hari (P. W. No. 3) asserts that the incident occurred two years before the murder of Vir Singh while Wadhawa Singh (P. W. No. 5) says it happened five years before that date and Bhagat Singh (P. W. No. 4) speaks merely from hearsay. As a matter of fact this vague suspicion, if ever it existed in Santa Sigh's mind, cannot have induced him, long after it had been forgotten, to murder Vir Singh.

Then, as to the death of Jawala Singh. This also occurred in *Chet* of last year and according to the evidence of Akram Ali Khan (P.W. No. 16), Sub-Inspector, the report then made at the *thana* was that Jawala Singh had died *after* three *months*' *illness*. In face of this report, it is impossible to believe that Jawala Singh's brother, present appellant, was firmly of opinion that death was due to poison administered by Vir Singh. We are asked, however, to believe that Santa Singh entertained that suspicion and that in order to avenge the death of his brother, he ingratiated himself with Vir Singh and his father with the object of eventually murdering one or the other. Had this been the case we should have expected Santa Singh to avail himself of the first opportunity that occurred thereafter, but though it is proved that Santa Singh and Vir Singh went out on many occasions, both by day and by night, to attend to their field—and Santa Singh would thus frequently have had the opportunity for which he was anxiously waiting—no attempt was made by the latter to kill the supposed murderer of his brother. It is, of course, possible that Santa Singh was all this time cherishing a resolution to kill Vir Singh, whom he suspected of having murdered Jawala Singh. But we can deal only with reasonable probabilities, and it seems to us highly unlikely that a man who was thirsting for another's blood would defer gratifying his desires for

several months though in the meantime many opportunities offered themselves to him. Furthermore, we cannot believe that if Santa Singh really suspected that his brother had been poisoned, he would have allowed the latter's death to have been reported as taking place after three months' illness.

Having regard to all these facts we are unable to find upon the record any proof of such motive as would have induced Santa Singh to commit a pre-meditated murder, while the very fact that Vir Singh was killed with a *chhavi* or *gandasa* is a strong point against the theory that Santa Singh may have killed him in a sudden fit of anger.

Turning now to the other points urged by the prosecution against the appellant we find in the first place that he was the last person seen in the company of the deceased. This fact is admitted by the defence, as appellant's own story is that the murder took place in his presence. *Per se*, the presence of the appellant on the occasion cannot afford proof of his guilt as that is a fact entirely consistent with his story and with his innocence. But, it is said that he gave a false story as to the commission of the murder. Obviously, this is an assumption and begs the whole question involved in the case. We cannot say that his guilt is proved because his story is false unless and until it can be established that his story is indeed untrue. Clearly, then, we must look to other facts to see if appellant's guilt has been proved. The *third* point urged in support of the conviction is that the appellant made certain admissions to Ishar Singh, Kishen Singh, Harnam Singh and others, to the effect that he would point out the place where he had murdered the deceased and the place where he had buried the *chhavi* with which he had committed the murder. It is not denied that at the time when the alleged admissions were made the appellant was in Police custody but it is urged that as, in consequence of the information thus given a *chhavi* was discovered and earth and grass were found with colouring matter of blood thereon, the whole statement made by the appellant in respect of these matters is admissible in evidence against him under section 27, Indian Evidence Act. We cannot agree with this proposition. In our opinion, only so much of that statement is relevant as led to the discovery of the *chhavi* or the spots of blood and that that portion of it which went further and purported to be a confession of guilt was irrelevant. In other words, the prisoner's statement that he buried the *chhavi* in a certain spot would be relevant, but not the further statement that it was the *chhavi* with which he had committed the murder, So also the statement that he would point out a certain spot would be relevant, and evidence that at the spot indicated blood stains would be found would be admissible but not the further statement that it was at this spot that he had committed the murder.

In the present case it is in evidence that the *chhavi* (Exhibit page 2) was actually *produced* by the appellant himself, and it is not contended that it was *found* by the Police or any one else in consequence of information given by him. In these circumstances we hold, upon the authority of *Queen-Empress* v. *Kamalia* (1) that though the fact that the appellant actually produced a *chhavi* at a particular place may be proved, the accompanying statement alleged to have been made by him to the effect that he buried the *chhavi* there, is inadmissible in evidence. The fact that spots of blood are said to have been found at the spot pointed out by the appellant is, of course, relevant and practically the whole case against him consists in the fact that he is said to have produced a *chhavi* and to have led the investigating party to a place where blood colouring matter was found in the earth and on the grass. All this occurred on the 10th August and it is significant that heavy rain (amounting, according to the official Gazette, to about $6\frac{1}{2}$ inches), fell in the Ajanala Tahsil between the very early morning of the 1st August and the 10th August. In addition to this it is admitted that on the night of the murder the sugar-cane field, where the murder is said to have occurred, was under water, having been irrigated from the well. In these circumstances we find it difficult to believe that blood colouring matter from the deceased's body would still be found, several days afterwards, in the earth and on the grass, and we are certainly not prepared to accept the statements of Ishar Singh, Hari Singh, Kishen Singh, Santa Singh and Akram Ali, Sub-

(1) 10 B. 595.

Inspector, that the stains of blood thereon were obvious to the eye. But these objections apart, we find great difficulty in accepting the story that a man, who has throughout consistently refused to make any confession before a Magistrate and against whom there was practically no evidence at all, was nevertheless prepared to admit his guilt to the Police by pointing out to them and the village authorities, the place where he had concealed the *chhavi* and the place where he is alleged to have committed the murder. The evidence may, of course, be true, but, when it is practically the only incriminating evidence against an accused person, it must necessarily be received with the greatest caution and suspicion.

The last point made against the appellant is that his clothes (*i.e.*, the *chadars* he was wearing about the 6th August) were found on examination by the Chemical Examiner to have blood colouring matter upon them. The Sessions Judge regards this as an important piece of evidence against the appellant, who, he says, has given "no rational explanation" to account for the stains. There might have been some force in this, had it not been for the fact that the *chadars* of two other persons who are not alleged to have had any part in the murder, namely, Jiwan and Sohan Singh, were sent for examination to the Chemical Examiner at the same time, and were also found to have blood colouring matter upon them. Obviously, therefore, the presence of such matter on the *chadars* of persons of this class proves nothing.

Having regard to all the circumstances and to the evidence on the record, checked as we have checked it, by reference when necessary, in the interests of the appellant, to the entries in the Police diary, we are of opinion that the case against the appellant is open to serious doubt. We, accordingly, accept his appeal and set aside the conviction and sentence. The appellant will be released as soon as possible.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 147 OF 1913.

March 13, 1913.

Present:—Mr. Justice Coxe and Mr. Justice N. R. Chatterjea.

NISHI CHANDRA CHAUDHURY—PETITIONER

versus

ROMESH CHANDRA SEN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, sub-ss. (6) and (7), 9, 408, 409, 367, 424—Additional Sessions Judge—Magistrate—Subordination—Sanction to prosecute—Reasons.

Section 408 of the Criminal Procedure Code makes sentences of a Magistrate appealable to the Court of Session and under section 409, read with section 9 of the Code, an Additional Sessions Judge has jurisdiction to hear such appeals. For the purpose of section 195, sub-section (7), therefore, a Magistrate is subordinate to an Additional Sessions Judge and consequently an Additional Sessions Judge has jurisdiction to grant sanction refused by a Magistrate.

A Court should give reasons for granting or refusing sanction.

Rule for setting aside a sanction.

Babu *Satya Charan Sen*, for the Petitioner.

Babus *D. L. Kastgir* and *Khitish Chandra Sen*, for the Opposite Party.

JUDGMENT.—This was a Rule to show cause why a sanction granted by the Additional Sessions Judge should not be set aside on the first two grounds mentioned in the petition. The first ground is that the Sessions Judge had no power in law to transfer the hearing of the matter to the Additional Sessions Judge and the latter had no jurisdiction to grant the sanction. Under section 195 of the Criminal Procedure Code any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing the sanction is subordinate; and for the purposes of this section every Court is deemed to be subordinate to the Court to which appeals from the former Court ordinarily lie. Under section 408 appeals from the first Court in this case lay to the Court of Session and under section 409 read with section 9 of the Code of Criminal Procedure an Additional Sessions Judge can exercise jurisdiction in that Court. It seems to us that the Magistrate was subordinate to the Additional Sessions Judge within the meaning of section 195 and that the Additional Sessions Judge had jurisdic-

tion to grant a sanction refused by the Magistrate.

The second ground is that the statements made cannot at all be construed to mean any offence "under section 193 of the Indian Penal Code." We are unable to understand why these statements, if they are false, cannot be construed to mean an offence under section 193. Apparently they were at first supposed to be contradictory statements but it is clear that they were not so. They were disbelieved by the Courts below as being altogether false and not as being self-contradictory. On this ground the Rule, therefore, fails.

On looking into the records we are not satisfied that the learned Additional Sessions Judge has dealt judicially in the matter in accordance with section 195, clause (*b*). There is a formal proceeding drawn up and there is a note in the order-sheet of the order passed, granting sanction but there is nothing to show that the Sessions Judge applied his mind judicially to the application and there is no statement of his reasons for the decision.

We think, therefore, that the case must go back, the application be re-heard and the reasons for granting or refusing sanction should be given.

Case remanded.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 464 OF 1912.

January 15, 1913.

Present:—Mr. Justice Chevis.

SHERA—PRISONER—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860*), s.* 307—*Doubt—Circumstantial evidence—Blood stains on clothes—One person accused at* thana *and another at the spot.*

Where in a case under section 307, Penal Code, *A.* and *B.* were named at the *thana* as the assailants but when the Police went to the spot the name of *C.* was substituted for that of *B.* and the only eye witness said he saw their backs as they ran:

Held, that the accused could not be convicted on such evidence, the mere fact of there being blood stains on the clothes would not suffice, the evidence of the trackers being by no means infallible.

Appeal from the order of the Magistrate, 1st class, Lyallpur, dated the 10th July 1912 convicting the appellant.

Lala *Nand Lal*, for the Appellant.

The *Assistant Legal Remembrancer*, for the Respondent.

JUDGMENT.—The appellant, Shera, has been conviced of attempting to murder Agra and sentenced to five years' rigorous imprisonment.

That a murderous attack was made on Agra while he was sleeping is clear; the question is whether there is sufficient proof against Shera.

There is not a single witness who deposes in Court to having recognized either of Agra's assailants (it is said that there were two assailants), and the decision of the case must rest on the evidence as given in Court. The prosecution witnesses may have been won over of course, but even so, if the evidence given in Court does not establish the guilt of the appellant he cannot be convicted.

Mathela and Waryami simply say they saw two persons running away but could not identify them. Agra's wife, *Musammat* Daulan, also says that she saw the backs of two persons running away but did *not* recognize them definitely. It is clear enough that suspicion at first fell on Shera and Wasawi, and these two were named at the *thana*. Shera is the brother and Wasawi is the husband of a girl who was abducted by Agra last *Katik*, so such suspicions would be natural enough. But when the Police reached the spot, Masta, a cousin, was named instead of Wasawi, the husband. It appears to me very doubtful if any one was really identified at the spot; this is very probably one of those cases in which a sudden assault is committed in the dead of the night when every one is asleep, and persons are named on suspicion though, as a matter of fact, no one has seen the assailants or at most has only seen their backs as they ran off. *Musammat* Daulan, as already stated, will not swear to any one in her statement in Court. Even from the prosecution evidence it would appear that she first named Wasawi and Shera, and then changed the names to Shera and Masta.

As to the track evidence the trackers swear to certain tracks as those of Shera and Masta, but they admit that no one but these

two and Wasawi was made to walk near the tracks, and I conceive it is as possible for a mistake in identification to be made by trackers as by any one else.

Ghulam Muhammad, *lambardar*, says that Shera and Masta confessed to him before the Police arrived, but in cross-examination he admits a quarrel over irrigation matters with Shera; such an admission may be made for the purpose of lessening the value of his evidence, but either there has been a quarrel or the witness lies when he says there has been a quarrel, and if he is a liar, his evidence must be regarded with caution.

As to the Chemical Examiner's report, this speaks of blood-stains on the clothes of all three, Shera, Masta and Wasawi, whereas all the other evidence in the case points to the assault having been committed by two men only.

The learned Magistrate distrusts the evidence of the *lambardar* and regards the Chemical Examiner's report as inconclusive, and so far I agree with him. The Magistrate convicts on the evidence of *Musammat* Daulan and the trackers and here I cannot uphold him. *Musammat* Daulan does *not* depose to having recognized the appellant, and the trackers' evidence I regard as by no means infallible.

I consider the evidence insufficient to warrant a conviction, and I accept this appeal and reversing conviction and sentence I acquit the appellant and order him to be released.

Appeal accepted.

CALCUTTA HIGH COURT.

FULL BENCH.

CRIMINAL REVISION No. 631 OF 1912.

February 4, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Richard Harington, Bart., Mr. Justice Stephen Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

HAR PRASAD DAS—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR.

Jurisdiction—High Court—Criminal Bench—Revision—Order by Civil or Revenue Court under section 476, *Criminal Procedure Code—Criminal Procedure Code (Act V of* 1898), *ss.* 435, 439, 476—*Civil Procedure Code (Act V of* 1908), *s.* 115—*High Courts Act* (24 *&* 25 *Vict. C.* 104), *ss.* 14, 15.

When action is taken by a Civil or a Revenue Court under section 476 of the Criminal Procedure Code, its proceedings may be revised by the High Court under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or may be examined under section 15 of the High Courts Act. A Bench of the High Court exercising criminal jurisdiction cannot, as such, deal with these matters unless authorised by the Chief Justice under section 14 of the High Courts Act to do so.

But when action under section 476 is taken by a Criminal Court, subordinate to the High Court, its proceedings are open to revision under section 439 of the Criminal Procedure Code.

The cases of *Kali Prasad Chatterjee* v. *Bhuban Mohini Dasi*, 8 C.W.N. 73; 1 Cr. L. J. 21 and *Emperor* v. *Gopal Barik*, 34 C. 42; 11 C. W. N. 125; 4 Cr. L. J. 460, were correctly decided.

Rule issued by the Criminal Bench of the High Court against the order of the Assistant Settlement Officer of Shahabad directing the prosecution of the petitioner under section 476 of the Criminal Procedure Code.

The matter was referred to a Full Bench by the following

ORDER OF REFERENCE.

HOLMWOOD, J.—The question has arisen on a Rule issued by us to show cause why an order made under section 476, Criminal Procedure Code, by the Assistant Settlement Officer in the Shahabad District, should not be set aside, whether the Criminal Bench has jurisdiction to interfere with the orders of Civil and Revenue Courts made under that section. The rulings are very conflicting on the point and it seems necessary to have the matter settled by a Full Bench. The difficulty has been got over on more than one occasion by the appointment of a Special Bench by the Chief Justice to hear such applications, but it is obvious that this causes unnecessary delay and embarrassment to applicants, and there seems to be no reason why the matter should not be settled once for all.

Our own view of the matter in a recent case was that there was no question as regards the jurisdiction of the High Court in sanctions under section 195. There it is expressly laid down that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and in the case of an

Assistant Settlement Officer the Special Judge would in the first instance deal with the matter and in the event of its going further the Civil Bench of the group to which the case belonged. It is the settled practice in this Court to treat cases under section 195 by way of appeal and no question as to the revisional powers of the Court or the powers under the Charter arises.

But under section 476 the matter is on a wholly different footing. To begin with, there is a conflict whether the High Court, in dealing with orders under section 476, acts under its revisional powers by virtue of section 439 or whether it only interferes under section 15 of the Charter. The most recent practice has been to discourage references from District Judges on the ground that such orders could not be dealt with in revision and District Judges have uniformly refused to refer such questions to us and have directed the aggrieved party to move this Court direct.

In a recent case a Civil Bench of this Court issued a Rule against an order under section 476 and directed the party to move the Criminal Bench for stay of criminal proceedings in the Magistrate's Court. This appeared to us to be the proper and reasonable procedure assuming as we did assume for the purposes of that case that this Court could only interfere with the Civil Court's order under the Charter or under section 115, Civil Procedure Code. The rulings of this Court to which we desire to draw attention are:

The case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1), where it was held by Rampini and Handley, JJ., that the Criminal Bench of the High Court has no authority to interfere, under section 439, Criminal Procedure Code, with the proceedings of a Munsif taken under section 476, Criminal Procedure Code. The Civil Bench should be moved under section 622 (now section 115) of the Civil Procedure Code.

In taking this view the Judges, no doubt, relied on the cases of *Eranholi Athan* v. *King-Emperor* (2) and *In re Chennanagoud* (3), and the former case has since been overruled by a Full Bench of the Madras Court in the case of *Ottupura Narayana Somayajipad* v. *Emperor* (4). The latter case of *In re Chennanagoud* (3) was a case under section 195 and still holds good.

It was argued by Mr. Jackson for the petitioner that the Full Bench decision of the Madras Court in *Eranholi's* case (2) having been overruled by the Special Bench in *Ottupura Narayana Somayajipad* v. *Emperor* (4), the decision of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) was no longer binding on us, but the same learned Counsel recently pointed out to us the remarks of Jessel, M. R., that authorities of reported cases could only be relied upon when they laid down certain principles which the Judges could follow and the Judges of this Court do not say that they merely follow the rulings of the Madras Court but that they think the contention on which those rulings went is well founded. They, therefore, follow the principle and that principle would, therefore, be binding on us if it be not overruled.

Now in the very latest reported case on the subject in this Court *Ram Prasad Malla* v. *Raghubar Mulla* (5), the same principle has been re-affirmed though in a different form. For it has been held that the High Court cannot take action under section 476 in a case decided by a Judge of Small Causes inasmuch as a Small Cause Court is not a Court subordinate to the High Court. In the same way a Settlement Officer's Court is not a Court subordinate to the High Court except in so far as cases may come before it in special appeal from the Special Judge in certain proceedings under the Tenancy Act.

The case of *Emperor* v. *Gopal Barik* (6) is in direct conflict with *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) inasmuch as the learned Judges (Mitra and Ormond, JJ.,) expressly dissent from *Eranholi's* case (2) and follow the case which was overruled by the Madras Full Bench, *viz.*, the case of *Queen-Empress* v. *Srinivasalu Naidu* (7).

(1) 8 C. W. N. 73; 1 Cr. L. J. 21.
(2) 26 M. 98.
(3) 26 M. 139.
(4) 33 M. 49 (F. B.); 3 Ind. Cas. 934; 6 M. L. T. 327; 19 M. L. J. 766; 10 Cr. L. J. 420.
(5) 37 C. 13; 13 C. W. N. 1038; 4 Ind. Cas. 6; 10 Cr. L. J. 454.
(6) 34 C. 42; 11 C. W. N. 125; 4 Cr. L. J. 460.
(7) 21 M. 124.

They say they have not been referred to any case in this Court to the contrary and *Kali Prasad Chatterjee* v. *Bhuban Mohini Dasi* (1) was not brought to their notice.

The case of *Mahomed Bhakku* v. *Queen-Empress* (8), treated the matter as one of doubt but inasmuch as the Bench had the civil business of the Burdwan group then in its hands and the case was transferred to it by the Chief Justice the question had not to be decided.

So, too, the case of *Hem Chandra Ray* v. *Atal Behari Ray* (9) seems to leave the matter in greater doubt than ever though some of the remarks of the Court of which Rampini, J., was a member, seem to conflict with the decision of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1). In a later case *Dakhineswar Misra* v. *Harris Chandra Chatterjee* (10), Mookerjee, J,. points out the conflict between the cases of *Kali Prasad Chatterjee* v. *Bhupin Mohini Dasi* (1) and *Hem Chandra Roy* v. *Atal Behari Roy* (9). But in the latter case the question was, as we have seen, left in doubt, so that we have really as far as this Court is concerned only to deal with the direct conflict between *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) and *Emperor* v. *Gopal Barik* (6) and we think that this must be referred to a Full Bench inasmuch as in the former ruling the [Criminal Bench declined jurisdiction even after the Chief Justice had made over the case to it by special order, apparently holding that as long as it was a Criminal Bench it had no jurisdiction and the only way it could get jurisdiction would be by a special order of the Chief Justice making the Bench a Special Bench for the disposal of this particular civil matter. The difficulty, therefore, cannot be altogther met by our making a reference to the Hon'ble the Chief Justice. We have been referred to the cases of *In the matter of the petition of Bhup Kunwar* (11) and *Salig Ram* v. *Ramji Lal* (12), as also to a Full Bench of the Punjab Chief Court, reported as *Bishan Singh* v. *Amritsaria* (13), in which the latest view of the Madras Court has been affirmed.

In the Allahabad cases the view of this Court in *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) has been affirmed, though in the case of *In re Bhup Kunwar* (11), Banerji, J., differed from Sir John Stanley, C. J, and Blair, J., and the later case *Salig Ram* v. *Ramji Lal* (12) was under section 195 and does not concern us.

Mr. Jackson relies on judgments of Banerji, J., in *Bhup Kunwar's* case (11), upon that of Mitra and Ormond, JJ., in *Emperor* v. *Gopal Barik* (6) and on the comparison of authorities in the Punjab Chief Court. Mr. Orr for the Crown relies on the ruling in *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) and the principles laid down in *Eranholi Athan* v. *Emperor* (2); *In re Chennanagoud* (3) and by the majority of the Allahabad Court in *Bhup Kunwar's* case (11). Perhaps the arguments *pro* and *con* are best set out in the judgments of Stanley, C. J., and Banerji, J., in the latter case and as they are there to be found in immediate juxtaposition it is convenient to refer to that ruling as setting out the conflict clearly and succinctly.

Speaking for myself I do not think that the question of whether the order under section 476, Criminal Procedure Code, is or is not in the nature of a complaint has anything to do with the matter and I strongly deprecate the introduction of section 195, Criminal Procedure Code, into the discussion at all.

The question seems to me to depend on the construction of section 439 and as regards that I agree with the view expressed by Stanley, C. J. I cannot see how section 439 can be strained to include the proceedings of a Civil or Revenue Court. The Munsif or Revenue Officer by exercising his powers under section 476 does not thereby make himself a Criminal Court. A Full Bench of this Court has held that proceedings under Chapter XII, Criminal Procedure Code, can only be dealt with under the Charter and not under section 439. It, therefore, establishes the principle laid down by Stanley, C. J., that sections 435 to 439 must be read together and cannot be

(8) 23 C. 532.
(9) 35 C. 909; 8 Cr. L. J. 435.
(10) 10 C. L. J. 450; 4 Ind. Cas. 368; 10 Cr. L. J. 564
(11) 26 A. 249; (1904) A. W. N. 15; 1 Cr. L J. 73.
(12) 28 A. 554; 3 A. L. J. 394; A. W. N. (1906) 103; 3 Cr. L. J. 400; 1 M. L. T. 219.
(13) 7 Cr. L. J. 281; 7 P. W. R. 1908 Cr. (F. B.) 103 P. L. R. 1908; 5 P. R. 1908 Cr.

separated. The word "any proceeding" occurs in section 435 exactly as it does in section 439 and the exclusion of Chapter XII and certain other sections in section 435 seems to exclude them equally from the operation of section 439. In the sections as regards contempt of Court, which immediately follow, Civil and Revenue Courts are given distinct criminal powers. Yet it is enacted that the appeal lies to the Court to which decrees or orders made in such Court are ordinarily appealable. Further it is said that the provisions of Chapter XXXI, that is, the Chapter on appeals, shall apply so far as they are applicable to appeals under section 486 but the law is silent as to revision under Chapter XXXI. Now it is clear that when acting under section 476 the Civil and Revenue Courts are not exercising in any way such direct criminal powers as they are under sections 480 to 484 and it appears, therefore, anomalous that the Criminal Bench of the High Court should have revisional jurisdiction under section 476 from Civil and Revenue Courts which is apparently excluded in the case of convictions for contempt.

The Civil Court has no power to punish under section 476 and merely expresses its judicial opinion as a Civil Court that the offender has rendered himeslf liable to the jurisdiction of the Criminal Court. That judicial opinion is liable to revision by the High Court in its revisional powers under section 115, Civil Procedure Code, and as Sir John Stanley says under that alone. There is, however, this decided conflict of opinion in all the Courts and Banerji, J., points out that the same conflict has occured in Bombay : *Queen-Empress* v. *Rachappa* (14) and *In re Balgangadhar Tilak* (15).

But we are only concerned with the decisions of this Court and the questions, therefore, which we refer to the Full Bench are :

(1) Was the case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1), rightly decided? or

(2) Was the case of *Emperor* v. *Gopal Barik* (6) rightly decided ?

(3) Has the High Court revisional powers under section 439, Criminal Procedure Code, in the case of orders passed by Civil and Revenue Courts under section 476 ?

(4) Can the High Court, in the exercise of its criminal jurisdiction, look into such orders under section 15 of the Charter, or, is section 115, Civil Procedure Code, the only section under which such orders can be revised ?

(5) If the latter, can the Bench exercising criminal jurisdiction deal with such matters under section 115, Civil Procedure Code ?

IMAM, J.—The question in this case is whether the propriety of an order of a Subordinate Civil Court or a Revenue Court passed under section 476 of the Code of Criminal Procedure, directing an inquiry into offences brought under its notice in the course of a judicial proceedings, can be considered by a Criminal Bench of this Court. There is a divergence of opinion among the Judges of this and other High Courts, and I agree with my learned brother in thinking that in the conflicting state of authorities on this subject, a reference to a Full Bench of this Court is necessary. The questions formulated cover all the aspects of the subject and I agree to the reference in their terms.

Whatever conflict there may be in the case-law, as to whether the High Court can, under section 439, interfere with an order for prosecution passed under section 476, it appears to me that the Act itself invests the Court with the fullest authority to deal with such an order as much as with any other order revisable by this Court. Prior to the passing of Act V of 1898, when the Code of 1882 was the law, no question was raised doubting the jurisdiction of this Court in exercising powers of revision over such orders. When the old Act was in force, in the case of *Ishri Prasad* v. *Sham Lall* (16), Petheram, C. J., and Straight, J., pointed out the inconvenience of a Munsif or a Subordinate Judge ordering prosecution to have to be examined as a complainant and it seems that the inconvenience pointed out in that case led to the insertion, in section 476 of the

(14) 13 B. 109.
(15) 26 B. 785; 4 Bom. L. R. 618.

(16) 7 A. 871; A. W. N. (1885) 267.

amended Code of 1898, of the passage, "and as if upon complaint made and recorded under section 200" Were it not for this amendment there would have been no room to doubt the jurisdiction of the High Court. It has been contended, but with little reason, that by this amendment an order under section 476 ceases to be a proceeding and is a mere complaint which, when forwarded under the provisions of the section, is the basis of a case in which the Magistrate has to proceed according to law and in the same manner as if a complaint had been made and recorded under section 200. It is clear from the amending passage in section 476 that in order to facilitate the procedure of the Magistrate after the case has been sent to him, the order is treated as analogous to a complaint. It does not mean, nor can it mean, that the order in itself is a complaint. It seems to me that the words "as if" are important and ought not to be overlooked in construing the section. In the light of the amendment the proceedings before the Magistrate begin, as though cognizance had already been taken of the offence after complaint made and recorded and the case transferred to the Magistrate for trial. It, therefore, follows that a Court, Civil, Criminal or Revenue, is authorised under section 476 to take cognizance of offences mentioned in section 195 and a necessary corollary to this is that up to the stage of the case being sent on to a Magistrate it is a criminal proceeding before the Court passing the order.

I venture to hold and urge it as a principle that a power once given cannot be withdrawn without express words of withdrawal and if withdrawal is suggested, by implication, from a phrase or a passage introduced in an amendment intended to obviate difficulties of procedure of subordinate Courts, such a withdrawal of power of the High Court could never be the meaning of the law.

In cases reported prior to 1898, *e. g.*, *Khepu Nath Sikdar* v. *Grish Chunder Mookerji* (17) and *Chaudhari Mahomed Izharul Huq* v. *Queen-Empress* (18), the learned Judges who decided those cases held, and correctly so, that the High Court had full jurisdiction to deal with such orders for prosecution.

I have already submitted that the amending passage in section 476 is not a withdrawal of the powers of the High Court and inspite of the amendment the provisions of section 439 remain intact. The terms of that section are very general and the expression "any proceeding" is sufficiently extensive to embrace any and every order passed under the Code except such as are expressly excluded or are held to be so.

In *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1), Rampini and Handley, JJ., referred with approval to the case of *Eranholi Athan* v. *King-Emperor* (2), in which a Full Bench of the Madras High Court held that where a Court had taken action under section 476, as a Court of Revision the High Court had no power to interfere under section 439 and that the reasons for the decision of *Queen-Empress* v. *Srinivasulu Naidu* (7) were not applicable to the amended Code. This Full Bench decision of the Madras Court has, however, been reconsidered by another *Full Bench* of the same Court and has been overruled. The case that Rampini and Handley, JJ., had before them, had no reference to an order for prosecution under section 476 passed by a Magistrate but was one in which a Munsif had passed the order. Thus whatever approval to the case of *Eranholi Athan* v. *King-Emperor* (2) may be gathered from the judgment of those two learned Judges, it is not to be forgotten that for the purposes of that case they were not considering the effect of section 439 in its relation to an order under section 476 passed by a Magistrate.

I now proceed to consider whether the High Court in its Criminal Revisional Jurisdiction is empowered to revise an order for prosecution passed under section 476 by a Civil or Revenue Court. Before I discuss or refer to any of the decided cases on the subject, I think it would be more useful to refer to the language of the law and derive such meaning as can be gathered therefrom. In dealing with the subject I may premise my remarks by referring to the preamble of the Act which lays down that the enactment is made because it is expedient to consolidate and amend the law relating to Criminal Procedure. Thus construing the Act from its preamble we have to hold that orders by even a Civil or Revenue Court

(17) 16 C. 730.
(18) 20 C. 349.

under the provisions of the Act come within Criminal Procedure and, therefore, whatever ordinarily the civil or revenue functions of a Court may be, its orders under the Act remain to be governed by the provisions of the Act, and section 4 (*j*) defines that a "High Court" means the highest Court of criminal appeal or revision. Chapter XXXII of the Act deals with matters of reference and revision and to elucidate the point in question it is worthy of note that section 435 deals with the calling of record from "any inferior Criminal Court" and sections 436 to 438 deal with the examination of record under section 435 which, in other words, limits us to the records of inferior Criminal Courts; but section 439 is much more general and much more extensive in its comprehension and without limiting the High Court to exercise its jurisdiction over the inferior Criminal Courts allows it to deal with any proceeding, record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge. In this section no limitation has been placed as to the character of the Court against whose orders powers of revision have to be exercised, and as I have already drawn attention to the preamble of the Act, it follows as a sequence to legitimate interpretation that orders under section 476, passed by a Civil or Revenue Court, come within the scope of section 439.

In the case of *In re Bhup Kunwar* (11), Stanley, C. J., held that to understand the true scope of section 439 it was necessary to consider the four preceding sections and particularly section 435 and that on a true interpretation of section 439 it applied only to a proceeding such as was expressly mentioned in section 435, namely, a proceeding before an inferior Criminal Court. I may be permitted to point out that, while sections 436 to 438 by express words are governed by section 435, the provisions of section 439 have no such limitation on them. It is obvious that all reference to section 435 has been left out from the words of section 439 with an object and that being that the judicial power of the highest Court of justice should remain unfettered. It seems to me that section 439 is not circumscribed by section 435 to the exclusion of all other powers of revision and holds much more than section 435 contemplates.

In *Emperor* v. *Gopal Barik* (6), Mitra and Ormond, JJ., held that the High Court had power under section 439 to revise such orders whether passed by a Criminal or a Civil Court although a contrary view of the law had been previously taken by Rampini and Handley, JJ., in the case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1), wherein they expressed their view that the Criminal Bench of the High Court had no authority to interfere under section 439 with the proceedings of a Munsif taken under section 476.

Further, it seems to me the jurisdiction of the Criminal Bench of this Court cannot be ousted once the proceedings under section 476 have been forwarded to the Magistrate for inquiry into the alleged offence, for the High Court in its exercise of criminal jurisdiction, even if it be taken in its limited sense, can send for the record from the Court of the Magistrate and can proceed to consider whether the Magistrate should or should not go on with the trial of the case.

As regards the third question whether the High Court in its criminal jurisdiction is empowered under section 15 of the Charter to exercise superintendence over the Civil and Revenue Courts in respect of such orders, I see nothing in the Charter to forbid it.

Dealing with the question whether section 115, Civil Procedure Code, is the only provision of the law under which such orders by Civil Courts can be subjected to revision, I venture to rely on the views I have already expressed and I am persuaded to hold that such an order is revisable by the High Court under the Criminal Procedure Code, the Charter and the Civil Procedure Code alike.

I now take the last question namely: is a Criminal Bench of this Court vested with powers of a Court of civil appeal and can it revise such an order under section 115 of the Code of Civil Procedure? The powers of a Judge of the High Court have not been limited by any legislative definition and I venture to think that a Judge of this Court is inherently, by reason of his position as such, invested with civil and criminal powers alike and in whatsoever Bench he may sit he is not divested of any of the powers that he, as a member of a Court of record, individually represents. The formation of Benches is

governed by sections 13 and 14 of the Charter. Under the latter section it is for the Chief Justice to determine what Judges of the Court shall constitute the several Division Courts, but that is merely an arrangement for convenience of administration of justice, as is laid down in section 13 of the Charter. There are no words in section 13 which derogate from the inherent powers of a Judge. In *Har Charan Mukherjee* v. *King-Emperor* (19), which was a case of an order for prosecution under section 476 passed by a Munsif, Harington, J., held that a Criminal Bench of this Court had jurisdiction to deal with the question under the powers vested in the Bench as a Court of criminal appeal or a Court of civil appeal, and Pargiter, J., held that as a Criminal Bench they had no jurisdiction to deal with the proceedings taken by Civil Courts under section 476, but he, nevertheless, held that the Judges of the Criminal Bench could deal with the matter under section 622, Civil Procedure Code, (section 115 of the new Code) in their civil jurisdiction. This case was decided after the case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1), and though not disagreeing with it, Pargiter, J., pointed out that their civil jurisdiction was exercisable even though they were sitting in the Criminal Bench.

It will be a matter for future consideration whether the particular order now impugned should be set aside or not, regard being had to the terms of the answer given to this reference by the Full Bench.

Mr. *S. P. Sinha*, Babus *Dasarothi Sanyal*, *Manmatha Nath Mukherjee*, *Biraj Mohun Majumdar* and *Chandra Sekhar Prosad Singh*, for the Petitioner.

Mr. *Orr* and Babu *Atulya Charan Bose*, for the Crown.

OPINION.—The questions referred for decision by a Full Bench have been framed in the following terms:

1. Was the case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) correctly decided?

2. Was the case of *Emperor* v. *Gopal Barik* (6) rightly decided?

3. Has the High Court revisional powers under section 439 of the Criminal Procedure Code in the case of orders passed by Civil and Revenue Courts under section 476?

4. Can the High Court, in the exercise of its criminal jurisdiction, look into such orders under section 15 of the Charter, or, is section 115 of the Civil Procedure Code the only section under which such orders can be revised?

5. If the latter, can the Bench exercising Criminal Jurisdiction deal with such matters under section 115 of the Civil Procedure Code.

The solution of these questions must depend primarily upon the true construction of sections 439 and 476 of the Criminal Procedure Code.

Sub-section 1 of section 476 provides that when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody or take sufficient security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial. On behalf of the petitioner, it has been contended, that when action is taken by a Civil Court under section 476 the proceeding before it is a proceeding within the meaning of the first sub-section either of section 435 or of section 439 of the Criminal Procedure Code. This argument, in each of its two branches, is, in our opinion, unsound. Sub-section 1 of section 435 authorises this Court to call for and examine the record of any proceeding before *any inferior Criminal Court* situate within the local limits of its jurisdiction. When a Civil Court, subordinate to this Court, takes action under section 476, it cannot plainly be deemed *an inferior Criminal Court* within the meaning of sub-section 1 of section 435. That section consequently has no application. Nor does section 439 touch the matter. It is clear that sections 435—439 must be read together, as pointed out by Wilson, J., in *Hari Dass Sanyal* v. *Saritulla* (20). Section 439 must, therefore, be read along with and subject to the provisions of, section 435. It follows that when an order has been

(19) 32 C. 367; 9 C. W. N. 364; 1 C. L. J. 161; 2 Cr. L. J. 110.

(20) 15 C. 608 at p. 617.

made by a Civil Court under section 476 of the Criminal Procedure Code, it cannot be revised by this Court under section 439. It is equally plain that the order may be revised by this Court under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or may be examined under section 15 of the High Courts Act.

When action is taken by a Criminal Court, subordinate to this Court, under section 476 of the Criminal Procedure Code, the proceeding before it is obviously a proceeding before an inferior Criminal Court within the meaning of section 435, and the order made therein is, consequently, liable to revision under section 439.

When action is taken by a Revenue Court under section 476, the proceeding before it is, for the reason already assigned, not a proceeding before an inferior Criminal Court within the meaning of section 435. The order made therein is accordingly not open to revision under section 439 read with section 435. But the order is open to revision under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or under section 15 of the High Courts Act, 24 and 25 Vict, c. 104; the order is made by a Revenue Authority as a Court in the course of a judicial proceeding before it; with reference to such judicial proceeding, the Revenue Court is a Court subordinate to this Court within the meaning of section 115 of the Civil Procedure Code, and is a Court subject to the appellate jurisdiction of this Court within the meaning of section 15 of 24 and 25 Vict., c. 104.

In view of this exposition of the law, the questions submitted to this Bench must be answered as follows:

1. The case of *Kali Prasad Chatterjee* v. *Bhupan Mohini Dasi* (1) was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Civil Court (in that case, the Court of a Munsif) cannot be revised by this Court under section 439.

2. The case of *Emperor* v. *Gopal Barik* (6) was correctly decided, in so far as it held that an order under section 476 of the Criminal Procedure Code made by a Criminal Court (in that case, the Court of a Sub-Divisional Magistrate) can be revised under section 439.

3. In the case of an order passed under section 476 by a Civil or a Revenue Court, section 439 has no application.

4. In the case of an order passed by a Civil or a Revenue Court under section 476, the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act.

5. When an order under section 476 made by a Civil or a Revenue Court is sought to be revised by this Court, the Bench exercising criminal jurisdiction cannot, as such, deal with the matter, but the Judges composing that Bench may do so, if authorised by the Chief Justice under section 14 of the High Courts Act.

In the case before us, the order in question was made by a Settlement Officer dealing with proceedings under Chapter X of the Bengal Tenancy Act. His order is, consequently, not open to revision under section 439 of the Criminal Procedure Code, but may be examined under section 115 of the Civil Procedure Code or section 15 of the High Courts Act. With this intimation of the opinion of the Court, the case is returned to the Referring Bench in order that it may be dealt with according to law.

Case Returned to the Referring Bench.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 384 OF 1912.

December 11, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

JAFFUR MAHOMED—ACCUSED.

Bombay Prevention of Gambling Act (IV of 1887), ss. 6, 7—Common gaming house—Search by Commissioner of Police without warrant, whether legal—Presumption under section 7, whether arises—Construction of statutes—Penal enactment—Intention of Legislature.

The Commissioner of Police in the City of Bombay is entitled to make a search in a common gaming house and to arrest the persons found there, even in the absence of a warrant under section 6 of the Bombay Prevention of Gambling Act.

The Commissioner has himself power to do that which under section 6 he is empowered to authorize a subordinate Police officer to do.

Emperor v. *Fernad*, 31 B. 438; 9 Bom. L. R. 695; 6 Cr. L. J. 60 followed.

EMPEROR *v.* JAFFUR MAHOMED.

The presumption under section 7 of the Act does not arise where a house is not entered under a special warrant but is raided by the Commissioner of Police without a warrant. The special rule of evidence authorized by section 7 only comes into operation when the imperative provisions of the section have been satisfied.

A penal statute must be construed strictly; the intention of the Legislature being gathered from the language which the Legislature has elected to use. Judges cannot add sections of their own to penal statutes with a view to improve them by some fancied completeness or consistency.

Criminal application for revision against the order of conviction and sentence passed by the Third Presidency Magistrate of Bombay.

Mr. *Raikes*, instructed by Messrs *Daphtary*, *Fereira* and *Divan*, for Accused No. 1.

Mr. *Velinkar*, instructed by Messrs. *Daphtary*, *Fereira* and *Divan*, for Accused No. 2.

Mr. *Strangman*, Advocate-General, instructed by Mr. *E. F. Nicholson*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application in revision, and the judgment which it is sought to revise is a judgment convicting the petitioners under section 5 of the Bombay Prevention of Gambling Act IV of 1887.

The facts are these:—On the night of 22nd September last, Mr. Harker, the Deputy Commissioner of Police, Bombay, received certain information in connection with an offence of gambling. He administered an oath to his informant and took that informant's statement. He then associated with himself other persons, including certain Police officers, and raided a house in the city, in which house these petitioners were found with cards and small coin lying near them.

The section, under which the petitioners have been convicted, lays down that whoever is found in any common gaming-house playing or gaming with cards shall be liable to a certain punishment; and a "common gaming-house" is defined as meaning "a house, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room or place." The conviction recorded by the learned Magistrate has proceeded on the application of the rule of law, or, as it has been termed, the presumption laid down in section 7 of the Act, which enacts that when any cards are found in any house, room or place entered under warrant issued under the provisions of section 6, it shall be evidence, until the contrary is made to appear, that such house, room or place is used as a common gaming-house. Section 6 in its turn enacts that it shall be lawful for the Commissioner of Police in the City of Bombay, upon any complaint made before him on oath, that there is reason to suspect any house to be used as a common gaming-house, and upon satisfying himself after inquiry that there are good grounds for such suspicion, to give authority, by special warrant under his hand to any Inspector or other superior officer of Police to enter a house, to take into coustody all persons whom he finds there and to seize all instruments of gaming.

It is admitted before us for the purposes of the present argument that the conviction is good if the rule of evidence stated in section 7 of the Gambling Act applies to the present facts, and is bad if it does not so apply. The only question, therefore, we have to consider is whether the Magistrate was right in giving effect to this rule; and for the purposes of the argument we will assume that the Deputy Commissioner occupied the same legal position as the Commissioner of Police would have occupied if he himself had made the raid. It remains to see what those powers are which are vested in the Commissioner. Under section 6 they are merely powers to give authority by special warrant under his hand to a subordinate Police officer.

Relying upon this Court's decision in *Emperor* v. *Fernad* (1) the learned Magistrate has held that the proper construction of this section is that the Commissioner has himself power to do that which under the section he is empowered to authorise a subordinate Police officer to do. In the case cited, it was held by this Bench that since the first class Magistrate has, under section 6 of the Gambling Act, power to give authority to a Police officer of a certain class to make the arrest and the search, the Legislature must be presumed to have intended that the first class Magistrate should have the authority to make the arrest and the search himself, if necessary.

(1) 31 B. 438; 9 Bom. L. R. 695; 6 Cr. L. J. 60.

And it is obvious that what is true of the first class Magistrate under the section is true of the Commissioner of Police. Mr. Raikes directed our attention to the fact that those observations in the Court's judgment were obiter, being unnecessary to the decision which was arrived at. However that may be, and whatever our own view of the question might be if the matter were now *res integra* for our consideration, we are not prepared to base our present judgment upon a view of section 6 directly contrary to the view taken in *Fernand's* case (1). We must, therefore, assume for the purposes of the present argument that the observations quoted correctly embody the meaning of the Legislature in regard to section 6 of the Act.

That, however, is not decisive of the question before us, for that question depends immediately not upon section 6 but upon section 7. It must be remembered that this is a penal statute and must be construed strictly. According to section 7 there are certain special circumstances where, when a raid is made, the mere finding of cards or dice is to be taken as evidence that the house in which they are found is used as a common gaming-house, but those special circumstances are carefully restricted by definition, and one essential part of the definition is that the house in which the cards are found should be a house "entered under warrant issued under the provisions" of section 6. While, therefore, we must now assume that the Deputy Commissioner of Police had authority to enter this house under section 6, we cannot concede that the presumption established by section 7 ought to be applied. For the section declares that it arises only if the house is entered under the special warrant, and here admittedly it was entered without such warrant. The learned Advocate-General has suggested that our construction of the Act falls short of giving full effect to the intention of the Legislature in enacting these sections; but the answer to that is that the only clue which we, as Judges, have to the intention of the Legislature is the language which the Legislature has elected to use. If there is substance in the Advocate-General's contention, we can only reply that it is the not uncommon case where the draftsman *voluit sed non dixit:* it is possible that he meant to say so; it is certain that he has not said so. We cannot add sections of our own to penal statutes with a view to improve them by some fancied completeness or consistency.

Speaking, not of a penal statute but of the Companies Act, 1862, Lord Watson in *Salomon* v. *Salomon & Co.* (2) said "'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." And in the same case Lord Harschell, discussing the same point, observed: "I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed."

In the present case it is a condition precedent to the success of this conviction that somewhere in the Act should be found a declaration that, notwithstanding the provisions of section 7, requiring that the house should have been entered under the special warrant before this particular presumption can arise, the presumption equally arises though the house has not been so entered, provided that the entering Police officer be the Commissioner himself. There is no such declaration. On the contrary, as the Act stands, it is fatal to the prosecution; and our duty is to administer the Act as we find it. We must hold that since the imperative provisions of section 7 have not been satisfied, the special rule of evidence authorised by that section does not come into operation.

We, therefore, set aside the convictions and sentences and direct that the petitioners be acquitted and discharged.

Convictions and sentences set aside.

(2) (1897) A. C. 22 at pp. 38, 45; 65 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193; 4 Manson 89.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 345 TO 348 OF 1912.

September 17, 1912.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

KILLIKYATARA BOMMA AND OTHERS—APPELLANTS NOS. 1 TO 4—PRISONERS

versus

EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), ss. 39, 94—Accomplice in murder case—Doing an act under threat of death—Voluntary—Accomplice's evidence—Corroboration.

A person, who by threats of death is induced to do an act in order to facilitate the commission of a murder, cannot claim the benefit of section 94, Penal Code. That section does not apply to cases of murder and the person is an accomplice, his action being voluntary under section 39 of the Penal Code.

Where the complicity of a person in an offence is due solely to coercion and his evidence cannot be ascribed to any desire to escape legal consequences, the discredit attaching to his evidence is so slight as to be practically negligible.

Appeal against the order of the Court of Session of the Bellary Division in Case No. 32 of the Calendar for 1912.

FACTS.—The accused were charged under section 302, Indian Penal Code, with murdering one Sivalingayya on the night of 21st January 1912. The deceased was on terms of criminal intimacy with the 1st accused's wife and 1st accused was coercing his wife to deliver the deceased into his hands. On three or four occasions she said he was not found and at last one day she induced the deceased to go with her to the temple where the accused who were hiding themselves murdered the man. The 1st accused's wife, (P. W. No. 5), kept quiet for over a week after the event. She deposes to the above facts. It was suggested that Yellava, (P. W. No. 5), was an accomplice inasmuch as she called Sivalingayya out of the cattle shed and thereby facilitated the commission of the murder. However, it appeared that what she did, she did under compulsion and threats of death and consequently her action was not voluntary and she cannot be said to have 'intentionally' aided in the commission of the offence. She was, undoubtedly, an accessory after the fact for she kept quiet for a whole week without revealing the story and on that account her story required careful scrutiny. The Sessions Judge found the accused guilty but having regard to the provocation of some standing sentenced the accused to transportation for life.

JUDGMENT.—The chief witness in the case is the woman Yellava (5th prosecution witness), whose evidence, if accepted, fully establishes the guilt of all the accused. The Sessions Judge has held that she is not an accomplice, in which respect he appears to us to be in error. On her own showing she intentionally aided the murderers by calling deceased, and bringing him into their power. It is true she was induced to do so by threats of death; but she cannot claim the benefit of section 94, Indian Penal Code, inasmuch as murder is an offence to which that section does not apply. The Sessions Judge says her action was not "voluntary." But it was certainly voluntary according to the definition of that word in section 39, Indian Penal Code.

We must, therefore, regard 5th prosecution witness as an accomplice, but it does not follow that her evidence should not be accepted and acted upon. The degree of discredit to be attached to an accomplice's evidence varies according to the circumstances of each case; and in the present case, as her complicity was solely due to coercion and her evidence cannot be ascribed to any desire to escape legal consequences, it is so slight as to be practically negligible. We have very carefully considered her evidence and believe it to be true. She appears to have made her statement as soon as she returned to the village with her husband (1st accused), so that there was very little opportunity of concoction, and it agrees in a very important part with a statement which had been recorded two days earlier, from the brother of the deceased. As regards three of the accused, no motive is shown for her falsely accusing them. Powerful corroboration is afforded by the evidence of 9th to 11th prosecution witnesses, which shows that one of the men she named (4th accused) showed the place in the river where the blanket full of stones to which the corpse had been attached was found.

We confirm the conviction and sentence and dismiss the appeals.

Appeals dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 499 OF 1912.

October 26, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

RALIA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 300, *exception* 1, 302—*Grave and sudden provocation, husband seeing paramour of his wife leaving his house—Wife's annoying reception of his remonstrances—Husband killing the wife.*

The accused returned home unexpectedly and met the paramour of his wife coming out of his house, he remonstrated with his wife, and was annoyed by her reception of his remonstrances, and killed her with a hoe which was lying near him:

Held, that the act of the accused was covered by the 1st exception to section 300 of the Penal Code.

Appeal from the order of the Sessions Judge, Lahore Division, dated the 1st August 1912.

Messrs. *Ganpat Rai* and *D. N. Mehra*, for the Appellant.

JUDGMENT.—The appellant has been sentenced, under section 302 of the Penal Code to transportation for life, for the murder of his wife, *Musammat* Ishro on the 19th of last April.

In the Court of the committing Magistrate, on the 22nd of May, he declined to make a statement, reserving his defence for the Sessions Court.

In that Court on the 31st of July, he stated that he had killed his wife because he found her in the act of adultery with one Bishan Das *alias* Chucha, *Brahmin*, and that he had seen her talking to Bishan Das the day before and had forbidden her to have anything more to do with Bishan Das.

The record contains ample evidence that after *Musammat* Ishro's death, the appellant told people in the village that he had killed her, because he had seen Bishan Das coming out of his house and had found her in the house and remonstrated with her to no effect.

We do not believe the witnesses who deposed that the appellant stated that he had seen *Musammat* Ishro in the act of adultery with Bishan Das, but we see no reason to doubt that, on his unexpected return from officiating at a marriage, he found Bishan Das coming out of his house, remonstrated with his wife, was further annoyed by her reception of his remonstrances and killed her with a hoe which was lying near him.

We are further satisfied that he subsequently concealed the hoe and produced it when asked to do so.

The record further contains ample evidence of previous immorality between *Musammat* Ishro and Bishan Das, who was described by the learned Sessions Judge as a weak looking youth and is about 17 years of age, the appellant and *Musammat* Ishro being about 35.

In our view of the facts above stated, the circumstances under which the appellant killed his wife bring his act within the 1st exception to section 300 of the Penal Code, the discovery that Bishan Das had again been to the appellant's wife at his house constituting grave and sudden provocation, immediately preceding the act of killing.

For these reasons, we allow the appeal to the extent of setting aside the conviction under section 302 and the sentence of transportation for life, and sentence the prisoner to rigorous imprisonment for five years under the first part of section 304 of the Code for culpable homicide not amounting to murder. Having regard to the fact that the cause of provocation was not proved to the full extent alleged, we are unable to pass a more lenient sentence.

Appeal accepted; Sentence reduced.

T. GAME *v.* U. KYE.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 6 OF 1912.

December 4, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

T. GAME—PLAINTIFF

versus

U. KYE AND ANOTHER—DEFENDANTS.

Legal Practitioners Act (XVIII of 1879), s. 28—Agreements between Pleaders and clients—Work to be done not Court work.

Section 28 of the Legal Practitioners Act, regarding the filing of agreements between Pleaders and clients in the District Court or in some Court where the work is to be done, applies to agreements for fees in respect of the practitioner's services where the business does not lie in any Court, Civil or Criminal.

Reference made by the Judge of Small Cause Court, Rangoon, under section 3, Code of Civil Procedure, in Civil Regular No. 4332 of 1912 of the Small Cause Court.

FACTS.—This was a reference under section 113 of the Civil Procedure Code and the question referred by Mr. Bagley was as follows: "Does section 28 of the Legal Practitioners Act touch on agreements made by a Pleader and client with respect to the former's professional employment, whether the business upon which he is engaged does or does not come into some Court?" The Judge of the Small Cause Court answered the question in the affirmative, but as he had doubts in the matter, he made a reference to the Chief Court.

In this suit, the plaintiff sued as Pleader to recover Rs. 500 as balance of his fees. The plaintiff's case was that first defendant was compulsorily retired from Government service and plaintiff was retained to memorialise the Lieutenant-Governor for Rs. 550, the second defendant agreeing to pay that sum. Plaintiff suggested that he fulfilled his contract and incidentally it was mentioned that the memorial was successful, the first defendant being reinstated. He now claimed the unpaid balance of Rs. 500.

The first defendant's case was that plaintiff's allegations in respect of the memorial were entirely false and exaggerated inasmuch as he (defendant) absolutely knew nothing of the transaction. The second defendant was the only and real party who engaged plaintiff's services and entered into certain terms and conditions for payment of only Rs. 50 for such work and not Rs. 550 as alleged.

The second defendant alleged that the consideration of Rs. 50 paid to plaintiff was true. The plaintiff demanded Rs. 100 at first, but defendant pleaded his inability to pay and thereafter plaintiff agreed to do the work for Rs. 50. In his

ORDER OF REFERENCE,

Mr. Bagley, the Judge of the Small Cause Court, said:—

"The plaintiff in this suit is a Pleader and he sues to recover an alleged balance of his fees. The plaint sets out that the 1st defendant was compulsorily retired from the Government service and that plaintiff was retained to memorialise the Lieutenant-Governor for Rs. 550, the second defendant agreeing to pay this sum. Plaintiff suggests that he fulfilled his contract and incidentally it is mentioned that the memorial was successful, the 1st defendant being reinstated. He now claims the unpaid balance of Rs. 500.

"As the agreement on which plaintiff relies was verbal, I pointed out that section 28 of the Legal Practitioners Act was fatal to his claim. Under that section a Pleader's agreement with his client respecting his fees must be "filed in the District Court or in some Court in which some portion of the business in respect of which it had been executed," within fifteen days, or it is invalid. But it has been argued on behalf of Mr. Game that the agreement touched a memorial and not a Court case. I am of opinion that the contention is unsound for two reasons: (1) A Pleader's professional business may embrace conveyancing, drafting, consulting, and that never comes into a Court at all, and I cannot suppose that the Legislature intended to differentiate between different kinds of legal business. What is wanted apparently to do was to protect a client in his transaction (professional) with his legal adviser for the relationship was one that afforded considerable opportunities for abuse; (2) The section says that the agreement must be filed either in the District Court, or in some Court in which some part of the work was to be done. To me this looks as if the District Court were expressly mentioned, as the Legislature had chamber

work in view. If the clause touched only work that came into Court, then surely, it was enough to say that the agreement must be filed in the Court or Courts in whch that work was done. As there is some doubt as to the true interpretation to be put upon the section and as it is a matter of great importance to all Pleaders, I think it is a fit case to refer to the Honourable Judges of the Chief Court.

"The question I refer is "does section 28 of the Legal Practitioners Act touch all agreements made by Pleader and client with respect to the former's professional employment, whether the business upon which he is engaged does or does not come into some Court?" I would answer the question in the affirmative."

Mr. *Israil Khan*, for the Petitioner:—The work done by his client has nothing to do with any Court at all, and that section 28 of the Legal Practitioners Act does not apply. But the learned Judge was of opinion that the section did apply and referred the matter for the decision of this Court. Under that section, a Pleader's agreement with his client respecting his fees must be filed in the District Court, or in some Court in which some portion of the business in respect of which it had been executed within fifteen days, or it was invalid. Although his client was a Pleader, he submitted that, according to the section, it was only when work was to be done or had been done in any Court that an agreement should be filed either in the District Court or any of the other Courts in which the work was to be done.

He knew many persons who were not licensed Advocates who wrote title-deeds, memorials, conveyances and so forth in other places and he submitted that plaintiff here in doing the work alleged to have been done by him, did not act in the capacity of Pleader but as one of those who wrote memorials and other documents. Those persons did not write for nothing. They got fees, and so did his client ask for his fees for the work he did. As regards second and third grade Pleaders, the Chief Court had made rules as to what fees they were to charge and everything was laid down in those rules for work to be done in Court. The Revenue Court and the Financial Commissioner had made rules for practitioners in Lower and Upper Burma fixing remuneration in revenue offices under the Financial Commissioner. In neither of the rules, either those made by this Court or by the Financial Commissioner, was there any rule, about work such as was done in the present case. Section 37 was the section under which the rules were made, and there was nothing in it touching the point in issue. He submitted that section 28 did not touch work done by a Pleader or by any one else, such as memorial drafting or petition writing to the Lieutenant-Governor. The plaintiff was quite within his right in filing the suit for the recovery of the fee arranged to be paid to him by the defendants.

Mr. *Halkar*, for the Respondent, said:—Section 28 said that the agreement was to be filed in the District Court or in the Court or Courts in which the work or part of the work was to be done. It did not say "in the Court or Courts in which the work is to be done." If it only referred to work done in connection with the Court, then the words "District Court" would be redundant. It was to protect clients from Advocates that section 28 was framed and the present case was governed by the section. A quack could give medicine under certain restrictions, whereas a professional medical man was on a different footing. Unless the plaintiff in the present case had the written agreement filed as required under section 28 he was not entitled to file this suit.

JUDGMENT.—We are of opinion that section 28 of the Legal Practitioners Act, 1879, applies to all agreements between a Pleader and his client respecting the amount and the manner of payment for the whole or any part of the former's services, fees or disbursements in respect of any sort of business done or to be done by a Pleader for the client.

The contention that the section applies only to remuneration etc., in respect of business done in a Court cannot prevail, since the section applies also to agreements of the nature specified between *Mukhtars* and their employers and between Revenue Agents and their employers. *Mukhtars* may appear, plead, and act in some Criminal Courts, but Revenue Agents cannot as such do any business in any Court either Civil or Criminal. Consequently, the words in the section

after "District Court" cannot be availed of by them and the District Court is the only Court open to them to file agreements in.

We express no opinion as to whether there is a Court in the town of Rangoon in which a Pleader may file an agreement covered by the section.

The question referred is answered in the affirmative.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 761 OF 1910.

March 19, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Chevis.

Musammat PARTAPO AND AMAR SINGH, MINOR, THROUGH *Musammat* NAND KAUR —DEFENDANTS—APPELLANTS

versus

ASA RAM AND OTHERS—PLAINTIFFS

DEWA SINGH AND OTHERS—DEFENDANTS —RESPONDENTS.

Custom—Alienation—Gift—Ludhiana Tahsil *Mauza* Jatana—*Gift by widow to daughter's son—Collaterals in the 7th degree—Daughters preferred to collaterals in 7th degree—Acceleration of succession—Niece not an heir.*

Among *Jats* of Mangat *got*, residing at *Jatana*, in the Ludhiana Tahsil, a daughter is entitled to succeed to the ancestral property of her father in preference to his collaterals in the 7th degree.

A gift of ancestral property to a daughter's son, consented to by the daughter, merely accelerates his succession as her heir; and the collaterals in the 7th degree have no right to contest such disposition of the property.

A brother's daughter is not an heir of her paternal uncle. His collaterals in the 6th degree are entitled to succeed to his ancestral property in preference to his brother's daughter and to control his gift of the property in favour of her son.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 30th May 1910, reversing that of the Munsif, 1st class, Ludhiana, dated the 31st January 1910, dismissing the plaintiffs' suit.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

Lala *Lajpat Rai*, for the Plaintiffs-Respondents.

JUDGMENT.—This appeal is from an appellate decree in a suit by collaterals for a declaration that a deed of gift executed by *Musammat* Partapo and Buji will not affect the plaintiffs' rights on the death of *Musammat* Partapo.

Ruldu had two sons, Sultan and Buji, Buji was childless and Sultan left a son Atra who died leaving his widow, *Musammat* Partapo and a daughter *Musammat* Nand Kaur. The donee Amar Singh is the son of the daughter. The subject-matter of the gift is admittedly ancestral agricultural land. The plaintiffs are descendants of Ramu, Ruldu's great-great-grandfather, from whom the property in suit descended. The question for decision is whether the plaintiffs-respondents are entitled to the property in suit on the death of *Musammat* Partapo. The consideration of this question involves the right of Atra's daughter to succeed, in presence of the plaintiffs-respondents:

(1) to Atra's property and (2) to the property of Atra's uncle Buji, whom he predeceased.

The authorities cited on either side are the following:—

(1) *Balram* v. *Gulab Singh* (1), in which it was held that *Dewal Jats* of Jagraon cannot give a stranger any ancestral property in presence of collaterals in the 5th degree;

(2) *Pala* v. *Buta* (2), in which it was held that collaterals, however remote, may be adopted among *Saraha Jats* of Ludhiana in presence of less remote collaterals. The rule laid down at page 69 of Walker's Customary Law of Ludhiana was not followed;

(3) *Wazira* v. *Tani* (3), in which it was held that *Kundal Rajputs* of the Una Tahsil, Hoshiarpur, cannot give away ancestral land in presence of collaterals of the 7th and 8th degrees;

(4) *Musammat Kishno* v. *Raman* (4), a case of Hindu *Jats* of Ludhiana, in which it was not proved that unmarried daughters could succeed in presence of collaterals of the 6th degree, but it was held that they had a right to maintenance out of ancestral property. The rule laid down in Walker's Customary Law, page 61, was followed;

(5) *Sharf-ud-din* v. *Nabia* (5), in which it was held that, among Muhammadan *Awans* of Ludhiana, collaterals in the 10th degree succeed before a daughter's son on the death of the widow.

(1) 51 P. R. 1884.
(2) 114 P. R. 1889.
(3) 118 P. R. 1891.
(4) 50 P. R. 1892.
(5) 64 P. R. 1892.

It was held that the burden of proof, which had been placed on the daughter's son because the daughter's right was doubtful, had not been discharged;

(6) *Rustam Khan* v. *Musammat Jio* (6), in which it was held that, among Muhammadan *Manjh Rajputs* of Ludhiana Tahsil, married daughters have not even a life-interest in the presence of collaterals;

(7) *Ralla* v. *Budha* (7), an adoption case, cited in *Hazara Singh* v. *Harnam Singh* (8);

(8) *Chatra* v. *Chanan* (9), in which it was held that it had not been proved that among *Dewal Jats* of Ludhiana a daughter's son could be adopted;

(9) *Raushan* v. *Lehna* (10), in which it was held that it had not been proved that an *Arain* of the Ludhiana Tahsil can give ancestral land to his daughter's son in presence of a nephew. Walker's Customary Law was approved;

(10) *Ram Singh* v. *Nand Singh* (11), in which it was held that it had not been proved that among *Garewal Jats* of the Ludhiana Tahsil the adoption of a daughter's son is valid;

(11) *Arur Singh* v. *Musammat Lachmi* (12) cited in *Hazara Singh* v. *Harnam Singh* (8);

(12) *Ishar* v. *Ganda Singh* (13), a Single Bench case, in which it was held that it had not been proved that among *Atwal Jats*, Nawanshahr Tahsil, Jullundur, collaterals in the 5th and 6th degrees were entitled to a declaration that an alienation of ancestral land to a collateral in the 6th degree did not affect their reversionary rights.

(13) *Amir* v. *Musammat Zebo* (14), in which it was held that it had not been proved that, among Muhammadan *Rajputs* of Amritsar a childless proprietor could alienate to collaterals in presence of collaterals of an equal degree;

(14) *Khazan Singh* v. *Relu* (15), a case between Hindu *Jats* of Hoshiarpur, in which it was held that among agricultural tribes in the Punjab there is no definite limit of propinquity up to which kinsmen are to be presumed to have the right to impeach alienation of ancestral land by a sonless proprietor without consideration or necessity, and beyond which they are to be presumed not to have it; and that male reversioners are entitled to object to any such alienation, even in favour of a male agnate of equal or remoter degree, except where the previous relations between the alienor and alienee have created a sort of moral obligation in the former to compensate the latter in this manner for services rendered;

(15) *Natha Singh* v. *Mohan Singh* (16), in which it was held that the plaintiffs, on whom the onus lay, had failed to establish a custom among *Ghuman Jats* of the Sialkot Tahsil, by which collaterals in the 8th degree can contest an alienation of ancestral estate by a childless proprietor as being without necessity or consideration;

(16) *Ram Chand* v. *Thakur Das* (17), in which it was held that among *Brahmans* of Tahsil Kasur, who are governed by agricultural law, the burden of proving that the adoption of a wife's brother's son was valid by custom or that collaterals in the 8th degree were not entitled to contest it, had not been discharged;

(17) *Abdul Karim* v. *Sahib Jan* (18), in which it was held that the burden of proving that among *Chauhan Rajputs* of the Jagadhri Tahsil, Ambala, collaterals in the 7th degree were entitled to succeed in preference to a married daughter of a deceased sonless proprietor had not been discharged, and that there is no general presumption that regardless of tribe and creed agnates, however remote, exclude daughters from succession to ancestral property;

(18) *Rajo* v. *Karm Bakhsh* (19), in which it was held that the burden of proving that among *Rattial Jats* of the Lahore Tahsil, collaterals of the 8th degree were entitled to contest an alienation by a sonless proprietor of the whole of his ancestral immoveable property to his daughter or to

(6) 139 P. R. 1892.
(7) 50 P. R. 1893.
(8) 24 P. R. 1912; 22 P. W. R. 1912; 44 P. L. R. 1912: 13 Ind. Cas. 180.
(9) 19 P. R. 1895.
(10) 36 P. R. 1895.
(11) 103 P. R. 1895.
(12) 75 P. R. 1898.
(13) 41 P. R. 1900; P. L. R. 1900 p. 343.
(14) 42 P. R. 1902.
(15) 35 P. R. 1906,
(16) 93 P. R. 1906; 163 P. L. R. 1906.
(17) 94 P. R. 1907; 29 P. L. R. 1908; 123 P. W. R. 1907.
(18) 5 P. R. 1908; 99 P. L. R. 1908; 29 P. W. R. 1908.
(19) 11 P. R. 1908; 13 P. W. R. 1908; 92 P. L. R, 1908.

succeed in preference to the daughter, had not been discharged;

(19) *Bholi* v. *Man Singh* (20), in which it was held that the burden of proving that among *Chauhan Rajputs* of the Naraingarh Tahsil, Ambala, daughters are excluded by male collaterals in the 6th degree from succession to ancestral property, had not been discharged. It was also held that the burden of proving that remote collaterals, such as those in the 6th degree, exclude daughters, rests on the party who asserts its existence;

(20) *Ganpat Rai* v. *Kesho Ram* (21), in which it was held that entries in the Record of Rights, while evidence of a custom are wholly insufficient to establish the existence of the custom, as they may represent the wishes of those who made them or may simply represent the ordinary entry made in the Record of Rights of the villages throughout a district but that they cannot be accepted as depriving persons, who were no parties to them, *i. e.*, the female relatives of the signatories, of their rights. *Maula Baksh* v. *Muhammad Baksh* (22) and *Har Narain* v. *Musammat Deoki* (23) were cited for the proposition that the Courts must watch with very special care over the rights and interests of the weak against the strong, and must in particular, see that the rights of the weaker sex are not sacrificed to the agnate's desire to take advantage of customs prevailing around him more favourable to himself and his sex than the custom which governs him;

(21) *Mohku* v. *Karam* (24), a Single Bench judgment, in which it was held that among *Gondals* of the Bhera Tahsil, Shahpur, collaterals in the 8th degree can contest a gift of ancestral property by a childless proprietor to his step-son, and that the burden of proving the validity, by custom, of the gift is on the donee. It was further held that the donee had failed to discharge this burden;

(22) *Muhammad* v. *Musammat Bakko* (25), a Single Bench judgment, in which it was held that among *Pathans* of the Mianwali Tahsil collaterals more remote than the 6th degree cannot exclude daughters and sisters from inheritance to their fathers and brothers;

(23) *Hazara Singh* v. *Harnam Singh* (8), in which it was held that among Hindu *Jats* of the Jullundur District collaterals in the 11th degree, though next in succession, cannot, in the absence of proof of a special custom, contest alienations of ancestral property;

(24) *Partab Singh* v. *Musammat Panjabu* (26), in which it was held that among *Garewal Jats* of the Ludhiana District, collaterals in the 4th degree exclude daughters from succession to self-acquired property;

(25) *Tari Baz Khan* v. *Fateh Khan* (27), a Single Bench judgment, in which it was held that it had not been proved that, by custom among *Pathans* of the Mianwali *Tahsil*, collaterals in the 6th and 7th degrees can claim possession of the alienated ancestral land in presence of daughters of the alienor;

(26) *Sant Singh* v. *Sadda* (28), in which it was held that, among *Hindu Jats* of Gujranwala, property, self-acquired *qua* collaterals, can be alienated at the owner's will, and that his collaterals cannot recover possession of the property from the person whom he purported to adopt though the validity of the adoption may be questionable, inasmuch as the adoption has the effect of gift.

The learned Divisional Judge has found, and his finding on this point has not been contested, that among *Riwaj-i-ams* prepared in the Ludhiana District, a list of which is given at pages 35 and 36 of Walker's Customary Law, are two, one of which relates to Hindu *Jats* of *Pargana* Khanna, *Ilaka* Isri and Khanna, and the other to *Hindu Jats* of *Pargana* Sanewal, etc., both in the Ludhiana *Tahsil*; that the village in which the land in suit is situate is in the former area while the villages contained in the latter area contain a large number of

(20) 86 P. R. 1908; 146 P. W. R. 1908.

(21) 34 P. R. 1909; 181 P. L. R. 1908; 1 Ind. Cas. 691.

(22) 54 P. R. 1906; 74 P. L. R. 1907.

(23) 24 P. R. 1893.

(24) 63 P. R. 1909; 79 P. L. R. 1909; 84 P. W. R. 1909; 2 Ind. Cas. 956.

(25) 19 P. R. 1912; 17 P. L. R. 1912; 39 P. W. R. 1912; 13 Ind. Cas. 27.

(26) 25 P. R. 1912; 41 P. L. R. 1912; 125 P. W. R. 1912; 13 Ind. Cas. 177.

(27) 29 P. R. 1912; 114 P. W. R. 1912; 98 P. L. R. 1912; 13 Ind. Cas. 316.

(28) 63 P. R. 1912; 222 P. W. R. 1912; 14 Ind. Cas. 23.

Rajputs of the Mangat *gôt*, to which the parties belong, that among the signatories to the former are the Mangat *Jats* of Jatana, the village of the parties, while the description of Mangat *Jat* does not actually appear in the latter, that the first of these two *Riwaj-i-ams* states clearly that daughters and daughter's sons have no right of succession in the presence of collaterals, however remote, this being the general rule of Hindu *Jats* in the districts stated on page 60 of Walker's Customary Law, and that the second states that the daughters and the daughters' sons do not succeed if there are male collaterals in the fifth degree alive, the inference being that collaterals more remote than the fifth degree do not exclude daughters and daughters' sons. It has been further stated by the learned Divisional Judge, and not denied, that no instances in support of the first *Riwaj-i-am* are quoted, while many instances in support of the second are quoted. The learned Divisional Judge, however, finds that the *Riwaj-i-ams* have been prepared with such care that the absence of instances is immaterial. He has further held that the Ambala Customary Law is not entitled to the same weight as that of Ludhiana, and that inasmuch as in *Bholi* v. *Man Singh* (20) the daughter had never left her father's house, that authority does not help the present appellants.

The weight of authority is, in our opinion, against the collaterals in respect of Atra's land and in their favour in respect of Buji's.

As remarked by the learned Divisional Judge, *Musammat* Nand Kaur is not an heir of her paternal uncle Buji, but is a stranger as far as he is concerned. No authority has been cited for the contention that the rules laid down in Articles 154 and 155 of Walker's Customary Law, pages 75 and 76, are incorrect and the respondents, who are Buji's collaterals in the 6th degree, are entitled to succeed to his ancestral land in default of a nearer heir, and to control his gift of the same.

They are, however, Atra's collaterals in the 7th degree and on the authorities cited we hold that *Musammat* Nand Kaur, Atra's daughter, was entitled to succeed to his ancestral property in preference to them. The gift to her son, to which she has consented merely accelerates his succession as her heir and the collaterals have no right to control this disposition of the property.

The result is that the appeal is decreed and the decree of the Court of first instance restored in respect of Atra's property and dismissed in respect of Buji's property.

Parties will bear their own costs of all Courts.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 385 OF 1911.

February 4, 1913.

Present:—Justice Sir Ralph Benson, KT.

MUTHUSAWMY PILLAI—DEFENDANT—PETITIONER

versus

SHUNMUGASUNDARAM PILLAI—AND OTHERS—PLAINTIFFS—RESPONDENTS.

Small Cause decree based on finding in original suit—Finding reversed in appeal—Civil Procedure Code (Act V of 1908), O. XLVII, r. 2—Proper procedure—Review—Discovery of new and important matter.

Where a decree in a Small Cause suit was based on a finding in an original suit and the judgment in the original suit was reversed on appeal:

Held, that the proper procedure was to apply to the Court that passed the Small Cause decree to review its decision under Order XLVII, rule 2, of the Civil Procedure Code.

Ram Lal v. *Kalka Prasad*, 33 A. 566; 8 A. L. J. 584; 10 Ind. Cas. 244, referred to.

Petition, under section 25 of Act IX of 1837, praying the High Court to revise the decree and judgment of the Subordinate Judge of Tinnevelly, in S. C. S. No. 866 of 1910

Mr. *V. C. Seshachariar*, for the Petitioner.

Mr *M. D. Devadoss*, for the Respondents.

JUDGMENT.—I cannot say that the decree of the Subordinate Judge is not in accordance with law. But the decree is based on the finding in Original Suit No. 51 of 1910 that the plaintiffs were not defaulters and had the right to sue. That decree was set aside on appeal, (*vide* judgment now admitted). I think the proper course is for the petitioner to apply to the Subordinate Judge to revise his decree in consequence of the discovery of new and important matter under Order XLVII,

clause 2, as was held in the case of *Ram Lal* v. *Kalka Prasad* (1).

I dismiss the petition but make no order as to costs.

Petition dismissed.

(1) 33 A. 566; 8 A. J. 584; 10 Ind. Cas. 244.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 31 OF 1911.

March 17, 1913.

Present:—Mr. Justice Rattigan.

MUKANDI—DEFENDANT—APPELLANT

versus

BAKHTAWAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom--Succession — Gour Brahmins — Mauzah *Kharkhanda, District Rohtak—Hindu Law—Tribe notified agricultural—Matter deserving consideration in decision of the question of law or custom—Alienation—Widow—Power to dispose of husband's acquired property.*

In matters of succession the *Gour Brahmins of Mauzah* Kharkhanda, District Rohtak, do not follow the principles of Hindu Law, but are regulated by the ordinary rules observed by the agricultural community of the Province.

The circumstance of a tribe having been notified as an agricultural tribe for the purposes of the Punjab Land Alienation Act, though not conclusive proof of the tribe being subject to the ordinary rules of Customary Law, cannot, nevertheless, be left entirely out of consideration.

Where a family has been in the main agricultural, the mere fact that of late years some members of it have been educated and have taken service under Government, does not free them from being governed by the Customary Law obtaining among agriculturists.

It is not competent to a widow governed by Customary Law to alienate the property of her late husband to which she has succeeded on the ordinary life tenure, even though such property was acquired by her late husband.

Second appeal from the decree of the Divisional Judge, Hissar Division, dated the 15th October 1910, modifying that of the Munsif, 1st class, Rohtak, dated the 16th June 1910, decreeing plaintiff's claim in part.

Mr. *Manohar Lal*, for the Appellant.

Lala *Laipat Rai*, for the Respondent.

JUDGMENT.—The pedigree-table, as propounded before me and admitted to be correct, is appended hereto, will be of assistance in understanding the facts to which reference will have to be made in the course of this judgment.

The parties are *Gaur Brahmans* of *Mauza* Kharkhanda a "*qasba*" or "village" situate in the old Sampla Tahsil of the Rohtak District.

On the 22nd August 1879, by duly registered deed, *Musammat* Har Kaur, the widow of Baldeo, made a gift of a house and certain agricultural land in the said *Mauza* in favour of her son-in-law, defendant, Mukandi, and the gift was followed by mutation of names, which was eventually sanctioned by the Revenue Authorities in favour of the donee on the 26th January 1883.

No suit for a declaratory decree was brought but on the death of *Musammat* Har Kaur on the 27th November 1909, present plaintiffs, who are the agnatic heirs of the last male proprietor (Baldeo) in the third (and not as erroneously stated by the Divisional Judge in the 5th) degree, brought this suit on the 3rd January 1910 for possession of the house and lands above referred to.

The Munsif, Lala Ghela Ram, in a judgment which displays very considerable ability in dealing with a somewhat difficult case, decreed plaintiff's claim except with regard to the house which he found to be non-ancestral property.

From this decree, both parties appealed to the Divisional Judge, who accepted the appeal of the plaintiffs holding that the house, no less than the land, was ancestral property but rejected that of the defendants, the result being that plaintiffs' claim was decreed in its entirety.

A further appeal from the decree of the Divisional Judge was preferred by defendants to this Court, and on their behalf Mr. Manohar Lal argued the case before me in a manner which reflects the greatest credit on himself. His arguments were expressed with lucidity and terseness and he made no attempt to labour points which were obviously untenable, and I am much indebted to him and to Mr. Lajpat Rai for the clear and concise way in which they put their respective cases before me.

Mr. Manohar Lal admitted very properly that the land must be taken to be ancestral property and that this is so can admit of no doubt. He contended, however, that there was no proof that the house was other than the acquired property of Baldeo and that the *onus probandi* of showing that it was ancestral rested, in accordance with the recent ruling of their Lordships of the Privy

Council *Attar Singh* v. *Thakar Singh* (1), upon plaintiffs. It seems to me, however, that a glance at the plan upon the record is in itself sufficient to show that the Divisional Judge was right in saying that it is a mere portion of the house which has descended to the descendants of Ratan, the common ancestor of the plaintiffs and Baldeo, and as such ancestral. Further defendants in their original pleas made no distinction between the house and the landed property which they now through their Counsel admit to be ancestral. But even if the house was not ancestral, I know of no authority to the effect that, in the absence of a special custom, it is competent to a widow of a person governed by Customary Law to alienate the property of her late husband to which she has succeeded on the ordinary life tenure, even though such property was acquired by her late husband (see paragraph 64 of the "Digest of Customary Law)."

The whole case, therefore, appears to me to depend on the answer to the question whether the parties are governed by Hindu Law or by the ordinary rules which obtain among agriculturists in this Province.

If Hindu Law is to be applied then admittedly the daughter of Baldeo and her son, Shambu Dial, (the son of Mukandi defendant) would be the heirs to the property and in their presence plaintiffs would have no *locus standi*. On the other hand, if the ordinary rules obtaining among agricultural tribes are to be applied there can be no doubt that the plaintiffs, as collaterals in the third degree of the last male owner, would exclude the daughter and her son unless the latter could establish the existence of a special custom to the contrary.

The question then is whether we are to look to the Hindu Law or to custom in this case for guidance. The Munsif (a Hindu) and the Divisional Judge (a Muhammadan who is himself a resident of the District) are agreed that custom and not Hindu Law regulates matters of succession among the parties and after full consideration of Mr. Manohar Lal's arguments, I am not prepared to differ from this concurrent finding.

The points urged by Mr. Manohar Lal in support of his contention that Hindu Law must be applied, are as follows:—

(*i*) the parties are *Gaur Brahmans* a very high caste among Hindus and even among *Brahmans inter se*;

(*ii*) as such they must be presumed to follow their personal law [*Musammat Maya* v. *Gurdit Singh* (2)];

(*iii*) the parties, though owning land, are not in the main agricultural but derive income from various sources, such as from priestly work and from service, plaintiffs Nos. 1 to 3 being at present employed as translators in the office of the Divisional Judge's Court at Amballa;

(*iv*) the *Brahman* community in *Mauza* Kharkhanda is not compact, but comprises various sections of that caste;

(*v*) Kharkhanda is not a mere village but a small town or *qasba* with a population of about 3,700, a Middle Class School, a Hospital, *Thana*, *bazars*, paved streets and *pucca* city gates; and it has been declared a town for the purposes of the Punjab Pre-emption Act;

(*vi*) there is no evidence to prove that the *Gour Brahmans* of this *Mauza* settled there with the founder of the place or that they have been there for any considerable period;

(*vii*) they own but a comparatively small area of the village lands;

(*viii*) defendants have been able to give instances showing that among *Brahmans* of the Rohtak District succession has been regulated by the rules of Hindu Law and not by custom.

There is force in these arguments but, on the other side the evidence adduced in support of custom as the governing rule appears to me to be overwhelming.

First and foremost we have the fact that in this very family, four different instances are forthcoming to show that collaterals have excluded daughters and daughters' sons from succession to ancestral property. These are as follows:—

(*a*) *Musammat* Sarwan, widow of Fatta, (the grandson of Sukh Ram) made

(1) 128 P. W. R. 1908; 18 M. L. J. 379; 12 C. W. N. 1049; 4 M. L. T. 207; 10 Bom. L. R. 790; 8 C. L. J. 359; 35 C. 1039; 35 I. A. 206; 6 Ind. Cas. 721; 42 P. R. 1910.

(2) 1 P. R. 1910; 128 P. W. R. 1909; 145 P. L. R. 1909; 4 Ind. Cas. 947.

a gift of her late husband's property to Shib Narain her daughter's son. Plaintiff obtained a decree to the effect that the gift would not affect his reversionary rights (on the 4th June 1892) and no appeal was preferred;

(*b*). on the death of Ram Parshad his collaterals succeeded to the property to the exclusion of his daughter, *Musammat* Soni;

(*c*). Rup Ram left a daughter, *Musammat* Jewni, but her father's collaterals succeeded to the property;

(*d*). Mathra (son of Tota) died leaving a daughter, *Musammat* Anar Devi, but his collaterals succeeded to the property.

In addition to the above, plaintiffs have given evidence of other cases among *Brahmans* of this very *Mauza* in which collaterals excluded daughters and daughters' sons. These are as follows;—

(*i*) In Sheo Dat's case (Suit No. 180 decided on the 3rd August 1902) a gift to a daughter's son was declared invalid as against the collateral heirs;

(*ii*) one Chitta died leaving two daughters, but his property went to his collateral, Kundan, who has given evidence in the case to that effect;

(*iii*) Chander Bhan, the nephew of one Kirpa, succeeded the latter to the exclusion of a daughter, *Musammat* Man Bhari, (see Shibbu, P. W. No. 6 Sant Lal, P. W. No. 2);

(*iv*) Niadar, a collateral succeeded to the property of Lakha, in preference to the latter's daughter, (see evidence of Niadar, P. W. No. 4).

The Munsif has also referred to the instances of Khashi Ram, Jas Ram, Shib Dial, Gharibu, Ram Parshad (not the man referred to above) and Bilu, all of whom left daughters, but were succeeded by collateral heirs.

Plaintiffs refer also to numerous instances from the adjacent village of Hasangarh, where the parties also own land, which prove that there, too, collaterals exclude daughters from succession. One of these instances relates to a case which went into Court (Sheo Gopal *v. Musammat* Dharmo) with the result that the daughter failed to prove her case.

Mr. Manohar Lal made no attempt to criticise the above instances and his own client, Mukandi, was obliged to admit the four which occurred in this very family.

Furthermore, we have the very important admission, against his own interest, of Ram Saran (P. W. No. 7) that daughters and their issue have no right of succession. This witness is married to *Musammat* Bari Badam, the sole surviving daughter of Baldeo (the last male owner of the property in dispute) and has a son living, but he states that neither his wife nor his son has any right to that property.

Then again, there is the positive assertion in the *Riwaj-i-ams* of the last and the present Settlement to the effect that among *Brahmans* of the Sampla (now Rohtak) Tahsil, daughters and their issue do not inherit in the presence of collaterals.

The *Riwaj-i-am* of 1879, it is to be noted, was signed by the two *Brahman Lambardars* of *Mauza* Kharkhanda.

As a matter of fact the *Brahmans* own a very large area of agricultural land in *Mauza* Kharkhanda. The total village area comprises 6872 *bighas* and of this the *Sayyads* own 2391 *bighas*, the next largest owners being the *Brahmans* who are proprietors of 831 *bighas*, of which 427 *bighas* are recorded as *khudkasht* and 408 *bighas* as cultivated by tenants. There are four separate *mohallas* of *Brahmans*, and they have two *Lambardars* of their own caste. The defendant's own witness Shib Chand (P. W. No. 2) admits, that the *Thullas* in the *Brahman mohallas* have been in existence for hundreds of years and that practically every *Brahman* family in the *Mauza* does agricultural work and to a very similar effect is the evidence of their witnesses, Hardwari, Sant Ram and Ram Richpal, all of whom do *zemindari* work.

A reference to pages 68-75 the Gazetteer of the Rohtak District (1911) will show that the *Brahmans* form a very considerable portion of the agricultural community of that District and that as "it was an invariable habit of *Jat* settlers to bring *Brahmans* with them, in many cases their residence is as ancient as that of the former." In the present case the evidence on the record satisfies me that the parties have been settled for many generations in *Mauza* Kharkhanda and the neighbouring village of Hasangarh. As *Brahmans* they have naturally been regarded with respect by their neighbours and have derived income from priestly work, but I see no reason to

doubt that in the main they have for some time past been as agricultural as their neighbours. This being so, I cannot agree that because of late years some members of the family have been educated and have taken service under Government, the family must be held to be no longer governed by the customary rules which ordinarily obtain among agriculturists and which, as the instances cited prove, have hitherto regulated questions of succession among them. In this connection I may also observe that the *Brahmans* of this District have been notified as an agricultural tribe for the purposes of the Punjab Land Alienation Act (Punjab Government Notification No. 2666-S. dated 1st October 1909) a circumstance which though not conclusive proof of the tribe being subject to the ordinary rules of Customary Law [*Jawahir Singh* v. *Yaqub Shah* (3) and *Faqir Muhammad* v. *Fazal Muhammad* (4)] cannot nevertheless be left entirely out of consideration. And finally I would point out that in an unreported case which related to *Brahmans* of Tahsil Sampla it was found by this Court, and indeed hardly contested by any of the parties, that custom and not Hindu Law regulated questions of succession among them (See Civil Appeal No. 391 of 1904).

Upon the whole case, and after giving every consideration to Mr. Manohar Lal's contentions, I am independently satisfied of the correctness of the lower Court's finding to the effect that the parties in matters of succession do not follow the principles of Hindu Law but are regulated by the ordinary rules observed by the agricultural community of this Province. Upon this finding, the claim of plaintiffs has rightly been decreed.

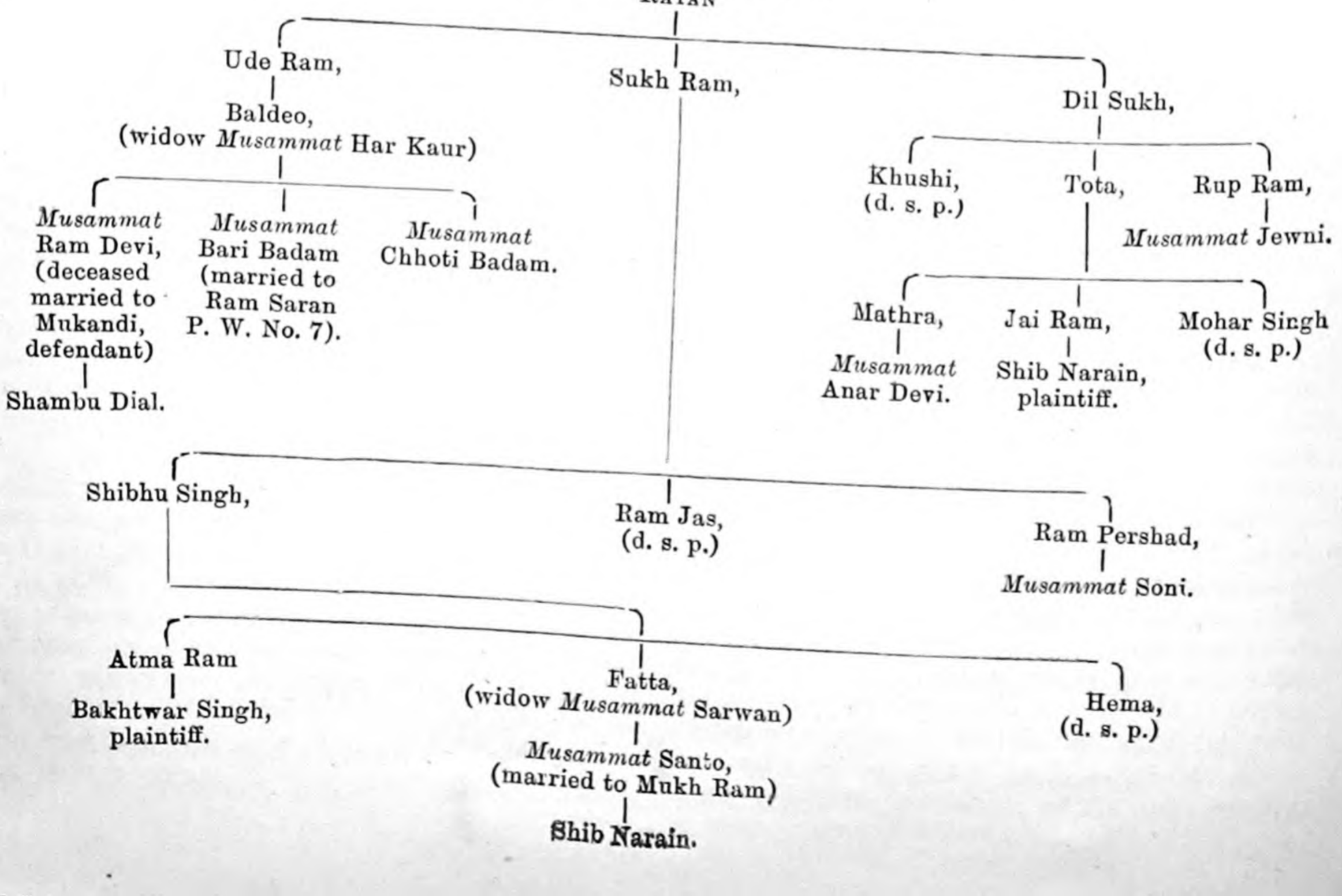
The plea of acquiescence which was urged by defendants in the Courts below has been dropped in this Court and very rightly, as it is quite clear that plaintiffs so far from tacitly accepting the widow's acts as binding on them, emphatically objected at mutation proceedings. The plea of limitation was also not urged before me, and is obviously untenable in view of the decisions of this Court. [See *Miran Bakhsh* v. *Ahmed* (5) and *Khiali Ram* v. *Gulab Khan* (6).]

I accordingly dismiss the appeal with costs

Appeal dismissed.

(3) 5 P. R. 1906; 59 P. L. R. 1906.
(4) 16 P. R. 1906; 66 P. L. R. 1906.
(5) 145 P. R. 1907.
(6) 33 P. R. 1911 (F. B.); 190 P. L. R. 1911; 11 Ind. Cas. 392.

PEDIGREE-TABLE.



MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 301 OF 1912.

February 18, 1913.

Present:—Mr. Justice Sankaran Nair.

DORASINGAM *alias* GOURI VALLABHA THEVAR—PLAINTIFF—PETITIONER

versus

VYRAVAN CHETTIAR—DEFENDANT No. 2—RESPONDENT.

Jurisdiction of Court to allow one party conditionally to draw money paid into Court pending decision—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 7, powers under—Investment not allowed.

When a certain sum of money paid into Court is claimed both by the plaintiff and the defendant, the Court has no jurisdiction to allow one of the parties to draw out the amount on his furnishing security for restitution of the amount with interest at 6 per cent. in case the other party obtains a decree in his favour.

Order XXXIX, rule 7, does not apply since such an order amounts rather to an investment carrying interest not contemplated by the rule.

The successful party is entitled to the money from Court without further proceedings.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Subordinate Judge of Ramnad, dated 2nd March 1912, in Original Suit No. 55 of 1906.

Mr. *J. L. Rosario*, for the Petitioner.

Mr *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.—An interpleader suit was filed by the lessees of Sivaganga against the *zemindar* of Sivaganga, the 7th defendant, and Vyravan Chettiar, the 2nd defendant, and certain others. The lessees paid into Court the sum of money, a lac and odd rupees, claimed by the defendants already to each other, and they were, on such payment, discharged from all liability to the defendants, and discharged from the suit. The *zemindar*, 7th defendant, was made the plaintiff in their stead. The Subordinate Judge has passed an order allowing the 2nd defendant to draw the amount deposited on his furnishing security for the restitution of the amount with interest at 6 per cent. in case the plaintiff gets a decree in his favour. The plaintiff contends that the order was passed without jurisdiction. Order XXXIX, rule 7, in my opinion, does not apply as this is clearly not an order for the detention or presentation of any property. It is rather an investment carrying interest. I have been referred to no other provision in the Civil Procedure Code to justify the order. On principle such a procedure seems to be objectionable. The successful party is entitled to payment by the Court to whom the money had been paid by the original plaintiff for payment to him. He should not be driven to take further proceedings to realize the money and run further risks. Unless, therefore, both the parties agree, the amount should be kept under the control of the Court available for payment at any time. Whether the party who succeeds will be entitled to interest or damages from the other party is a question unnecessary for me to decide. I am, therefore, constrained to hold that the order is one passed without jurisdiction, and I accordingly set it aside with costs in this and the lower Court.

Order set aside.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 334 OF 1909.

June 4, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

AMIN CHAND—PLAINTIFF—APPELLANT

versus

SANT MURLI DHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 39, 42, proviso—Suit to have alienation of wakf property declared of no effect—Consequential relief—Plaintiff not bound to sue for cancellation of document or decree to which plaintiff is no party—Document or decree may be treated as nullity—Religious institution—Power of Mahant to alienate property—Hindu Law—Widow.

Plaintiff sued for a declaration that an alienation by way of sale by defendant No. 1 in favour of defendants Nos. 2 and 3 of certain property alleged to be *wakf* was illegal, and that the decree for possession of the said property passed in favour of defendants Nos. 2 and 3 on the strength of the sale-deed should have no effect on the property sold:

Held, (1) that even if the plaintiff could have brought a suit under section 39 of the Specific Relief Act for cancellation of the deed of sale, he was not bound to do so;

(2) that there was no necessity for the plaintiff to get the decree complained of set aside specifically, when he was no party to it. He could regard it as a nullity and ask for a declaration that it should not affect the property.

The proviso to section 42, Specific Relief Act, 1877, is only applicable to such relief as is appropriate and consequent on the right asserted.

Kannan v. *Krishnan*, 13 M. 324, followed.

The powers of a *Mahant* of a religious institution in matters of alienation of endowment property are analogous to those of a Hindu widow.

Kashi Ram v. *Bawa Tola*, 3 P. R. 1902; 60 P. L. R. 1902, followed.

Appeal from the order of the District Judge, Rawalpindi, dated the 17th February 1909.

Mr. *Tek Chand*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiff-appellant brought this suit for a declaration that an alienation by way of sale by defendant No. 1 in favour of defendants Nos. 2 and 3 of certain property alleged to be *waqf* was illegal, and that the decree for possession of the said property passed in favour of defendants Nos. 2 and 3 on the strength of the sale-deed should have no effect on the property sold. The lower Court dismissed the suit for a declaration on the ground that the plaintiff was able to seek further relief and had not done so. It was of opinion that the plaintiff could bring a suit for cancellation of the sale-deed under section 39 of the Specific Relief Act and a suit to set aside the decree giving defendants Nos. 2 and 3 possession of the property sold.

From the lower Court's decree the plaintiffs have appealed to this Court. We are clearly of opinion that this decree cannot be maintained and Mr. Nanak Chand, on behalf of the respondents, admits his inability to support it. The case of *Kannan* v. *Krishnan* (1) was a suit for a declaration that a conveyance executed by the defendant in favour of a third party was not binding on the plaintiff and for specific performance of an antecedent oral agreement made by the defendant with the plaintiff, it was held to be no bar to the suit that the plaint contained no prayer for the delivery up, and cancellation, of the conveyance, the High Court holding that its cancellation and delivery up in favour of the plaintiff was a species of auxiliary equitable relief which the plaintiff was not bound to claim under this section. The proviso to section 42, Specific Relief Act, the Court said, was only applicable to such relief as was appropriate and consequent on the right asserted. We agree with this exposition of the law. Even if the plaintiff could have brought a suit under section 39 of the Specific Relief Act for cancellation of the deed of sale, we hold that he was not bound to do so. That relief would be a species of auxiliary equitable relief, and not such further relief as is contemplated by the proviso to section 42 aforesaid.

As regards the setting aside of the decree, we consider the plaintiff, who was no party to it, can regard it as a nullity and can ask for a declaration that it should not affect the property. There is no necessity for him to get it set aside specifically when he was no party to it. In *Kashi Ram* v. *Bawa Tola* (2), it was held that the powers of a Mahant of a religious institution in matters of alienations of the endowment property are analogous to those of a Hindu widow. In cases where a Hindu widow has made an alienation of property, which reversioners challenge, the ordinary kind of suit brought by them is one for a declaration that the alienation should not affect their reversionary rights. We know of no case where it has been held that the reversioners must sue for specific cancellation of the instrument of alienation. Frequently the alienee gets a decree against the widow for possession of the property alienated, but the reversioners are not bound to sue for the cancellation of such a decree. Applying this principle to the present case, we hold that the plaintiff can maintain the present suit for mere declaration without consequential relief under section 42 of the Specific Relief Act.

We, therefore, accept the appeal, set aside the decree of the District Judge and remand the case under Order XLI, rule 23, Civil Procedure Code, for decision on the merits.

Appeal accepted.

(1) 13 M. 324.

(2) 3 P. R. 1902; 60 P. L. R. 1902.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 70 OF 1912.

February 20, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

KAMAYYA AND OTHERS—DEFENDANTS —APPELLANTS

versus

YERAKOLA *alias* PENTA KRISTNAYYA AND OTHERS—PLAINTIFFS AND DEFENDANT No. 10—RESPONDENTS.

Construction of document—Charge or mortgage—Simple bond—Intention to create charge—'Thanakha'.

A document purporting to be a simple bond contained a clause "I and my heirs with all my property moveable and immoveable as '*thanakha*' shall be liable".

Held, that this could not be regarded as apt language to create a mortgage or a charge.

Norton v. *Florence Land and Public Works Co.*, 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123, referred to.

Tyson v. *Kelcey, In re Kelcey*, (1899) 2 Ch. 530; 68 L. J. Ch. 742;81 L. T. 354; 48 W. R. 59, distinguished.

No charge can be created without an intention to do so.

Peacock v. *Baijnath*, 18 C. 573 at p. 592; 18 I. A. 78, referred to.

The inclusion of the moveable property of the executant taken with the fact that the document purports to be a simple bond clearly shows the non-existence of such an intention.

The mere use of the word 'thanakha' after the expression "my moveable and immoveable property" does not create a charge or mortgage.

Appeal against the order of the Temporary Subordinate Judge of Ganjam, in A. S. No. 198 of 1911, preferred against that of the District Munsif of Sompet, in O. S. No. 513 of 1910.

Mr. *B Sitarama Row* for Mr. *H. Sitaramaswami*, for the Appellants.

Mr. *B. Narasimha Row*, for Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—We are of opinion that the document, Exhibit A, did not create a mortgage or charge over any property. It purports to be only a simple bond. After promising to discharge the amount due under the bond and interest on the date fixed, the executant proceeds to say:—"If I do not so pay, I shall add to the amount of principal and interest profit at Re. 0-8-0 per rupee and pay the aggregate. For this I and my heirs with all my property moveable and immoveable as *thanakha* (security) shall be liable." We do not think that this can be regarded as apt language to create a mortgage or charge. In *Norton* v. *Florence Land and Public Works Co.*, (1), Sir George Jessel observed as follows:—"The mere fact that the obligor binds not only himself but also his estate, property and effects, is not sufficient to constitute a charge. Every bond does in a sense bind the property of the debtor. In legal course, it binds his property generally as property is bound to pay a judgment-debt." The language of the document in this case is not stronger than that in the above case where the company (the debtor) purported "to bind themselves, their successors and assigns and all their estate, property and effects." In *Tyson* v. *Kelcey, In re Kelcey* (2), relied on by the respondent, where Kekewich, J., held that a valid charge was created, the language used was much stronger. "I . . . . hereby charge all my real and personal estate whatsoever and wheresoever and of what nature or kindsoever the same may be or consist." The intention to create a charge was taken to be clearly expressed and the real question that the learned Judge considered was whether the description of the security was so vague that effect could not be given to the intention of the parties. But the question here is whether there was an intention to create a charge. As pointed out by the Judicial Committee of the Privy Council in *Peacock* v. *Baijnath* (3), there can be no charge where there was no intention to create any. It may be, as observed by Dr. Rash Behari Ghose in his learned Treatise on Mortgages, that valid charge could be created in this country at least before the enactment of the Transfer of Property Act over all the property owned by a person, though the property may not be specifically described, but the Court will not lightly construe a document as evidencing such an intention in the absence of clear words to that effect. The inclusion of the moveable property of the executant of the instrument is a material circumstance in ascertaining the intention, for it is unlikely that he meant to tie up all his moveable assets and it is equally unlikely that he intended to create a floating charge over his moveables. The fact that the instrument purports to be only a simple bond is also not without some value. The use of the word *thanakha* after the expression 'all my moveable and immoveable property' is not sufficient to justify the inference that a

(1) (1878) 7 Ch. D. 332; 38 L. T. 377; 26 W. R. 123.

(2) (1899) 2 Ch. 530; 68 L. J. Ch. 742; 81 L. T. 354; 48 W. R. 59.

(3) 18 C. 573 at p. 592; 18 I. A. 78.

charge or mortgage was intended to be created. *Ram Sidh Pande* v. *Balgobind* (4) has been referred to for the respondent, but in that case the language of the instrument was stronger; there was a promise not to alienate the debtor's property and there were other circumstances which, in the opinion of the Court, disclosed an intention to create a charge. *Bheri Dorayya* v. *Maddipatu Ramayya* (5); *Ram Bullick* v. *Sook Deo Salig Ram and Deebee Charan* (6); *The Collector of Etawah* v. *Beti Maharani* (7), on the other hand, support the defendant's construction of the document.

Venkatasami Reddi v. *Rangamma* (8), referred to by the Subordinate Judge, is not in point as the instrument in that case was one of gift and the question at issue was whether it was void for indefiniteness. On the whole we are of opinion that the Subordinate Judge is wrong in holding that Exhibit A is an instrument of mortgage. We set aside the order of remand and restore the Munsif's decree with costs here and in the lower Appellate Court to be paid by the plaintiff.

Order set aside;
Case remanded.

(4) 9 A. 158; A. W. N. (1887) 15.
(5) 3 M. 35.
(6) 1 N. W. P. 159.
(7) 14 A. 162; A. W. N. (1892) 27.
(8) 11 M. L. J. 27.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1086 OF 1910.

June 6, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

PARAS RAM AND OTHERS—PLANTIFFS—APPELLANTS

versus

NATHU MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 28, Sch. I, Art. 142—Suit for possession against trespasser—Plaintiff can succeed on proof of mere possession before his dispossession—Defendant must prove his own title to ownership—Adverse possession—Extinguishment of right to immoveable property.

In 1884, *A.* sold his land to *B.* with a share in the village *shamilat*. *A.* brought a suit for possession against *B.* and obtained possession of the property in 1890. In 1898, *B.* mortgaged the land to *C.* In the same year, the sons of *A.* sued *B.* for possession of the land on the ground that the sale was without consideration and necessity, and they finally got a decree for possession of the land claimed on payment of a certain sum in 1903. In their plaint they made no mention of the *shamilat* land, and so it was not entered in their decree. In execution of their decree, however, they got possession of the *shamilat* as well from *C.*, the mortgagee of *B.*, who was in possession of both the land and *shamilat*. In 1907 *B.* sued *C.* for possession of the *shamilat* land by redemption. The sons of *A.* were impleaded as defendants:

Held, (1) that in taking possession of this *shamilat* land in the course of execution proceedings, the sons of *A.* acted unlawfully and their possession became that of trespassers;

(2) that *B.* could sue for possession simply on the strength of the possession which he had before dispossession, provided he sued within twelve years allowed by Article 142 of the Limitation Act.

In such a suit unless the defendant proves a title, plaintiff should succeed without being asked to prove his own title to ownership and even if he (the defendant) proves that he has no such title;

Abdul Hamid v. *Sarbuland Khan*, 78 P. R. 1902; 137 P. L. R. 1902, referred to.

(3) that *B.* had acquired a good title by adverse possession extending over 12 years, and the right of *A.*'s sons, if any, had been extinguished, having regard to section 28 of the Limitation Act.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated 18th July 1910.

The Hon'ble Mr. *K. B. Muhammad Shaffi* and Mr. *Gobind Das*, for the Appellants.

Rai Bahadur Lala *Sukh Dial* and Mr. *Gokal Chand*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are as follows:—

On the 25th June 1884, Fateh Singh, father of defendants-respondents Nos. 2 to 5, sold to Dogar Mal, plaintiff, 510 *kanals* of land situate in village Samagh together with a share in the village *shamilat* for a sum of Rs. 6,000. Dogar Mal was not given possession by the vendor and on the 19th July 1887, sued him for the land and got a decree on the 14th November 1887 and in execution proceedings obtained possession in February 1890. In that suit, it was finally held by the Chief Court that the whole consideration had duly passed to Fateh Singh. On the 25th July 1898, Dogar Mal mortgaged this land together with other land to Buta Mal, defendant No. 1, who is now represented by his son, Nath Mal, for Rs. 9,200. On the 26th July 1898, the sons of Fateh Singh, respondents Nos. 2 to 5, sued Dogar Mal for possession of the 510 *kanals*, sold to him by their father in 1884, on the ground that the sale was without consideration and valid necessity. In their plaint, they made no

mention of the *shamilat* land which was sold along with the 510 *kanals* of proprietary land. That suit went up to the Chief Court, where on the 5th August 1903, it was held that the sale was valid to the extent of Rs. 3,915-8-0 and the plaintiffs were given a decree for possession of the land claimed on payment of that sum. The decree specified the land as 510 *kanals*, and made no mention of the *shamilat*. In execution proceedings of that decree the sons of Fateh Singh on the 25th July 1905 obtained possession, not only of the 510 *kanals* of land decreed to them, but also of the appurtenant *shamilat*. The *dakhalnama* is dated the 28th July 1905 and in the heading of this document the land is described as 110 *ghumaons* in area. Buta Mal, having in this way lost more than 800 *kanals* of the land mortgaged to him by Dogar Mal, sued the latter for an equivalent area of land elsewhere or for compensation. Eventually on the 21st January 1907, this Court gave him a decree for Rs. 4,500 by way of compensation. The present suit was brought by Dogar Mal for redemption of the balance of the land mortgaged by him to Buta Mal after deducting the 510 *kanals* for which Fateh Singh's sons had obtained a decree against him. He deducted the Rs. 4,500 paid by him to Buta Mal in accordance with the decree of this Court of the 21st January 1907 and asked for redemption on payment of Rs. 4,700. Defendant No. 1 was Buta Mal, defendants Nos. 2 to 5 were the sons of Fateh Singh and defendants Nos. 6 to 10 transferees from the latter of portions of the *shamilat* land.

The District Judge held that defendants Nos. 2 to 10 were trespassers on the *shamilat* land and were not entitled to possession as against Dogar Mal. He said that Dogar Mal had bought the land from Fateh Singh and had obtained a good title to it. He had got a decree against the vendor and had been for many years in possession. Fateh Singh's sons had sued him and had obtained a decree for 510 *kanals* out of the land sold, but they had omitted to sue for the *shamilat* which was sold along with the proprietary land. The Courts in decreeing the suit did not say that Dogar Mal was in wrongful possession, but that he must hand over possession of 510 *kanals* of land sold to him on receipt of such and such sum. Therefore, his title to the *shamilat* remained good and the sons of Fateh Singh had no right to dispossess him. He, therefore, gave the plaintiff a decree for possession of the *shamilat* land claimed as against the sons of Fateh Singh.

The Divisional Judge, on the other hand, held that the plaintiff had to prove that he was entitled to possession of the *shamilat*. He reasoned as follows:—"Plaintiff's sale-deed is dead. It was declared a mortgage of less amount and has been fully paid off. It is true that the sale-deed, as far as it affected the *shamilat*, has not been specifically declared void in a Court of law. But it is equally true that it has been declared entirely dead. Plaintiff is no longer a vendee of any land from Fateh Singh or his heirs. His whole title, as derived from the sale-deed, has been extinguished." Adopting this view, the learned Judge held that whatever the title of defendants Nos. 2 to 10 might be, the plaintiff, who had no title, could not eject them. He, therefore, accepted the appeal of defendants Nos. 2 to 10 and dismissed plaintiff's claim so far as the *shamilat* land was concerned. Plaintiff has filed further appeal to this Court.

We are unable to agree with the reasons of the learned Divisional Judge. Fateh Singh's sons brought no suit during the life-time of their father to have it declared that the sale-deed would not affect their reversionary rights. The sale-deed was never set aside as a whole. When they eventually sued for possession, they only sued for the proprietary land sold by their father, though the *shamilat* land was specifically mentioned in the deed of sale. It cannot be said that the sale-deed was converted into a mortgage-deed for a lesser amount. It may, perhaps, be said that it was so converted as regards the 510 *kanals* actually sued for. But the decree had no effect upon the sale of the *shamilat* land.

The way we look at the case is this: Dogar Mal was in possession of the land under a valid deed of sale. The sons of Fateh Singh got a decree for possession of the proprietary land sold by their father and were entitled to get possession thereof in execution of the decree. They were, however, not entitled under their decree to take possession of the *shamilat* land, which they had not claimed and which is not entered in their decree. When they took

possession of this *shamilat* land in the course of execution proceedings, their act was unlawful and their possession became that of trespassers. In *Abdul Hamid* v. *Sarbuland Khan* (1), it was held by a Division Bench of this Court that where a plaintiff has been forcibly dispossessed of immoveable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the 12 years' period allowed by Article 142 of the Limitation Act. In such a suit, unless the defendant proves a title, plaintiff should succeed without being asked to prove his own title to ownership and even, if he (the defendant) prove that he has no such title. Applying this to the present case we find that defendants Nos. 2 to 5 have not proved their title to the *shamilat* land. Dogar Mal was in lawful possession of the whole of the land sold to him by Fateh Singh in 1884. Fateh Singh's sons had, no doubt, a right under the Customary Law of the Punjab to challenge that sale on the ground that it was made without valid necessity. They brought no such suit during their father's life-time. After his death they had a cause of action to sue for the possession of the whole of the land sold. They brought a suit for possession but only of a part of the land sold, and under section 43 of the former Code of Civil Procedure they could not have subsequently brought a second suit for possession of the *shamilat* land, which they had omitted to sue for in the former suit. Their act in taking the law into their own hands and ousting Buta Mal, sub-mortgagee of Dogar Mal, from possession of the *shamilat* land was unlawful. They had at the time no title whatsoever to the land and had they sued for it, their suit must have been dismissed. Not only had defendants Nos. 2 to 5 no title to the *shamilat* land, but, in our opinion, Dogar Mal had a good title to it. The plaint in the suit instituted by Fateh Singh's sons on the 26th July 1893 was written on the 19th July. It stated that the plaintiff's father had died five years previously. We may take it, then, that he died not later than 19th July 1893. Dogar Mal's possession was adverse against deceased's sons from the date of the death. That possession had continued for more than 12 years at the time of the dispossession of Buta Mal on the 25th July 1905. Dogar Mal had, therefore, acquired a good title by adverse possession extending over 12 years and the right of defendants Nos. 2 to 5, if any, had been extinguished, having regard to section 28 of the Indian Limitation Act. Whichever of these views be adopted, we consider that the plaintiff is entitled to possession of the *shamilat* land claimed as against the sons of Fateh Singh.

As to costs, we agree in the main with the view taken by the learned Divisional Judge and we think that Buta Mal should not have to pay the costs. The present litigation has arisen entirely from the omission of Fateh Singh's sons to include the *shamilat* in their original claim against Dogar Mal. Buta Mal was probably quite ready to give up the land, still in his possession, on receipt of Rs. 4,700 being the balance of his mortgage money. Dogar Mal, however, was unwilling to pay this unless he also recovered the *shamilat* land. This land, however, was not in Buta Mal's possession and he, therefore, could not restore it, hence the plaintiff was obliged to bring the matter into Court. We do not think Buta Mal is very much to blame for allowing defendants Nos. 2 to 5 to get possession of the *shamilat* land during the execution proceedings. We agree with the learned Divisional Judge that Dogar Mal was guilty of contributory negligence.

As regards defendants Nos. 2 to 5 we have little doubt that it was by an accidental omission that they did not claim the *shamilat* land in the suit against Dogar Mal. They may have thought that it was not necessary to claim it specifically. We have no doubt that they intended to challenge the sale as a whole, and we do not think they were very much to blame in taking possession of the whole of the land sold by their father to Dogar Mal. Had they included the *shamilat* in their claim they would have, undoubtedly, got a decree for it as well as for the 510 *kanals*, and it is, therefore, very unfortunate for them that they now lose this land. Dogar Mal, on the other hand, is very lucky to be able to keep it. Considering all the circumstances of the case, we think that the parties should bear their own costs throughout the litigation, and we order accordingly.

(1) 78 P. R. 1902; 137 P. L. R. 1902.

The appeal is accepted and, the decree of the lower Appellate Court being set aside, the decree of the first Court for possession of the land specified therein is restored.

Appeal accepted.

MADRAS HIGH COURT.

[SECOND APPEALS NOS. 158 AND 174 OF 1912.

February 13, 1913.

Present:—Justice Sir Ralph Benson, Kt., and Mr. Justice Sundara Aiyar.

CHAGANTI ATCHAPARAZU—DEFENDANT—APPELLANT

versus

RAJA YELUGOTI KRISTNA YACHANDRULAVARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3, 153, 157—Madras Estates Land Amendment Act (IV of 1909), s. 8—Tenant of 'old waste'—Grounds of ejectment.

Though section 153 of the Madras Estates Land Act, as it originally stood, does not make the expiry of a lease, granted before the passing of the Act, a ground for ejectment, the effect of the proviso, added to that section by Madras Act IV of 1909, is to make that an additional ground.

Section 157 of the Act expressly deprives a contract, entitling the landholder to eject a tenant of old waste, of its ordinary legal effect.

A tenant of old waste can be ejected only on the grounds mentioned in section 153 of the Act as it originally stood but he cannot be ejected on the ground of a contract entered into before the Act came into force.

Second appeals against the decrees of the District Court of Kistna, at Masulipatam, in Appeal Suits Nos. 501 and 502 of 1909 respectively, preferred against those of the Deputy Collector of Ellore, in Summary Suits Nos. 97 and 98 of 1909.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *S. Subramania Iyer*, for the Respondent.

JUDGMENT.—The first point argued in this second appeal is that, supposing the defendant is a *ryot* of 'old waste', as defined in section 3 of the Madras Estates Land Act, the landholder has no right to eject him as none of the grounds mentioned in section 157 of the Act, which relates to the ejectment of such a *ryot*, has been alleged to exist by the plaintiff. Section 157 enacts that such a *ryot* cannot be ejected except on the grounds mentioned in section 153 (and certain other grounds which are immaterial for the present case) which refers to the ejectment of non-occupancy *ryots* generally. Five grounds for ejectment were mentioned in section 153 as it originally stood. A proviso was added to the section by section 8 of Madras Act IV of 1909 in these terms "nothing in this section shall affect the liability of a non-occupancy *ryot* to be ejected on the ground of expiry of the term of a lease granted before the passing of this Act." The effect of the proviso was, of course, to entitle a landholder to eject a non-occupancy *ryot* on the ground of the expiry of a lease granted before the passing of the Act. The ground of the ejectment in such a case is the expiry of the lease. Section 153 does not make the expiry of the lease a ground of ejectment but leaves it to have the effect which it would have but for the provision in the first part of the section, that the *ryot* shall not be liable to ejectment except on the grounds enumerated in the section. It leaves the contract of tenancy which gives the landholder the right to eject to have the operation which it would ordinarily have. Section 157 expressly deprives a contract entitling the landholder to eject a *ryot* of old waste of its ordinary legal effect. It also provides that the only valid grounds for the ejectment of such a *ryot* are those mentioned in section 153 as grounds for ejecting a non-occupancy *ryot*. The expiry of a lease, made before the Act came into force, is not one of the grounds given by section 153 for ejectment.

The result is that a *ryot* of 'old waste' cannot be ejected on the ground of a contract entered into before the Act came into force. The plaintiff's suit must, therefore, fail if the defendant be a *ryot* of 'old waste.' If the land be *kamatam*, the suit could not be maintained in the Revenue Court. In either view, therefore, the suit must fail. We leave the question whether the land is *kamatam* or not undecided.

We reverse the decrees of the lower Courts and dismiss the suits with costs throughout on the grounds mentioned above.

Decrees reversed.

NATHAN SAO *v.* MRS. ANNIE BEASANT.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3356 OF 1910.

March 19, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

NATHAN SAO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MRS. ANNIE BEASANT—PLAINTIFF—AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Mortgage—Mortgage decree—Execution sale—Surplus sale-proceeds taken out by fourth mortgagee—Suit by third mortgagee against fourth mortgagee for recovery of money as his own making no claim against mortgagor—Whether suit maintainable.

The second mortgagee of certain property brought a suit on his mortgage and obtained a decree in execution of which the property was sold and purchased by the third mortgagee. The decree was fully satisfied from the sale-proceeds, and a surplus was left in deposit. The fourth mortgagee then sued on his bond, and obtained a decree and in satisfaction thereof withdrew from Court the amount of his decree out of the deposit there held. To this suit the third mortgagee was not made a party. The third mortgagee sues now to recover from the fourth mortgagee the sum withdrawn by the latter claiming the money as her own and making no claim against the mortgagor:

Held, that she cannot succeed on this footing: that she was entitled in equity to regard the surplus sale-proceeds as part of her mortgage security and to follow them in the hands of the fourth mortgagee; that she could establish her right to the money, not as the owner thereof, but as part of her security; and that her present suit claiming the money as her own and making no claim at all against the mortgagor cannot succeed.

Berhamdeo Pershad v. *Tara Chand*, 33 C. 92, 9 C. W. N. 989, referred to.

The provisions of clause (*c*) of the proviso to sub-section (1) of section 73 of the Code of Civil Procedure operate, as the earlier part of the sub-section shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof.

Appeal from the decree of the District Judge of Patna, dated January 14th, 1910, reversing that of the first Sub-Judge of Patna, dated March 3rd, 1908.

Babu *Umakali Mukherjee* and Moulvi *Mahomed Mustafa Khan*, for the Appellants.

Dr. *Rash Behary Ghose*, Babus *Shoroshi Charan Mitra* and *Surendra Krishna Dutt*, for the Respondents.

JUDGMENT.

CARNDUFF, J.—This second appeal arises out of a suit brought by one of four successive mortgagees to recover the surplus sale-proceeds which a mortgagee subsequent to him had withdrawn from Court in satisfaction of his decree.

It appears that the second mortgagee of the property mortgaged had brought a suit on his mortgage and obtained a decree, in execution of which the property worth Rs. 72,900 was sold and purchased by the third mortgagee for Rs. 33,000. The decree was fully satisfied from the sale-proceeds, and a surplus of approximately Rs. 6,000 was left in deposit.

The fourth mortgagee then sued on her bond, obtained a decree and, in satisfaction thereof, withdrew from Court Rs. 2,378 of the deposit there held. To this suit the third mortgagee was not made a party.

The third mortgagee has not so far attempted to enforce his security but he brought the suit before us now in order to recover from the fourth mortgagee the sum that the latter had withdrawn. The Court of first instance dismissed his suit, but the lower Appellate Court has held that he is entitled to succeed, and has remanded the case for an inquiry as to the precise amount that should be decreed in his favour.

The learned District Judge in the Court of Appeal below has relied upon *Berhamdeo Pershad* v. *Tara Chand*(1), but it seems to me that that case not only is distinguishable from the present case, but actually stands in the way of the plaintiff instead of supporting his claim. In it the third mortgagee had obtained a decree on his mortgage without making a second mortgagee a party, and had withdrawn the surplus sale-proceeds held in deposit after the satisfaction of a first mortgagee's decree. The second mortgagee then sued to recover the deposit from the third mortgagee, but he put his mortgage in suit, and he succeeded on the plea that he was entitled in equity to regard the surplus sale-proceeds as part of his mortgage security and to follow them in the hands of the third mortgagee. As pointed out by Mr. Justice Sale he could establish his right to the money, not as the owner thereof, but as part of his security. Here, however, the third mortgagee has endeavoured to do precisely what Mr. Justice Sale observed that it was not open to a person in his position to do. He has brought a simple money suit, claiming the money as his own and making no claim at all against the mortgagor. He cannot, as it seems to me, succeed on this footing.

(1) 33 C. 92; 9 C. W. N. 989.

The learned Vakil for the respondent-plaintiff has, however, further argued that his client is entitled to have the surplus sale-proceeds rateably applied to the discharge of his incumbrance by virtue of the provisions of clause (*c*) of the proviso to sub-section (1)of section 73 of the Code of Civil Procedure, 1908. But those provisions operate, as the earlier part of the sub-section shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof; whereas, as has already been stated, the respondent-plaintiff holds no decree for the satisfaction of which by rateable distribution he could apply under the section.

In my view, therefore, this appeal should be allowed, the order of the lower Appellate Court discharged and the decree of the first Court dismissing the suit restored with costs thereof throughout.

HARINGTON, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND APPEAL No. 573 OF 1911.

December 18, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

SRI RAJA VENKATA RANGAYYA APPA RAO BAHADUR, *Zemindar* OF KAPILASWARAPURAM—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

Madras Irrigation Cess Act (VII of 1865), *s.* 4—*'Engagement,' meaning of—Implied or express*—*Zemindar, flow to the tank of, obstructed by Government irrigation works—Rights on obstruction.*

The 'engagement' referred to in Act VII of 1865 may be an implied engagement.

To ascertain the meaning of 'engagement', as used in that Act, the events which led to the passing of that Act must be looked to.

The rules, framed in 1864 in pursuance of various directions from the Secretary of State and ultimately embodied in the Act and particularly G. O. No. 101 Rev. dated 16th January 1864, show that it was not intended to levy any charge on water taken for lands which, owing to the construction of the several anicut channels and other works connected therewith, were found to have lost wholly or partially their pre-existing sources of supply.

When Government intercepts the flow of water to a *zemindar's* tank, the natural presumption is that he has been compensated in some form for the injury inflicted and in these circumstances if the *zemindar* receives a free supply of water from Government irrigation works for a number of years, the only presumption is that there was an implied engagement between the parties for such free supply.

That engagement, unless there is an express contract to the contrary, will ordinarily be taken to be only in respect of the extent of lands irrigable by the pre-existing irrigation works at the time when they are interfered with by Government.

Second appeal against the decree of the District Judge of Kistna, in Appeal Suit No. 347 of 1908, preferred against that of the Subordinate Judge of Kistna at Masulipatam in Original Suit No. 14 of 1907.

Mr. *V. Ramesam*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.

SANKARAN NAIR, J.—The appellant is one of the Nuzwid *zemindars* whose judicial history will be found in *Raja Venkata Row* v. *Court of Wards* (1) and *Sri Raja Venkata-narasimha Appa Row* v. *Sri Raja Rangayya Appa Row* (2). The *zemindar* alleged that the defendant, the Secretary of State, constructed in 1863 the Ellore Canal to carry the anicut water through the *zemindari* and thereby obstructed the flow of water into one of his tanks Voddu Cheruvu from his other three tanks, and since that time, the Government have been supplying him with water free of charge for the cultivation of his lands about 507 acres 14 cents, which depended on these tanks for their irrigation. From 1889 they allowed water supply free of charge only for 427 acres 91 cents, and on his appeal from such reduction, it was still further reduced to 202 acres 67 cents. He prays for a declaration of his right to the supply of water as before and for certain reliefs consequential on such declaration. The Government filed their written statement and issues were framed, which covered all the questions of fact relied upon by the plaintiff. But without taking any evidence, the question whether the plaint discloses a cause of action was first argued and decided against the plaintiff.

(1) 2 M. 128 (P. C.).
(2) 29 M. 437; 16 M. L. J. 178.

The Subordinate Judge held that no express 'engagement' under Act VII of 1865 having been alleged, all lands irrigated by Ellore Canal water must pay cess. The Judge in appeal held that a promise by the Government in 1863 to supply water may perhaps be implied in the plaint, though the issues according to him show that the claim was based on a letter of a Deputy Collector of May 1891, which, it may be remarked, however, is not referred to in the plaint. He was of opinion that unless there was an express agreement, the Government are entitled to levy water cess at pleasure.

The decisions of the lower Courts go beyond the claim set up by the Government, who concede the plaintiff's right to water free of charge for 200 odd acres in their written statement. The Subordinate Judge states that the plaintiff's Pleader in argument before him relied on a contract with the Government and the Judge states that the plaint apparently implies it. Issues Nos. 1 to 4 were necessary only if an implied agreement formed the basis of the claim. They certainly include it. In these circumstances, as the evidence had not been taken and the plaintiff relied only on the facts alleged in the plaint and raised by the issue, an amendment of the plaint setting forth that the plaintiff relied on an 'engagement' with Government should have been allowed if necessary. I do not think the omission to mention it is fatal to the suit. However, to remove any difficulty, we have allowed the plaint to be so amended. The question whether the facts set forth disclose a cause of action has been fully alleged before us. As the plaintiff relies upon an 'engagement' in 1863 with the Government in the sense in which that term is used in Act VII of 1865, it is necessary to refer to the events which led to the passing of that Act. We assume that the facts on which the plaintiff relies are true. When it was proposed in 1856 or thereabouts to undertake a general survey and re-assessment of the lands in the Madras Presidency, the question arose how those lands irrigated from the Godavari and Kistna anicuts were to be assessed. Till that time the practice in the Presidency, when water was supplied from irrigation works, was to charge a consolidated wet assessment when water was permanently available and to levy a water rate only when it was temporarily required for cultivation. The lands were classified as either 'irrigated' or 'non-irrigated.' The Secretary of State suggested that this classification of lands, according as they were capable of irrigation or otherwise from the Government sources, should be abolished and all land should be classified with reference to its soil and productiveness without irrigation; a water rate being charged when water is used or permanently available.

After a long correspondence which showed that different views were put forward and various difficulties pointed out among them, the practical impossibility of fixing the assessment, to which the land, which has been long under wet cultivation, would be liable as unirrigated land, it was finally resolved to accept the suggestion of the Secretary of State and orders were issued by the Government of Madras on 12th March 1858 that "a water cess calculated with reference to the additional irrigation canal communication, drainage and embankments is to be levied invariably on all lands irrigated from the Godavari and Kistna channels from the 2nd year of irrigation, without any reference to whether they are Government land, *inam* lands or belonging to proprietors, and if in the latter two cases, the acting Collector (Masulipatam) has neglected to take *engagements* and opposition is made, he is forthwith to stop the supply." These instructions received the sanction of the Secretary of State and one of his reasons was that this would be the easiest and most equitable mode of obtaining a fair contribution from the *zemindar* towards the re-payment of the expenditure incurred in the construction of "drainage irrigation and other works undertaken by Government and benefiting the lands of those proprietors as well as of Government." This is how the term 'engagement' (see proviso to section 4 of Act VII of 1865 of which the draft bill was then under consideration) was used so far as I know for the first time.

These instructions were communicated to the Revenue Board and officials to be carried out.

From this the following conclusions may be deduced.

Water rate was intended in re-payment of the cost of those irrigation works

which supplied the water. It was not intended to assess lands which received their supply from sources, as in this case, completely under the *zemindars'* control with which the Government had nothing to do. No 'engagement' with *ryots* were contemplated obviously for the reason that it could be included in land revenue, the only mode at that time of recovering the water charge from proprietors, as distinguished from *ryots* of Government lands, was to enter into *engagements* with them, and if they refused to do so, the remedy suggested was to stop the supply of water. It is clear that the *zemindar* was not bound to enter into any engagement with Government to take water when he was the owner thereof as when it was confined in tanks or reservoirs or in virtue of this riparian or easement rights from rivers, as it was not open to Government to prevent him from doing so. The Government were not in those cases supplying him with water; nor could they, therefore, stop the supply.

It is probable, therefore, that where the Government continued the supply, it was under some engagement.

With reference to these two classes there was no difficulty. In the first class of cases in which the irrigation was carried on without any costs to Government and in exercise of the proprietors' rights of easement by vicinage of ownership, no water cess was levied, or in fact, could be claimed. In the second class of cases where irrigation was carried out with water supplied from the anicuts and only by means of Government irrigation works, channels etc., the Government were entitled to dictate their own terms for the supply of water. If they were not accepted, they were entitled to stop the supply. The result was, between the construction of the anicut and the passing of the Act of 1865, water was supplied to the proprietors on terms.

There were, however, other cases which it was more difficult to deal with.

Inams were exempted from permanent *sanads* and the *nanja inams* were irrigated from Government sources. Similarly, where there were *zemindaris* (and those formed out of *havelli* lands in which water sources were retained under Government control would be such) which were irrigated from Government sources, as they were entitled to Government water, the following rule for water assessment was passed for their benefit on the 26th October 1831:—

"Lands granted as *nanja inams* and fully irrigated accordingly at the Government cost will not be charged with water assessment." The same rule was applied to *zemindars*.

There was a fourth class. Water from the Government anicut works was often carried to *ryotwari* lands by means of the old channels which passed through *zemindaris* and were for that purpose improved, enlarged and extended by the Government. The *zemindar* who obtained his water through these channels naturally claimed the anicut water which flowed through his channels. Some of the Government channels flowed through the tanks or reservoirs which were *zemin* property, and the *zemindar* was thus deprived of his tank water. Some channels of the Ellore Canal, in the case before us, cut off the supply to the tanks on which the cultivation of *zemindari* lands depended. It is obvious that the *zemindar* in all these cases had a just grievance. The Government, however, considered that the water supply before the days of the anicut was precarious and irregular and they issued the following rule on the 26th October 1831:—

No. 12. "Such *nanja inams* as were formerly imperfectly irrigated and have since been fully supplied with water from the anicut works, will be charged at half the above water rates." The rule was made applicable to *zemindaris* also. There was a proposal sometime afterwards that even the rule which allowed the full supply without any charge should be altered to allow half rate on the ground that there was never any adequate supply before. On account of the strong protest of the Board of Revenue the Government altered the half rate rule and allowed water free of charge even where the half rate had been levied on lands which "owing to the construction of several anicut channels and other works connected therewith were found to have lost wholly or partially their pre-existing sources of supply." See G. O. No. 101 Rev. dated the 16th January 1864. For determining what lands lost their sources of supply, the order states:—"The real criterion

is the rate of assessment which the accounts show the land is liable to." The order further says:—"If this indicates the title of the land to water or if other reasonable proof can be adduced, then no charge should be made for irrigation as the *engagement* to supply water manifestly implied a full and not an imperfect supply."

There is only one further order to be referred to. The Secretary of State, in considering whether a cultivator should have the option to refuse Government water said: the 16th January 1864 "with reference to your question" 'whether the *ryot* should be allowed the security against an excessive charge which the option of deciding, by a stated period of each year, whether he will have water or not will give him,' I am clearly of opinion that such option should be permitted. There is little ground for apprehension that the option would be exercised by the cultivator in the way of declining to use the means of irrigation when they are supplied to him at a moderate price, and the possession of it would in no respect limit the right, which the Government, acting on your own behalf or on that of the irrigation company, must retain, of declining to supply any particular tract of country with water, unless the cultivator should be prepared to enter into engagements to take the water at the stipulated rate in such numbers and for such terms of years as might warrant the required outlay. Although few would probably reject the opportunity, yet no compulsion to take the water must be exercised towards the dissentients and they must in no way be disturbed in the possession of their lands, so long as they desire to hold them, and continue to pay the ordinary rate of assessment.

This despatch makes it clear that the Secretary of State wanted to give the *ryots* the same option of taking anicut water as the *zemindars* and *inamdars* had. This order was communicated by the Madras Government to the officers concerned and it was pointed out by the Government that "as regards lands which have been fitted for irrigation by the owners and have actually been irrigated for at least one season it may fairly be held that *such preparation and acceptance of water imply acquiescence* with the usage of the country which does not require any formal engagement." That really means, in other words, an engagement will be implied between the Government to furnish water and the *ryots* to receive the supply. In those cases where the water was forced on the *ryots* the option was allowed and agreements were directed to be taken from them for any further supply of water. And they added: "The same rule must, of course, apply equally to the holders of lands in *zemindaris* until the *zemindars* come to terms with the Government and collected cess." In accordance with those directions rules were framed in 1864; the bill which subsequently became Act VII of 1865 was directed to be prepared in accordance with these orders of the Secretary of State. I extract below two of the rules.

Rule (7). "Where *ryots* desire to convert dry land into wet, application is to be made to the Collector either directly or through the Tahsildar on or before 31st of March, and the Collector will arrange with the Public Works Department for the supply of water. *Where the means of irrigation for such land already exist* the *ryot* shall, as a rule, have the option of continuing or ceasing to use the water at his pleasure, provided that where water is taken etc." This shows clearly no water-cess was intended where the *ryot* uses only the means of irrigation he already had.

Rule (10). These rules shall apply to *zemindari* and *inam* lands except in the case of *zemindaris*, a composition shall have been made either for fixed yearly payment or according to the quantity of water supplied. Provided always that no charge whatever shall be made under these rules for a single crop for *zemindari* or *inam* land where such lands are proved to have been customarily cultivated with wet crops *under old tanks, channels, or by any means of irrigation* whatever prior to the construction of anicuts, or to have been charged in the accounts with such a rate of assessment as indubitably indicates the title of such land to water or by the terms of the grant to have been given as *nanja inam*."

There were thus three circumstances recognised as conferring a right to exemption from water rate otherwise leviable:

(1) The existence of any means of irrigation including tanks, channels whatever prior to the construction of anicuts ;

(2) lands being charged with *nanja* assessment; and

(3) the title deed showing that an *inam* was granted as *nanja*.

Two conclusions follow: That it was not intended to levy any charge on cultivation carried on with *any* pre-existing source of supply, tank, channels and rivers; that in these instances the Government were only carrying out a legal obligation created by interference with such pre-existing source of supply which would have been enforced by the Courts.

An Act was necessary to collect the cess in the same way as land revenue and perhaps to remove the difficulties that might be caused by taking water through *zemindari* and *inam* lands. It was first intended only for the districts which used the Godavari and Kistna water and power was reserved in the original draft to extend it to other districts. But finally the bill was drafted for the Presidency.

Before considering what the relations of the parties were or whether there was an engagement between the parties at this time, *i. e.*, in 1863 and 1864, I shall finish my review of the proceedings which led to the Act.

In forwarding the draft Act to the Government Pleader, the Government asked his opinion whether it was necessary to specify *zemindari* and *inam* lands in order to enforce the special cess "on land *newly* irrigated from *Government sources* at *Government expense.*" The opinion of the Government Pleader was in the affirmative and he drafted the section in these terms: "This Act shall extend to all lands held by *zemindars* or *inamdars* for the irrigation of which water may be, *after the passing of this Act*, *newly* supplied or used from any such river, stream, channel, tank or work as specified in section." On its being pointed out that this might preclude the levy of any water rate for irrigation newly supplied to such lands since the construction of the anicut but prior to the passing of the Act and which supply may hereinafter be continued, the Government modified it by omitting the words "after the passing of this Act newly" and the section then ran in the form in which it was finally passed by the Legislative Council thus:— "This Act shall extend to all lands held by *zemindars*, *inamdars* or any other description of landholders for the irrigation of which water may be supplied or used from any such river, stream, channel, tank or work as is specified in section, provided always that where a *zemindar* or *inamdar* by virtue of engagement with the Government is entitled to irrigation free of separate charge no cess under this Act shall be imposed for water supplied to the extent of such right and no more."

In the case before us the water is supplied to the lands in suit from a Government source, to wit, Ellore Canal and Government anicut works, and, therefore, unless the plaintiff proves the 'engagement' that he sets up the Government are entitled to levy water tax. The word 'engagement' in the section is, no doubt, used in the same sense in which it was used in the proceedings to which I have already drawn attention. Now what was the state of things when the Act was passed? When the Government intercepted the flow of the water from the other three tanks mentioned in the plaint into Voddu Cheruvu, they undoubtedly inflicted an injury upon the plaintiff and if the plaintiff had enforced his claim in a Civil Court he would have obtained a decree for compensation payable to him for such interference which would probably have been a direction to supply him with that water which his tank was usually getting before the interruption or some equivalent compensation. Now it is not to be presumed that the Government did a wrongful act if the facts are consistent with any other supposition. The natural presumption is that they compensated him in some form. We find that the Government had issued orders that where their irrigation works had interfered with a pre-existing source of supply, water was to be supplied free. We see here there was such interference and the consequent free supply. The orders also show that in other cases water was to be supplied to *zemindars* under engagements to pay at certain rates. We see here no such payment received or demanded We further find that even as to the *ryotwari* lands the Government proceedings directed that engagements should be entered into and that the Government presumed that, when the *ryots* prepared their lands for irrigation

and received water from such irrigation sources, an engagement might be implied. Under these circumstances unless the free supply of water from 1863 is explained by Government, it appears to me the presumption, not only natural but almost irresistible, is that there was an implied engagement between the parties for the free supply of water. The Judge rightly observes:—"The Act was an embodiment of the Government Order;" but he holds that "it was for the *zemindar* to have entered into an engagement with Government as to the extent of irrigation to which he was entitled." In my opinion he is wrong in holding that an express agreement is necessary. That the plaintiff was irrigating the lands in suit with Government water free of charge is clear evidence that he was entitled to water sufficient to irrigate them either because they were then being irrigated with his tank water or could have been so irrigated or it was only on those conditions that he permitted any interference with his property.

The Government Pleader contends that, though there may be an engagement, it is only to the effect that the *zemindars* are entitled to receive from the Government water necessary for the old customary irrigation of their lands, that is to say, they are only entitled to water sufficient to irrigate that area which is entered as wet in the Permanent Settlement accounts and in the absence of any allegation in the plaint that the land for which they claim free supply of water is land so entered as wet in the old accounts, the plaintiff is not entitled to maintain the suit. If the argument is that the 'engagement' in 1863 with reference to this estate had reference *only* to the old settlement accounts to the knowledge of both the parties, it is open to the Government to plead it and prove the same. That would be an express agreement. Otherwise it cannot be used to limit the plaintiff's claim based on the state of things in 1863. For, the *zemindar* may have improved the capacity of his tank or increased the area of his wet cultivation since the *sanad* and the supply of water must have been made to compensate him for his loss thus sustained. If the argument is that an 'engagement' referred to is to be implied from the conditions that existed at the date of the permanent *sanad* it is not an answer to the plaintiff's claim; because, if the facts imply an engagement in 1863, when the supply was obstructed, that there was another engagement in 1802 or afterwards when the permanent *sanad* was granted, unless it is shown that is the only engagement which is intended by the Act of 1865, is not material. The section itself is not restricted to any engagement at the time of the permanent settlement. And I have no doubt it was open to the parties to enter into any engagement at any time they liked. The plaintiff may be entitled to say that if the old Gudigat wet area according to the Permanent Settlement accounts entitled him to more land than what he now claims then he should be entitled to the free cultivation of lands to that extent in addition. He may also be entitled to say, if he was getting water sufficient to cultivate more lands than the area he now claims, he is entitled to such quantity of water and cultivate more lands with it as it is reasonable to presume that the Government could not have intended to deprive a man of his property without compensation. This is apparent by the effect of G. O. No. 2416, 17th June 1895, "where the *mamul* wet areas to be allowed are found to be in excess of the highest recorded areas under wet cultivation in the villages concerned, the maximum area *irrigable* should be allowed." It is unnecessary, however, to consider this question as he makes no such claim in the plaint. The rules, already extracted, in force at the time the Act was passed, support this conclusion. He is entitled to exemption if his pre-existing source of supply is interfered with *or* if the accounts show a *nanja* assessment *or* if the title deed supports the claim. The one is not exclusive of the others. The Act, as rightly pointed out by the Judge, being only an embodiment, so far as this matter is concerned, of the pre-existing rules, an engagement will be implied if any of these grounds exist. The tanks, if any, in the *zemin*, undoubtedly, belonged to the *zemindar*. The Government lay no claim to them. It is not probable that there was, therefore, any engagement by the Government to supply water for the irrigation of such lands under those tanks. From where could the Government supply such water? Not from these tanks with which they had nothing to do,

and it is not shown there was any other source of water supply. No engagement can, therefore, be implied. An engagement can, only be implied in those cases in which it was in the power of the Government to stop the supply of the water claimed or when they undertook to supply such water themselves. Otherwise I see no reason for any implied contract so far as the lands irrigated with any pre-existing source of supply, which did not belong to the Government, are concerned. For these reasons I am unable to accept the Government Pleader's argument that the engagement to be proved has reference only to the wet area as shown in the Permanent Settlement accounts. If, however, it is necessary to prove what the area was so entered, then, the fact that these lands were under cultivation from 1863 to 1889, and it is not shown by the Government that the lands were brought under cultivation only sometime after the permanent *sanad* was granted, would be evidence to show that they were *mamul* wet even at the date of the Permanent Settlement. The Permanent Settlement accounts are with the Government and if the extent of wet cultivation under these tanks is referred to in those accounts, it is for the Government to produce them if it is material.

The only case that has been cited in argument before us is against the Government Pleader's contention. Appeal No. 182 of 1904 was a similar case and the learned Judges, Benson and Miller, JJ., stated the question for decisions in these terms: "The question for decision in this appeal is, in effect, what is the extent of land in the village of Ravipad which was irrigable from the irrigation works existing before the construction of the Godavari anicut irrigation system." I entirely agree. It appeared that various accounts showed the various extents of lands under cultivation but they adopted the greatest area irrigated which, no doubt, showed those lands were capable of irrigation works before the days of anicut. They did not put the plaintiff to proof of what the settlement area was. I am, therefore, of opinion that, if the facts relied upon by the plaintiff are proved, a cause of action is disclosed. The Judge is, therefore, directed to return findings on the issues in the case. It will be open to him to direct the Subordinate Judge to submit findings to himself.

Six months are allowed for findings and seven days for objections.

SADASIVA AIYAR, J.—I concur in the decision just now pronounced by my learned brother and if I add a few words in my own language it is merely on account of the importance of the questions involved in this case. This is one of those cases arising out of the Government's having constructed anicut, channels and other works connected therewith in the Godavari and Kistna deltas. Some of these channels interfered with the sources of irrigation to the lands of certain landholders or interfered with the flow of water to the tanks which formerly supplied water for irrigation to such lands. The Proceedings of the Board of Revenue, dated the 11th February 1898, contain the following:—

"When the system of anicut irrigation was introduced into the Godavari and Kistna deltas, Government allowed free irrigation from the anicuts to all lands which, owing to the construction of the several anicut channels, and other works connected therewith, were found to have lost, wholly or partially, their pre-existing sources of supply (G. O. No. 101, Rev., dated 16th January 1864)."

This shows that about 1864, the Government offered to allow free irrigation from the anicuts to such lands as were deprived of their former sources of supply. The owners of such lands, who did not enter into litigation with the Government in order to prevent Government from interfering with the old sources of supply and who took the water supplied by the Government from the Government anicuts. must be taken to have accepted the offer of Government as satisfaction of their claims against Government. The fourth paragraph of the plaint in this case says that the Government supplied the plaintiff's land with water from year 1863 to *Fasli* 1900 and that the plaintiff accepted such water. There was, in my opinion, therefore, a clear, completed engagement between the Government and the plaintiff set out in the plaint and hence the plaint shows a good cause of action. Similar suits to this were instituted by the proprietrix of the village of Ravipad, the

proprietor of Chinchinada and by two other proprietors in 1902 in the District Court of Godavari. Mr. Hamnett, the learned District Judge, who decided those suits, acted upon the Government Order of 1864 and found an implied engagement between the Government and the proprietors of those estates and gave effect to that engagement as against the Government. On appeal to the High Court by the Government, it was contended, as the very first ground in the appeal memorandum (see the appeal memo in Appeal No. 182 of 1904), that the District Judge erred in law in finding that there was an implied contract between the plaintiff and the Government to allow free irrigation for the extent of land, the irrigation sources of which had been cut off by the anicut works. The learned Judges (Benson and Miller, JJ.) who decided that appeal and connected Appeals Nos. 183 and 184 of 1904 saw nothing in that contention and begin their judgment at once with the sentence: "The question for decision in this appeal is, *in effect*, what is the extent of land in the village of Ravipad which was irrigable from the irrigation sources, existing before the construction of Godavari anicut irrigation system." Following the decision in those appeals, we must in this case set aside the decisions of the lower Courts which held that the plaint discloses no cause of action. I may add that in Appeal Suit No. 182 of 1904, it was assumed that, if there was an engagement between the Government and the proprietor that engagement was to supply water free of tax on the extent of land which was irrigated from the irrigation works existing *just before the construction of the Godavari anicut irrigation works*, and not merely on the lands which were irrigable as wet lands *at the time of the Permanent Settlement*. The contention of the learned Government Pleader before us that the engagement mentioned in Act VII of 1865 section 1 (*a*) relates to the engagement at the time of the Permanent Settlement cannot be accepted in the face of the decision in Appeal No. 182 of 1904. It seems unreasonable to hold that after a landholder has improved his *zemindari* and brought between 1802 and 1864 a large extent of land under wet cultivation by improving his irrigation sources, when the Government by their new anicut system cut off the sources of irrigation supply to those large extents of lands, they intended to arrange with the *zemindar* to supply him water free of charge only to the wet area, which existed in 1802 but not to the area which had begun to be permanently cultivated as wet at the time when they constructed the anicut channels. The Government Order of 1864 and the Board's Proceedings of 1898 already referred to are against the contention that the Government did not undertake liability to supply water free to all those lands whose then existing irrigation sources were interfered with by the Government's constructions. In the result I agree in the order proposed by my learned brother.

Case sent back.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 305 OF 1911.

February 13, 1913.

Present:—Justice Sir Richard Harington, BART., and Justice Sir Herbert Carnduff, KT.

KALI PROSAD TEWARY—APPLICANT—APPELLANT.

versus

Pundit PRAYAG RAJ—RESPONDENT.

Non-appearance of plaintiff—Dismissal of suit—Sufficient cause for non-appearance—Karpardraz *missed train, whether sufficient cause—Civil Procedure Code (Act V of* 1908), *O. IX, r.* 9.

The failure to be in time to catch a train, in order to attend a case, is not a sufficient cause within Order IX, rule 9 of the Civil Procedure Code.

Appeal from the order of the Sub-Judge of Mozaffarpur, dated May 29th, 1911.

Moulvi *Mohammad Mustafa Khan*, for the Appellant.

Babu *Hari Bhushan Mukherjee*, for the Respondent.

JUDGMENT.—This is an appeal against an order refusing to restore a petition which has been dismissed for default. The excuse that the petitioner gives is, *first*, that he was ill and *secondly*, that he sent his *karpardaz*, who missed the train. The story of the illness was disbelieved by the learned Subordinate Judge, and the fact that the *karpardaz* was not in time to catch the train is not a sufficient cause within Order IX, rule 9, of the Code of Civil Procedure. The result is that the appeal is dismissed with costs.

We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 656 OF 1911.

May 29, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

UTTAM SINGH AND THREE OTHERS—DEFENDANTS—APPELLANTS

versus

BARKAT ALI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 91, 144 --Alienation by de facto guardian of minor—Suit by minor for possession of property alienated—Void alienation--Cancellation of document not necessary.

A suit by a Muhammadan for possession of land sold during his minority by his *de facto* guardian is governed by Article 144 of the Limitation Act, and not by Articles 44 and 91. The alienation of a minor's property being *ab initio* void, he is entitled to treat the transaction as a nullity and is not bound to sue for cancellation of the sale-deedd.

Sardar Shah v. *Haji*, 28 P.R. 1909; 182 P. L. R. 1908; 170 P. W. R. 1908; 1 Ind. Cas. 545, *Ghulam Rasul* v. *Ajab Gul*, 57 P. R. 1891; *Raghubar Dyal Sahu* v. *Bhikya Lall Misser*, 12 C. 69; *Hafiz Karim Bakhsh* v. *Musammat Begam Jan*, 52 P. R. 1895; *Mastu* v. *Nand Lal*, 73 P. R. 1890 (F. B.), referred to.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 11th February 1911.

Mr. *Mukerji*, for the Appellant.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—This is an appeal under section 70 (1) (*b*) of the Punjab Courts Act. The facts are fully stated in the judgment of the Divisional Judge and need not be repeated.

The question for decision is whether a suit by a Muhammadan plaintiff for possession of land sold during his minority by his *de facto* guardian is governed by Articles 44 and 91 of the Limitation Act or by Article 144. The Divisional Judge, though somewhat reluctantly, following *Sardar Shah* v. *Haji* (1) held that Article 144 was applicable and maintained the order of the first Court giving plaintiff a decree for possession of the land in suit conditionally on payment of Rs. 250.

In the case of *Sardar Shah* v *Haji* (1), mentioned above, it was held that an alienation by a Muhammadan uncle as a *de facto* guardian of his nephew's property was void *ab initio* and, consequently, a suit by a plaintiff for the recovery of the property against the alienee in such a case is governed by Article 144 and not by Articles 44 and 91, as he is not bound to set aside the alienation or to sue under either of those Articles. If this decision be correct the present appeal must fail.

After examining the authorities referred to in the ruling in question, we have no doubt that it is quite correct. In *Ghulam Rasul* v. *Ajab Gul* (2) the principle laid down in *Raghubar Dyal Sahu* v. *Bhikya Lall Misser* (3) was affirmed as correct. It was as follows:—"When a person sues for possession of immoveable property, and is met by a defendant in possession, founded upon a title, which, as between him and that defendant, is null and void, the plaintiff may be at liberty to ignore the transaction and to get the benefit of 12 years' limitation; but if he is not at liberty to treat the title, or the transaction in which it originated, as a nullity, then one of the shorter periods of limitation is applicable, such as under Articles 44, 91, 92 and others, according to the circumstances of the particular case." In that case the learned Judges considered that the plaintiff was not at liberty to ignore the defendant's title, which was founded on a deed, the plaintiff's own case being that if the transaction was founded on necessity, the transfer of his share was valid. In *Hafiz Karim Bakhsh* v. *Musammat Begam Jan* (4) the same principle was affirmed and it was stated that the plaintiff was competent to entirely ignore a document that was a nullity and that he need not sue to set it aside.

The question then in the present case is reduced to this—Was the sale by the uncle of plaintiff made during the latter's minority void *ab initio*? If it was, then the plaintiff can ignore it and is entitled to the benefit of the twelve years' rule. Plaintiff's uncle, who made the alienation in dispute, was only *de facto* guardian. He was neither a near guardian by Muhammadan Law nor by appointment of the Court, and he could not,

(1) 28 P. R. 1909; 170 P. W. R. 1908; 1 Ind. Cas. 545; 182 P. L. R. 1908.

(2) 57 P. R. 1891.
(3) 12 C. 69.
(4) 52 P. R. 1895.

therefore, bind the minor's property by his acts of alienation. This was the rule laid down by the Full Bench in *Mastu* v. *Nand Lal* (5) and it has been followed in the later decisions of this Court. We have, therefore, no difficulty in holding that the alienation of plaintiff's property was *ab initio* void. He is entitled to treat it as a nullity and is not bound to get the sale-deed cancelled. The suit is, therefore, governed by Article 144 of the Limitation Act and is within time.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) 73 P. R. 1890 (F. B.).

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1164 OF 1911.
March 13, 1913.
Present:—Mr. Justice Kensington and
Mr. Justice Beadon.
UTTAM SINGH—PLAINTIFF—APPELLANT
versus
BASANTA—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908)—Deed of exchange, not registered, effect of—Title defective—Possession recoverable—Defendant entitled to refund of benefit.

Where the title of a person in possession of immoveable property is defective for want of registration of the deed creating that title, he must be regarded as a trespasser.

Mangalasamy Devar v. *Subbiah Pillay*, (1910) M. W. N. 263; 8 M. L. T. 91; 20 M. L. J. 966; 6 Ind. Cas. 504; 34 M. 64, referred to.

By an unregistered deed *A.* exchanged a house worth more than Rs. 100 with *B.* for a vacant site and Rs. 219 in cash. *A.* received the money and took possession of the site and gave *B.* the possession of the house. Subsequently, *A.* sued *B.* to recover the house:

Held, that *B.*'s title was defective, and that *A.* was entitled to a decree for possession but must return the vacant site and the sum of Rs. 219 received from *B.*

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 16th February 1911, reversing that of the Munsif, 2nd class, Phillour, dated the 29th November 1910, decreeing plaintiff's claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

JUDGMENT.—By an unregistered deed, dated 5th September 1908, the plaintiff-appellant transferred the house now in dispute to the defendant-respondent in exchange for a vacant site and a sum of Rs. 219 and the respondent by a similar unregistered deed transferred the vacant site to the appellant. Appellant at the same time executed a written acknowledgment of the payment to him of Rs. 219 and respondent entered into possession of the house and gave up the vacant site.

On the 1st October 1909, the appellant's sons instituted a suit against the respondent and the appellant for a declaration that the alienation of the house by exchange would not affect their reversionary rights. Appellant supported his sons' claim and pleaded that a fictitious exchange had taken place without consideration—and while the suit was still pending, appellant instituted the present suit for possession of the house alleging that he had been wrongfully dispossessed by force by the respondent in September 1908.

Admittedly the value of the house exceeds Rs. 100. Both suits were decided on the same date by the same Munsif who, holding that defendant-respondent's title-deed was defective for want of registration decreed the plaintiff-appellant's claim, and on the ground that the plaintiff-appellant had succeeded in avoiding the exchange, the Munsif dismissed the declaratory suit.

Plaintiff's sons do not appear to have taken any further steps in their suit which was dismissed but in the suit by plaintiff for possession the defendant's appeal to the Divisional Court has been accepted and the plaintiff's suit has been dismissed.

The plaintiff-appellant's allegations that he was dispossessed by force and that there was a fictitious exchange without consideration are clearly untrue and there is no doubt that he received Rs. 219, that he took over the site and that he delivered possession of the house to the defendant-respondent.

It is, however, clear that the contract of exchange was in writing, that defendant-respondent cannot establish his title except by the written deed, and that the document for want of registration is inadmissible in

evidence. *Prabh Dyal* v. *Gurmukh* (1) related to an application to a Court setting forth the terms of a compromise which had been previously arrived at and this authority is not applicable to the document now in question which is itself the actual deed of exchange.

The defendant-respondent's title is, therefore, defective and as was held in similar circumstances in *Manglasamy Devar* v. *Subbiah Pillay* (2), he must be regarded as a trespasser.

Appellant's Counsel admits that if it be held that appellant has received the vacant site and Rs. 219, he cannot get back the house till he returns what he has received.

We, accordingly, accept the appeal and setting aside the lower Appellate Court's decree, we give plaintiff a decree for possession of the house in suit on his paying Rs. 219 into Court for the defendant and giving up the vacant site which he received from the defendant.

In view of plaintiff's conduct in connection with the exchange we order that each party shall pay its own costs throughout.

Owing to the meeting of the Legislative Council to-day, certain cases fixed for to-day had been adjourned and to provide sufficient work for to-day this appeal, which was not reached yesterday, was held over for disposal to-day. The parties were duly informed that the appeal would not be struck off the list of the present week but would be carried forward to to-day, and, as respondent is absent and is not represented by Counsel, the appeal has been heard *ex parte*.

Appeal allowed.

(1) 98 P. R. 1902; 18 P. L. R. 1903.
(2) 34 M. 64; (1910) M. W. N. 263; 8 M. L. T. 91; 6 Ind. Cas. 504; 20 M. L. J. 966.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2597 OF 1911.

April 1, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

HAZURA SINGH—DEFENDANT—PETITIONER

versus

ILAM DIN—PLAINTIFF—RESPONDENT.

Revision—Jurisdiction—Appellate Court deciding that Court of first instance had jurisdiction—Punjab Courts Act (XVIII of 1884), s. 70 (a)—Civil Procedure Code (Act V of 1908), s. 115.

In an appeal before a District Judge, from an order of a Munsif of the first class who directed the filing of an award and passed a decree in accordance therewith, an objection was taken that the case was beyond the pecuniary jurisdiction of the Munsif. The District Judge dismissed the appeal, holding *inter alia* that the Munsif had jurisdiction:

Held, that the appellate judgment, though it erroneously decided that the Court of first instance had jurisdiction to hear the suit, was not open to revision by the Chief Court.

Doulat Ram v. *Asa Ram*, 46 P. R. 1886 and *Arur Singh* v. *Bua Ditta*, 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911; 9 Ind. Cas. 674, followed.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Gujrat, dated the 28th July 1911, affirming that of the Munsif, 1st class, dated the 5th December 1909, ordering an award made out of Court to be filed and passing a decree thereon.

Rai Bahadur Pandit *Sheo Narain*, for the Petitioner.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—The parties to the present application for revision referred their dispute to arbitrators who made an award in plaintiff respondent's favour for Rs. 364.

Plaintiff had originally claimed Rs. 2,188 and defendant Rs. 1,150. Plaintiff applied under Schedule II, section 20 (1) of the Civil Procedure Code that the award should be filed in Court. The case was heard by a Munsif with powers up to Rs. 1,000, an objection to his jurisdiction having been overruled by the District Judge. The Munsif ordered that the award should be filed and passed a decree in plaintiff's favour.

Defendant-petitioner appealed to the District Judge, one of his grounds being that the case was beyond the pecuniary jurisdiction of the Munsif. The District Judge

dismissed the appeal holding *inter alia* that the Munsif had jurisdiction.

Defendant has now moved this Court on the revision side and the learned Judge who admitted the petition referred it to a Division Bench in order that it might be decided what was the meaning of the words "subject-matter of the award" in section 20 (1) of the said Schedule of the Civil Procedure Code.

The only question referred to us is whether the case was beyond the pecuniary jurisdiction of the Munsif.

Now in *Dowlat Ram* v. *Asa Ram* (1), it was held that an appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear the suit is not open to revision by the Chief Court where no appeal lies, as the lower Appellate Court cannot in such a case be said to have exercised a jurisdiction not vested in it by law simply because it has come to an erroneous decision on a question of jurisdiction raised by an appeal properly preferred. This Division Bench ruling was followed by a single Judge in *Arur Singh Bua Ditta* (2). The present case is on all fours with these decisions. The appeal was properly preferred to the District Judge who had jurisdiction to hear it.

Pandit Sheo Narain has asked us to refer the question to a Full Bench chiefly on the ground that in accordance with the above rulings a party has no remedy however erroneous and perverse a decision as to jurisdiction by a lower Appellate Court may be. We see no reason to assume that lower Appellate Courts will wantonly decide such questions in an erroneous manner and after all we have to interpret the law as we find it. We see no reasons for considering the previous decisions of this Court to be wrong and we, therefore, dismiss the application for revision with costs.

Application rejected.

(1) 46 P. R. 1886.

(2) 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911; 9 Ind. Cas. 674.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 572 OF 1912.

February 26 1913.

Present:—Mr. Justice Banerji and Mr. Justice Tudball.

INDARJIT AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAJADHAR SAHAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 31, application of—Realisation of rents and profits in lieu of interest—Mortgage with possession—Dispossession—Limitation.

Under the terms of a mortgage of 1850, the mortgagee was to take possession of the mortgaged property and to appropriate its rents and profits in lieu of interest.

In 1899 the mortgagee was dispossessed:

Held, (1) that the realisation of rents and profits in lieu of interest was equivalent to the receipt of interest as such;

(2) that the limitation began to run under the circumstances from the year 1889 when Act XV of 1877 had come into operation;

(3) that section 31 of Act IX of 1903, therefore, did apply to the case and the plaintiff's suit for sale of the property brought on 10th January 1910 was within limitation.

Second appeal from the decision of the District Judge of Farrukhabad.

Mr. *J. N. Chaudhri*, for the Appellants.

The Hon'ble Mr *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale upon a mortgage of January 26th, 1850. The question to be decided is whether the suit is barred by limitation. The mortgage-deed provided that the mortgagee was to take possession and appropriate the rents and profits in lieu of interest. It has been found by the Court below that in pursuance of this clause in the mortgage-deed the mortgagee was in possession till the year 1889, when he was dispossessed. It is argued that the claim had become time-barred before Act XV of 1877 came into operation and, therefore, the plaintiff was not entitled to the benefit of section 31 of the Limitation Act of 1903. Section 21 of Act IX of 1871 gave a fresh start for the computation of limitation from the date of payment of interest as such. The realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and, therefore, under section 21 of Act IX of 1871, the plaintiff was entitled to compute limitation from the year 1889 up to which year he has been

found to have received interest. Before that Act XV of 1877 had come into operation. Therefore, in accordance with the provisions of section 31 of Act IX of 1908 the plaintiff was entitled to bring his suit within two years of the date on which that Act came into force. The suit having been brought on January 10th 1910, was well within time. The only point raised, therefore, fails. We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1090 OF 1911.

March 22, 1913.

Present:—Mr. Justice Kensington and Mr. Justice Beadon.

SAGHAR—PLAINTIFF—APPELLANT

versus

NUR AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Limitation—Pre-emptor cannot be allowed to extend time on account of delay in Deputy Commissioner's sale—Punjab Land Alienation Act (XIII of 1900)—Punjab Pre-emption Act (II of 1905), s. 29—Limitation Act (IX of 1908), Sch. I, Art. 10—Practice—Hard cases.

A pre-emptor is bound to bring his suit within time whatever the time may be, and he cannot be allowed to extend that time by asserting that the sale which gives him his cause of action is a nullity until the provisions of the Land Alienation Act are fulfilled. The sale is none-the-less a sale, merely because it may be unenforceable in consequence of that Act, and if eventually sanctioned by the Deputy Commissioner it becomes effective from its original date.

Certain land was sold on 9th July 1908 and possession was delivered to the vendee on the same date.

The sale required the sanction of the Deputy Commissioner, which was granted on 19th July 1909.

Mutation was formally sanctioned on 28th July 1909, and a suit for pre-emption was brought on 6th January 1910:

Held, that the suit was barred.

Said Khan v. *Musammat Matwala*, 82 P. R. 1912; 219 P. L. R. 1912; 219 P. W. R. 1912; 16 Ind. Cas. 775, not followed.

Courts are constrained to administer the law as they find it without reference to hard cases.

Second appeal from the decree of the Additional Divisional Judge, Jhelum, at Rawalpindi, dated the 5th January 1911, affirming that of the Munsif, 1st class, Jhelum, dated the 21st July 1910, dismissing the claim.

Mr. *G. R. Harris*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—The two Appeals Nos. 1090 and 1091 are before us as appeals under section 70 (1) (*b*), Punjab Courts Act, as it stood prior to 1912. The question to be determined is whether the lower Courts have rightly dismissed plaintiff's pre-emption suits as time-barred.

The suits cover two petty sales of the 9th July 1908 in respect of half shares of *khasra* No. 969, area 2-4/20 *kanals*. The vendors were *Jats* and the vendees two sets of brothers, *Tarkhans* by caste, belonging to the same village.

The plaintiff-appellant, a *Jat* of the village, instituted his suits for pre-emption on the 6th January 1910. The unregistered deeds covering the sales recited that possession had been already given and this is, undoubtedly, correct as the purchasers at once began building houses on the small areas sold to them. The sales were entered in the mutation register on the 27th March 1909. It was then discovered that the Deputy Commissioner's sanction for the sales was required under the Land Alienation Act, and this was applied for and obtained on the 19th July 1909. The mutations were then formally sanctioned on the 28th July. The lower Courts have discussed the question of limitation somewhat differently. The Munsif treated the cases under section 29 of the Pre emption Act while the Divisional Judge considered Article 10 of the Limitation Act schedule to be applicable. We are inclined to say that the learned Divisional Judge was right but this particular point is of no practical importance in the present cases, as possession was clearly taken at the time of sale. Whichever provision of the law is applied, plaintiff's limitation would be one year reckoning from the 9th July 1908, and his pre emption suits were long barred by time on the 6th January 1910.

The plaintiff has sought to bring his suits within time by a contention that the starting point for limitation will be the 19th July 1909, when the Deputy Commissioner's sanction was obtained. The lower Courts have agreed in disallowing this contention, and we should, if the matter was entirely open to discussion, have had no difficulty in holding that they were right. The law nowhere lays down that extended time is to be given to a pre-emptor merely because the sales in dis-

pute were to start with in contravention of the Land Alienation Act and we do not consider it open to the Civil Courts to invent a starting point for limitation other than that contained in one or other of the precise provisions applicable.

Our difficulty has been that exactly the same point came before a single Judge of this Court and was decided by him in plaintiff's favour by the ruling published as *Said Khan* v. *Musammat Matwala* (1). Curiously enough the decision there given was on appeal from two other decrees of the same Divisional Judge as in the present cases, bearing date one day after the decrees now before us, and there also the lower Courts concurred in treating the suits as time-barred, but our learned colleague came to a different conclusion.

We have considered the matter in the light of *Said Khan* v. *Musammat Matwala* (1), but we find ourselves unable to adopt the line of argument there used. So much of the rulings, as is taken up with discussion of sections 20, 21 and 26 of the Pre-emption Act is, in our humble judgment, immaterial to the matter realiy in dispute, and with the utmost respect for the conclusion of our learned colleague, we can only say that there appears to us to be a *non sequitur* in his argument where he goes on to hold that the starting point of limitation was the date of the sanction given by the Deputy Commissioner.

A pre-emptor is bound to bring his suit within time, whatever the time may be, and he cannot be allowed to extend that time by asserting that the sale which gives him his cause of action is anullity until the provisions of the Land Alienation Act are fulfilled. The sale is nonetheless a sale merely because it may be unenforceable in consequence of that act, and if eventually sanctioned by the Deputy Commissioner, it becomes effective from its original date.

The pre-emptor was, no doubt, placed in a difficult position by the terms of section 21 (1) of the Pre-emption Act, but the Courts are constrained to administer the law as they find it without reference to hard cases, and we observe that by the terms of section 9 of the recently amended Act I (Punjab) of 1913 the difficulty will no longer arise, so that the matter ceases to have much importance. Under the Act as it previously stood we are obliged to say that we are unable to follow the ruling of *Said Khan* v. *Musammat Matwala* (1), and, in our opinion, the present suits were time-barred. The appeals are accordingly dismissed with costs to the vendee defendant. Counsel's fee Rs. 10 in each case.

Appeals dismissed.

(1) 82 P. R. 1912; 219 P. W. R. 1912; 219 P. L. R. 1912; 16 Ind. Cas. 775.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 596 OF 1911.

February 10, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

Mohunt SEARAM DAS—PLAINTIFF—APPELLANT

versus

MOHABIR DAS—DEFENDANT—RESPONDENT.

Right of suit—Mohunt *of* Asthal—*Suit against trespasser for ejectment by* mohunt *alleging himself as* malik—*Right of* mohunt—*Suit to be decreed.*

The plaintiff alleging himself to be the *malik* of an *asthal* sued to eject the defendant, a trespasser, from a room within the *asthal*. The plaintiff claimed to have an absolute right to turn the defendant out. It was found that the plaintiff was not the proprietor of the *asthal*, but was the *mohunt* or manager of the goddess who was the real proprietor of the *asthal*:

Held, that, as *mohunt* of the *asthal*, the plaintiff had a right to sue the defendant and that his suit should be decreed.

Appeal from the decree of the District Judge of Mozaffarpur, dated January 4th, 1911, affirming that of the Munsif of Sitamarhi, dated July 25th, 1910.

Dr. *Rash Behary Ghosh*, Babus *Golap Chandra Sarkar*, *Hara Prosad Chatterjee* and *Lachmi Narain Singh*, for the Appellant.

Babus *Umakali Mukherjee* and *Gonesh Dutt Singh*, for the Respondent.

JUDGMENT.

HARINGTON, J.—This is an appeal against a judgment of the learned District Judge of Mozaffurpur who affirming the judgment of the Munsif, dismissed the suit brought by the plaintiff to eject the defendant from a room of which he had had possession within the boundaries of a certain *asthal*. The plaintiff in his plaint, alleged himself to be the *malik* of the *asthal* and he stated that his predecessors, the previous *mohunts*, had been in possession and that, after them, he himself

had been in possession of the *Asthal* and then alleges himself to have an absolute right to turn out the defendant who was in the *Asthal* against his consent. The defendant traversed the plaintiff's allegation that he was the proprietor and also traversed his right to turn him out of the *Asthal*. The suit was dismissed because it was found that the plaintiff was not the proprietor of the *Asthal* but occupied no higher position than that of the *mohunt* or manager of the goddess who was the real proprietor of the *Asthal*. The difficulty that we are met with in this Court with regard to the judgments of the lower Courts is this that, notwithstanding on the face of the plaint, that was the claim set up by the plaintiff, the suit was tried as though he had asserted his right to turn out the defendant in his character as *mohunt*. If the case had been tried solely on the question whether the plaintiff was the absolute proprietor of the *Asthal* and whether as such he had the right to turn out the defendant, then the question as to the plaintiff's power as *mohunt* would have been absolutely and entirely irrelevant and the question whether the defendant had due authority to justify the plaintiff in turning him out would also have been irrelevant, because as absolute proprietor, the plaintiff had the right to turn the defendant out as the person who occupied the room without his consent. We find difficulty in affirming the judgments of the Courts below dismissing the suit, because, though they have found that the plaintiff is not the proprietor, yet they have found that he is the *mohunt* and, as such, his power to turn out the persons whose misconduct justifies him in taking that course, and they have also found that the present defendant did misbehave in a way which would justify the *mohunt* in turning him out. The Judge of the lower Appellate Court prefaced his consideration of this question with the observation that it was perhaps hardly necessary to go into the question and came to his conclusion after consideration of the evidence which was tendered on this point in the Court of first instance. The result, therefore, is that on the findings of fact and having regard to the way in which the case was tried in the lower Courts, the plaintiff's claim ought not to have been dismissed in the way in which it has been dismissed The Courts below might have declined to go into the question as to the powers of a *mohunt*, and finding that the plaintiff was not the absolute proprietor, might have dismissed the suit but not having gone into the question as to the powers of a *mohunt* and having tried the case on the footing as they did, they ought not to have refused the plaintiff the relief to which they have found him entitled. I think, therefore, that the decree of the lower Appellate Court ought to be set aside and a declaration should be made to the effect that the plaintiff, as the *mohunt* or manager of the goddess, who is the proprietor of the *Asthal*, is entitled to eject the defendant from the room within the precincts of the *Asthal* as described in paragraph 7 of the written statement and of which the boundaries are given in paragraph 13 thereof.

We have then to consider the question of costs. In my view, no order ought to be made with respect thereto. The defendant might have succeeded if, in the first Court, he had objected to all these with regard to the *mohunt*, if that had been kept out, this appeal would have been hopeless. The appellant has been unabled to come here in consequence of the way in which the Courts below have tried the case as if the plaintiff was asserting his rights as *mohunt*. Under these circumstances, I am of opinion that there should not be any order as to costs.

CARNDUFF, J.—I agree.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 622 OF 1910.

March 4, 1913.

Present:—Mr. Justice Sankaran Nair.

YERRAKANTLA SUBBIAH—PLAINTIFF—PETITIONER

versus

DELAVAR KHAN DOULAT JAI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 14—Ex parte decree, setting aside of—Notice to opposite party imperative.

Order IX, rule 14, is imperative and no *ex parte* decree against the defendant can be set aside unless notice has been served on the plaintiff.

Oral notice given to the Pleader, who appeared in execution proceedings in connection with the same decree but who was different from the Pleader who appeared in the case, was considered not sufficient.

LAL CHAND SEW KARAN *v.* EAST INDIA RY. CO.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Munsif of Nandyal, in M. P. No. 624 of 1910, in O. S. No. 280 of 1907.

Mr. *B. Sitarama Rao*, for the Petitioner.

JUDGMENT.—The Munsif passed an *ex parte* decree on the 19th August 1907. On the 14th April 1910, the plaintiff applied for execution. The application was posted for hearing on the 14th June. The defendant, on the 6th June 1910, applied to set aside the *ex parte* decree. The application was posted to the 14th June. Notice was not served on the plaintiff. But the Pleader, who appeared for him in his execution petition on the 14th, was asked to file his counter-affidavit on the 17th, though he says in his affidavit that he appeared only in the petition. On the 17th the plaintiff and his Pleader for the execution petitioner were present, and the Munsif set aside the *ex parte* order. The section is imperative that the *ex parte* order can be set aside only after notice is served on the plaintiff. Subramania Iyer, who appeared for him in the execution petition, was not his Pleader in the case. The Munsif acted illegally in setting it aside without notice. His order also is defective. It does not state any ground, whether notice was not served or the defendant was prevented by any sufficient cause from not appearing.

I reverse the Munsif's order setting aside the *ex parte* decree. The defendant will pay the plaintiff's costs throughout.

Order reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2679 OF 1910.

January 28, 1913.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

LAL CHAND SEW KARAN—PLAINTIFF—APPELLANT

versus

THE EAST INDIA RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railway Company—Loss of portion of consignment of ghee—*Theft by unknown person—Matter put in hands of Police—Theft not by Railway servant—Discharge of* onus *by Railway Company—Liability of Railway Company—Contract Act (IX of* 1872*)*, *ss.* 151, 152—*Railways Act (IX of* 1890*)*, *s.* 72.

The plaintiff consigned 494 tins of *ghee* through the defendant Railway Company. Out of the consignment, 83 tins were lost owing to their theft by some person other than the Railway servants. The plaintiff contracted under section 72 of the Railways Act and took the benefit of reduced freight:

Held, that the Railway Company discharged any *onus* which lay upon them, and were not liable for the loss of the 83 tins of *ghee*.

Sheikh Mahamad Ravuther v. *The British India Steam Navigation Company Ltd.*, 32 M. 95; 4 M. L. T. 110 (F. B.); 18 M. L. J. 497; 1 Ind. Cas. 977, distinguished.

Appeal from the decree of the Sub-Judge of Hooghly, dated May 6th, 1910, affirming that of the Munsif of Howrah, dated December 16th 1909.

Babu *Probodh Chandra Roy*, for the Appellant.

Mr. *G. B. Macnair* and Babu *Ambika Pada Chowdhury*, for the Respondent.

JUDGMENT.—There is nothing in this appeal, which should never have been brought, and could not possibly be argued upon the grounds on which it is sought to be argued. Whether the case falls under the common law of bailment and is governed by section 151 or 152 of the Contract Act, or whether it comes under the special provision of section 72 of the Railways Act, as, undoubtedly, it does, the suit is equally without foundation.

The goods which were lost in transit were 83 tins of *ghee* in a consignment of 494 tins. They have been proved to have been locked and sealed in one of the Company's vans. They were put in in the presence of the consignor's own man and he saw that they were all right when they left Etawah. They were further checked and found to be all right at Asansole, and when they arrived at Liluah it was found that the van had been broken open by some thief unknown and the goods had been stolen. The matter was put in the hands of the Police, which was all the Railway Company could possibly do, and the Police did not find that any Railway servant had anything to do with the theft. That being so, the Railway Company discharged any *onus* which lay upon them: and there is not a particle of evidence to rebut any of the above facts, so that even if the Contract Act applied in its strictest form and if the case of *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Company Ld.* (1) be

(1) 32 M. 95; 4 M. L. T. 110 (F. B.); 18 M. L. J. 497; 1 Ind. Cas. 977.

followed the plaintiff would have no case whatever. But that case is clearly distinguishable from this. There is no reason whatever why the plaintiff should not contract under the statutory provision of section 72 of the Railways Act. He has done so. He has taken the benefit of reduced freight and he now seeks in a manner which is little short of dishonesty to try and get out of the terms of the contract into which he has freely and lawfully entered.

The result is that this appeal must be dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 400 OF 1908.

February 26, 1909.

Present:—Mr. Justice Johnstone.

SAHIB DITTA AND OTHERS—DEFENDANTS —PETITIONERS

versus

KHANDA AND OTHERS—PLAINTIFFS— RESPONDENTS.

Punjab Tenancy Act (*XVI of* 1887), *s.* 59—Nazdiki bhai *etc.*, *in* wajib-ul-arz *of* Mouza *Bhawan*, *Tehsil Sirsa*, *District Hissar*, *interpretation of*.

Nazdiki bhai in the *wajib-ul-arz* of *Mouza* Bhawan, Tahsil Sirsa, District Hissar, taken in connection with succession to the rights of occupancy, should be taken to include only descendants of the first occupier of the land.

The passage in the *wajib-ul-arz* that "*jo khud zemin chhor jawe uska nazdiki bhai bashart khawahish mustahaq kasht zemin ka hoga*," (if he abandons possession of the land of his own accord, his *nazdiki bhai* will be entitled to possession if he so desires) does not touch the matter of inheritance of occupancy rights at all.

When it is sought to bring in agreements under section 111, Punjab Tenancy Act, to override section 59, the language of those agreements must be clear and the intention unmistakeable.

Petition, under section 70 (*a*) & (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ferozepur Division, dated 24th August 1907, reversing that of the Munsif, 1st class, Sirsa, District Hissar, dated 31st day of May 1907, dismissing the plaintiff's claim.

Lala *Dwarka Das*, for the Petitioners.

Mr. *Beni Pershad*, for the Respondents.

JUDGMENT.—In my opinion, the learned Divisional Judge is in error when he holds that this *Wajib-ul-arz* of *Mauza* Bhawan, *Tahsil* Sirsa, District Hissar, overrides section 59 of the Punjab Tenancy Act. The words of the *Wajib-ul-arz* are these:—"*asamian-i-maurusi har do patti ko ikhtiyar kabza kasht apne ka ta adai lagan muaiyana hasil hai, aur niz yih bhi ke apni zamin waste izafa lagan ke dusre shakhs se kasht karawe aur babat rahn arazi makbuza ke ikhtiar nahin hai, agar kabza chhor kar kisi jagah ko chala jawe aur sal bhar yani do fasl tak na awe to woh be-dakhl mutlak mutasawar hoga, aur jo is gaon ka bashinda apni abadi chhor ke aur kisi gaon men ja abad hoga, to woh kasht aur kabza ka mustahaq na hoga, aur jo khud zamin chhor jawe, uska nazdiki bhai bashart khawahish mustahaq kasht zamin ka hoga warna woh zamin ba ikhtiyar malkan-i-patti rahegi aur kisi kashtkar ko ba-iwaz lagan jadid dijawegi aur ghair maurusi par hamko ikhtiyar hai ke bamah jeth us ko kasht se bedakhl karden ya kaim rakhen magar yeh amal daramad kaghazat i-Patwari men kar dia karenge.*"

These matters or some of them may be agreements enforceable under section 111, Punjab Tenancy Act, 1887, but I am unable to see how in any way succession or inheritance is provided for in this document. The passage specially important for us may be translated, "if he goes away leaving possession of the land of his own accord his *nazdiki bhai* will be entitled to possession if he so desires."

The learned Divisional Judge interprets this thus:—"If an occupancy tenant leave his land, his near relatives may *succeed* if they wish." But I am unable to see any justification for the word 'succeed,' the words mean merely that the near relative may take cultivating possession. It is not stated what the ultimate result of this taking possession would be, nor whether on the death of the absentee the relative, who so took possession, would succeed to the occupancy rights by inheritance.

It is not said that the absentee's *nearest* relatives shall succeed or his "next heir," and it may well be that the framers of the passage never thought of laying down a law of succession at all, but were merely concerned in laying down a convenient rule for arranging for cultivation.

Another way of looking at the matter

is this. The words '*nazdiki bhai*' are vague and this Court has held that in interpreting such phrases as this and as *karabatian*, practice of the tribe and all the surrounding circumstances must be looked at—in short, that a reasonable and not a pedantic interpretation should be aimed at. Now, it seems to me nearly impossible that the proprietors of 1863, when this *Wajib-ul-arz* was framed really could have meant that in all cases a *nazdiki bhai* should have a right of succession to the rights of a deceased occupancy tenant. Take the case of a proprietor who in 1862 brought a stranger cultivator from elsewhere and planted him on his land conferring on him occupancy rights. Can it be supposed that the proprietor would have admitted a right of succession in this new tenant's collateral relatives? Far from it. In my opinion, the general view of the *zemindar* proprietor in connection with succession to occupancy rights is just that embodied in section 59, Tenancy Act; namely, that succession goes to members of the family of the first occupier of the land and to no other and thus I am inclined to think that, even if this *Wajib-ul-arz* covers succession at all, which I do not admit, it should not be held to go beyond section 59 aforesaid, the words *nazdiki bhai* being interpreted in the aforesaid reasonable way.

My conclusion then is:—

(1) That *nazdiki bhai* in this *Wajib-ul-arz* taken in connection with succession to rights of occupancy should be taken to include only descendants of the first occupier of the land.

(2) That the passage specially dealt with above does not touch matters of *inheritance* of occupancy rights at all.

(3) That when it is sought to bring in agreements under section 111, Punjab Tenancy Act, to override section 59 of that law, the language of those agreements must be clear and the intention unmistakeable.

I accept the revision and setting aside the decree in favour of plaintiffs I dismiss their suit with costs throughout.

Revision allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 996 OF 1912.

March 25, 1913.

Present:—Mr. Justice Banerji.

LATORE—PLAINTIFF—APPELLANT

versus

BINDRABAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Question of law—Defendant held not to be a tenant.

A. sued *B.* for ejectment on the ground that *B.* was his non-occupancy tenant. *B.* pleaded that he was not a tenant but a mortgagee of *A.*

The suit was dismissed on the ground that *B.* was not a tenant of *A.* but his mortgagee.

The deed of mortgage was an unregistered document and was on that account inadmissible in evidence. In a subsequent suit by *A.* for ejectment:

Held, that the decision in the first suit operated as *res judicata* on the question that *B.* was not *A.*'s tenant.

Obiter dictum.—A decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit.

Phundeo v. *Jangi Nath*, 15 A. 327; A. W. N. (1893) 110, *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Dabya*, 28 C. 318; *Behari Lal* v. *Majid Ali*, 24 A. 138; A. W. N. (1897) 29, followed.

Second appeal from the decision of the District Judge of Jhansi, dated the 9th April 1912.

Mr. *Mukerji*, for the Appellant.

Mr. *Lakshmi Narain* (for Mr. *Satya Chandra Mukerji*), for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff to eject the defendant from a plot of land No. 1409 on the allegation that the defendant is the plaintiff's non-occupancy tenant and that he has sub-let his holding in contravention of the provisions of section 25 of the Agra Tenancy Act. The defendant, Bindraban, denied that he was the plaintiff's tenant, and he relied on a previous decision between him and the predecessors-in-title of the plaintiff. It appears that in 1899, Sannu and Pannu, from whom the plaintiff derives his title, brought a suit for the ejectment of Bindraban on the allegation that he was a tenant without right of occupancy. Bindraban defended the suit on the ground that he was not the tenant of those plaintiffs but was their mortgagee. The Revenue Court, in which the suit was pending, held that Bindraban was not the plaintiff's tenant but was a mortgagee from them. That judgment has become final. In the present suit, the Court of first instance

was of opinion that the decision in the former suit between Bindraban and the plaintiff's predecessors-in-title could not operate as *res judicata*, inasmuch as that decision was erroneous in law by reason of the mortgage being an unregistered document and, therefore, inadmissible in evidence. The Court of first instance went behind the decision in that case and decreed the claim.

On appeal the learned Judge has held the matter to be *res judicata* and dismissed the suit.

The only contention raised by the learned Vakil for the appellant is that the Court below has erred in holding that the decision in the former suit operates as *res judicata* in the present suit. In my opinion, the Court below was right. The issue in the first suit was whether the defendant, Bindraban, was the tenant of Sannu and Pannu, the then plaintiffs. The issue in the present suit is the same, namely, whether Bindraban is the tenant of the plaintiff. Therefore, in both the suits the same issue arose. That issue having once been decided in favour of Bindraban as against the predecessors-in-title of the plaintiff, it is not open to the plaintiff to re-open it in the present suit. No doubt, the Court in the former suit held that Bindraban was the mortgagee of Sannu and Pannu, and in so holding admitted in evidence the mortgage-deed which, by reason of absence of registration, was inadmissible in evidence, but the issue was not whether the defendant was mortgagee or not but whether he was the tenant of the plaintiff's predecessors-in-title. If his mortgage was not a good mortgage he was a trespasser but that would not make him a tenant of the then plaintiffs. As it was held that he was not the plaintiff's tenant, and as the present plaintiff only stands in the shoes of the plaintiffs in the first suit, and as the issue as to the status of the defendants was decided by a Court of competent jurisdiction, that issue could not be reconsidered in the present suit. In this view it is not necessary to decide whether an erroneous decision on a question of law operates as *res judicata*. But if this question had to be determined, I note that it was held by this Court in *Phundo* v. *Jangi Nath* (1), which was followed by the Calcutta High Court in *Bishnu Priya Chowdhrani* v. *Bhaba Sundari Debya* (2) that a decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit. The same view appears to have been held in *Behari Lal* v. *Majid Ali* (3). I dismiss the appeal with costs.

Appeal dismissed.

(1) 15 A. 327; A. W. N. (1893) 110.
(2) 28 C. 318.
(3) 24 A. 138; A. W. N. (1897) 29.

CALCUTTA HIGH COURT.
CIVIL RULE No. 46 OF 1913.
March 27, 1913.
Present:—Mr. Justice Stephen and Mr. Justice Holmwood.
THE INDIA GENERAL STEAM NAVIGATION Co., LTD.,—DEFENDANTS —PETITIONERS
versus
BHAGWAN CHANDRA PAUL—PLAINTIFF—OPPOSITE PARTY.

Common carrier—Steamer Company—Negligence or criminal act of common carrier—Liability of common carrier—Loss of goods—Prima facie *evidence of negligence etc.*—Onus—Prima facie *case of care and caution to be made by defendant—Carriers' Act (III of* 1865), *ss.* 6, 8.

A special contract exempted a steamer Company, common carriers, from liability for any loss or damage unless it arose from the negligence or criminal act of their servants or agents:

Held, that if the carriers seek to exempt themselves from liability, they must prove that the loss was or must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents, for the loss of the goods is *prima facie* evidence of the negligence or criminal act of the carriers, their servants or agents.

Choutmull Doogur v. *The Rivers Steam Navigation Company*, 24 C. 786 at p. 822, 1 C. W. N. 201, relied upon.

Rule granted on the 18th of January 1913 against the judgment of the Small Cause Court Judge of Silchar, dated the 9th October 1912.

Babus *B. C Mitter*, *Provash Chunder Mitter* and *Ambica Pada Choudhury*, for the Petitioners.

Babus *Tara Kishore Choudhury* and *Brojolal Chackrabartty*, for the Opposite Party.

JUDGMENT.

STEPHEN, J.—The facts of this case are as follows:—The plaintiff in a Small Cause Court suit, who shows cause as the opposite party to a Rule before us, was the consignee of four tins of oil forwarded to him from Dacca by the defendants, the present petitioners, on terms contained in what is known as an owner's risk note. The defendants received the tins in good condition and carried them to Silchar, where they called on the plaintiff to take delivery. This he refused to do because one tin was cut open and partly empty, and another was quite empty, but brought a suit for the value of the oil. The Court below decreed the suit on the ground that the Company's servants were responsible for what had happened. No evidence was given on either side to show how the two tins that were not full had been tampered with.

This Court has granted a Rule calling on the opposite party to show cause why the decision of the Small Cause Court should not be set aside or modified on the grounds that the plaintiff was wrong in not taking delivery and was, therefore, not entitled to the value of all the four tins, and that the Court should have held that the *onus* was on the plaintiff to prove negligence on the part of the defendant, or that the loss of the missing oil was due to theft by the servants or agents of the defendants.

The first ground has not been pressed before us.

The second seems to us to be amply covered by authority.

There is no doubt that the defendant Company is a common carrier, and, therefore, subject to the provisions of the Carriers' Act, 1865, is in a different position from a Railway Company which is only a bailee under sections 151, 152 and 161 of the Contract Act as far as the carriage of goods is concerned, see *Irrawaddy Flotilla Co*., v. *Bugwands* (1). Its liability is, therefore, that of an insurer but by section 6 of the Carriers Act it can, subject to exceptions that do not apply here, limit that liability, though by section 8 it will be liable for loss of or damage to arising "from the negligence or criminal act of the carrier or any of his agents or servants".

Section9 then enacts:—"In any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents". The special contract in this case exempts the defendant Company from liability for any "loss or damage of whatever nature or kind soever", unless it has "arisen from the negligence or criminal act of their servants or agents".

In dealing with a case arising under the same Act, covered by a special contract in what are practically similar terms, where the goods in the possession of the bailee were destroyed by fire, Maclean, C. J., treated it, as a matter of course that the common carrier defendant must disprove negligence; Macpherson, J., said "the effect of the 9th section of the Carriers' Act is to make the loss of goods evidence of negligence which the carrier must displace": Trevelyan, J., held that "the loss of the goods is *prima facie* evidence of the negligence or criminal act of the carrier, his servants or agents, and, therefore, if the carrier seeks to exempt himself from liability, he must negative such *prima facie* evidence, that is to say, he must prove that the loss was or must have been occasioned otherwise than by the negligence or criminal act of himself, his servants or agents". *Choutmull Docgur* v. *The Rivers Steam Navigation Co.* (2).

The provisions of the Carriers' Act seem to us to be quite clear and we find it impossible to distinguish the present case from that which we have just quoted. We have been referred to decisions relating to railways which seem to be decided on a contrary view but in view of the fact that a Railway Company is not a common carrier we cannot consider that they have any application to the present case.

The result is that we hold that the case was rightly decided in the Court below as far as the question of *onus* is concerned. The Rule is, therefore, dismissed with costs, hearing fee two gold *mohurs*.

HOLMWOOD, J.—I agree with my learned brother. I think that under the Carriers' Act a *prima facie* case of ordinary care and caution must be made out by the defendant Company.

(1) 18 C. 620; 18 I. A. 121.

(2) 24 C. 786 at p. 822; 1 C. W. N. 201.

NAKCHEDI AHIR *v.* RAM DAS RAI.

The judgment in *Lalchand Sew Karan* v. *The East Indian Railway Company* (3), clearly brings this out even in the case of the Railways Act and there is nothing in *Sheo Barat Ram* v. *Bengal and North-Western Railway Co.* (4) to affect the long course of decisions under the Carriers' Act.

I would, therefore, discharge this Rule as no evidence whatever was offered by the Company.

Rule discharged.

(3) 19 Ind. Cas. 242; 17 C. W. N. 635 *note*.
(4) 15 Ind. Cas. 56; 16 C. W. N. 766.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 924 OF 1912.
March 26, 1913.
Present:—Mr. Justice Rafique.
NAKCHEDI AHIR AND OTHERS—DEFENDANTS—APPELLANTS
versus
RAM DAS RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil and Revenue Court—Jurisdiction—Suit for possession against rival claimants—One of zemindars *also a party.*

Plaintiffs brought a suit to recover possession of their tenancy holding from certain persons who claimed that holding under the right of alluvial accretion. One of the *zemindars* also was made a party to the suit:

Held, that the suit was cognizable by the Civil Court.

Second appeal from the decision of the District Judge of Ghazipur, dated the 29th day of March 1912.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Govind Pershad*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents Nos. 1 to 5 sued in the Court of the Munsif of Mahmudabad to recover possession of 2 *bighas* 2 *biswas* out of holdings 46/5 and 56/5, on the allegation that they were tenants of the said land from which they had been wrongfully dispossessed by the defendants-appellants, a year prior to the institution of the suit. Rupees 50 were also claimed by way of damages as price of crops forcibly taken away from the said land, by the defendants-appellants. The defendant-respondent No. 6, one of the *zemindars* of the village, was also impleaded as a defendant in the case. He did not oppose the claim. The defendants-appellants alone resisted it. They urged in defence that the land in suit, had accreted to their occupancy holding of 46/5 by alluvion and that they alone were entitled to the said land. It was further said that the plaintiffs had not been in possession within limitation and that the crops in respect of which damages were claimed had been sown by and belonged to the defendants-appellants. A further objection regarding jurisdiction of the Court to entertain the suit was also taken. It was stated in the written statement that the *zemindar* of the village had brought a suit against some of the plaintiffs in the Revenue Court, under section 58 of the Tenancy Act, for the ejectment of the latter from the land in suit. Nakchedi, defendant-appellant, intervened and at his request was made a defendant in the case. The claim of the *zemindar* was dismissed on the ground that Nakchedi was in possession of a part of the land in suit. No appeal was preferred from the decree of the Revenue Court which became final and hence the present suit was not cognizable by a Civil Court. The learned Munsif held that the plaintiffs-respondents Nos. 1 to 5 had not proved their possession within limitation, that the defendants-appellants had acquired the land in suit by alluvial accretion, and that the crops grown on that land were grown by and belonged to the defendants-appellants. The claim was accordingly dismissed. On appeal, the learned District Judge reversed the decree of the first Court. The defendants-appellants have come up in second appeal to this Court. Three points are urged in support of their appeal. It is argued that the suit of the plaintiffs-respondents Nos. 1 to 5 is not maintainable, inasmuch as they brought the suit against the persons who are said to have dispossessed them and against one of the *zemindars* also. The fact that one of the *zemindars* had been made a party to the suit ousted the jurisdiction of the Civil Court. This objection was not taken in the lower Courts and is urged for the first time here. It is not quite clear how the mere fact of the *zemindar* being a party to the suit deprived the Civil Court of jurisdiction to decide the case. In the present case the plaintiffs-respondents Nos. 1 to 5 are no

seeking to have the nature of their tenancy determined. They have admitted in the plaint that they are tenants. But they seek to recover possession of their holding from which they have been dispossessed by the defendants-appellants who set up a right to that holding under the right of alluvial accretion. I do not think that this objection for the appellants has any force and I reject it. The second point for the appellants also relates to the question of jurisdiction. It is said that the decision of the Revenue Court, dated March 27th, 1911, determined the status of the parties with regard to the land in suit and that the present claim is an attempt to get round a decree of the Revenue Court. On reference to the Revenue Court judgment of March 27th 1911, it appears that one of the *zemindars* of the village brought a suit against Anmol Rai and others for their ejectment from land No. 56/5, on the allegation that the defendants in that suit were mere tenants-at-will. Nakchedi, the defendant-appellant No. 1, in the present case, intervened, on the ground that a part of plot No. 56/5 had accreted to his occupancy holding by alluvion and that he was entitled to retain it. Anmol and others wanted to enter into a compromise with the *zemindar*, but Nakchedi stood out and on a report from the Tehsildar it was found that he (Nakchedi) was in possession of part of plot No. 56/5. The Assistant Collector accepted the report of the Tehsildar and dismissed the *zemindar's* suit on the ground, that Nakchedi had not been sued originally as a defendant but had been brought on the record at his own request. It is clear from these facts that the Assistant Collector did not decide the rights of any party by the judgment of March 27th, 1911. As has already been said above, the plaintiffs in this case did not seek to have the nature of their tenancy determined; they want possession of the land from which they have been unlawfully dispossessed. I do not see how the judgment of March 27th, 1911, deprives the Civil Courts of the jurisdiction to entertain the present suit. The last argument for the appellant is that the evidence on the record satisfactorily proves the usage of alluvial accretion. It is useless to discuss that evidence on the face of the finding of the learned Judge that the plaintiffs-respondents Nos. 1-5 have been in possession of the land in suit for 15 or 16 years. They have, therefore, a right to be maintained in that possession. The appeal, therefore, fails and is dismissed with costs including fees in this Court, on the higher scale.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1902 OF 1911.

March 31, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

RAMJI DAS AND COMPANY—DEFENDANTS—PETITIONERS

versus

Sheikh MUHAMMAD RAMZAN—PLAINTIFF—RESPONDENT.

Principal and agent—Liability of principal to pay agent's hotel bill when travelling on principal's business—Agent to be paid by commission on orders—No stipulation to pay hotel bills—No liability—Decree by principal for value of his goods left by agent in hotel.

In the absence of a stipulation that the principal is to defray his commission agent's hotel bills when he is travelling on business, the money spent by him in board and lodging cannot be said to have been incidental to carrying on the business of his principal.

The obtaining of a decree by the principal against the hotel-keeper for the value of their goods left by the agent at the hotel does not affect the question of their liability to pay the hotel bill incurred by their agent.

Edmunds v. *Bushall*, 35 L. J. Q. B. 20; L. R. 1. Q. B. 97; 12 Jur. (N. S.) 332, referred to.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge Small Cause Court, Delhi, dated the 29th May 1911, decreeing plaintiff's claim.

Lala *Durga Das*, for the Petitioners.

Pandit *Jowala Parshad*, for the Respondent.

JUDGMENT.—The facts which have led to this reference to a Division Bench were given in the referring order of the learned Chief Judge of May 25th, 1912.

We have examined the authorities mentioned in this order and find that they do not at all help the plaintiff-respondent. What was held in *Edmunds* v. *Bushell* (1) was that an agent must be taken to have had authority to do whatever was necessary or incidental to carrying on the business, and drawing and accepting bills was incidental to it.

(1) 35 L. J. Q. B. 20; L. R. 1 Q. B. 97; 12 Jur. (N. S.) 332.

RAMESHWAR SINGH *v.* MOHENDRA NARAIN KOER.

We find from the agreement between petitioners-defendants and R. D. Sethi, their agent, that the latter was to be paid by a commission on orders and was allowed his Railway fare and Rs. 30 a month for incidental expenses such as coolie and carriage hire, etc. There was no stipulation that defendants-petitioners were to defray his hotel bills when he was travelling on their business. The money spent by him in board and lodging cannot be said to have been incidental to carrying on the business of his principals. The hotel bill includes a large item for carriage hire, and yet according to the agreement that had to be paid by R. D. Sethi out of the sum of Rs. 30 a month allowed him by the firm.

It is argued that because the defendants obtained a decree against the plaintiff-respondent for the value of implements of sport left by the agent at the hotel, therefore, in equity they should pay the hotel bill. We are unable to accept this argument. *Prima facie* defendants were entitled to that decree, but whether they were or not it does not affect the question of their liability to pay the hotel bill incurred by their agent.

Plaintiff-respondent's claim is not supported by any authority and we consider it to be quite unreasonable. We accept the petition for revision and setting aside the decree of the Small Cause Court dismiss plaintiff-respondent's suit with costs in both Courts.

Petition allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 4176 AND 4320 OF 1910.

March 18, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

Maharaja RAMESHWAR SINGH—

PLAINTIFF—APPELLANT

versus

MOHENDRA NARAIN KOER—

DEFENDANT—RESPONDENT.

Road Cess Return—Rent appearing in return—Recovery of higher rent if possible—Mistake in return—Road Cess Act (IX B. C. of 1880), s. 20—Rent due before filing of return.

No landlord is entitled to recover any rent for any land at any higher rate than is mentioned in the Road Cess Return for such land, even if the entry as to rent in the return be a mistake, or if the rent fell due before the return was made.

Appeals from the decrees of the Additional Sub-Judge of Darbhanga, dated September 15th, 1910, modifying and reversing those of the first Munsif of Madhubani, dated August 21st, 1909.

Dr. *Rash Behary Ghosh* and Babu *Lachmi Narain Singh*, for the Appellant.

Babu *Ganesh Datt Singh*, for the Respondent.

JUDGMENT.

HARINGTON, J.—These are appeals on behalf of the plaintiff in two rent suits which were dealt with by the lower Courts in the same judgment. The lower Appellate Court modified the judgment of the Court of first instance holding that the plaintiff was not entitled to recover higher rent than what appeared in the Road Cess Return which was made in respect to his holdings. The learned Subordinate Judge applied the provisions of section 20 of the Road Cess Act. It appears to me that *prima facie* that section was applicable and that there was no obvious way of getting out of the difficulty which was created by the Road Cess Return showing a smaller rent than what the plaintiff claimed in the suits.

Two points are taken by the learned Vakil for the appellant. One is that there was a mistake in the entry in the Road Cess Return. As to that there are difficulties in point of fact as well as in point of law. The person who verified the Road Cess Return was not called for the purpose of showing how the mistake arose and explaining if there was any mistake, moreover, if there was a mistake, that does not seem to take the case out of the provisions of section 20 of the Road Cess Act, which is very precise and explicit in its terms. The other point taken is that part of the rent fell due before the Road Cess Return was made; but section 20 sub-clause (4) seems to meet that case and it precludes the plaintiff from suing for and recovering rent at any higher rate than is mentioned in the Road-Cess Return. In my opinion, the Judge of the lower Appellate Court was right in the view which he took of the law and, consequently, these appeals must be dismissed with costs.

MUMTAZ ALI *v.* KASIM ALI.

The cross-objection in Appeal No. 4176 not being pressed is dismissed.

CARNDUFF, J.—I agree.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 949 OF 1912.

March 17, 1913.

Present:—Mr. Justice Banerji.

MUMTAZ ALI—DEFENDANT—APPELLANT

versus

KASIM ALI—PLAINTIFF—RESPONDENT.

Partnership—One partner opening a rival business—Injunction—Contract Act (IX of 1872), ss. 257, 259—Specific Relief Act (I of 1877), ss. 54 (e), 56 (i)—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint.

Where one of the two partners carries on a rival business in competition with and to the prejudice of the partnership, the other partner is entitled to an injunction restraining the former from carrying on the rival business.

The amendment of a plaint may be allowed to avoid multiplicity of actions.

Second appeal from the decision of the Additional Judge of Bareilly, dated the 24th of April 1912.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *Sham Nath Mushran*, for the Respondent.

JUDGMENT.—The parties to the suit, out of which this appeal has arisen, are brothers. The plaintiff holds a share in the *zemindari* of the village and the defendant holds some cultivatory lands. They entered into a partnership to carry on a market and a fair and to maintain an inn for the convenience of persons resorting to the market. For this purpose, they executed a document on the 18th of January 1911, by which it was agreed that the market, the fair, and the inn would be jointly carried on, each brother doing his best to promote the business of the partnership. There was no specific covenant in this document that the defendant should not carry on any other business in the neighbourhood. The plaintiff brought the present suit on the allegation that the defendant had pulled down a part of the inn which stood on his cultivatory holding and had begun building shops thereon in order to set up another market and he prayed either that the contract of partnership be rescinded or that an injunction be issued to the defendant restraining him from carrying on a rival market to the prejudice of the market in which the parties were partners. After the institution of the suit, the plaintiff filed an application stating that the defendant had removed the market, which he had begun to set up, to another *patti* in the village and was carrying it on in partnership with another person and that the injunction should restrain him from carrying on and maintaining that rival market also. He prayed for an amendment of the plaint. This prayer was granted, but I find that the amendment was not embodied in the plaint. This is an irregularity and omission to which the attention of the Court below should be drawn. Issues were framed and the case went to trial after the amendment granted by the Court and the Court of first instance made a decree for an injunction restraining the defendant from carrying on a rival market. It dismissed the claim for rescission of the partnership contract.

This decree of the Court of first instance was affirmed by the lower Appellate Court.

The defendant has preferred this appeal and it is first of all contended on his behalf that the amendment sought ought not to have been allowed, that the plaintiff added a new cause of action, which had come into existence after the institution of the suit and that upon this cause of action the plaintiff ought not to have been permitted to go to trial. It seems to me that the provisions of Order VI, rule 17, of the Code of Civil Procedure, are wide enough to allow of an amendment of this nature, specially as in this case the amendment was made before the parties actually went to trial. The result of not granting the amendment would have been a multiplicity of actions and this it is apparently the object of the rule referred to above to prevent. By the amendment the real questions in dispute between the parties could be determined and relief adequately granted without resort to further litigation. I, therefore, disallow the first objection as to the amendment allowed by the Court of first instance.

The real question in the case is whether an injunction could be granted in a case of this kind. Section 257 of the Contract Act provides that partners are bound to

carry on the business of the partnership for the common object of the partnership and to be just and faithful to each other, and by section 259 if a partner without the knowledge and consent of the other partners carries on any business competing or interfering with that of the firm, he must account to the firm for all the profits made in such business and must make compensation to the firm for any loss occasioned thereby. Therefore the defendant, whose duty as the plaintiff's partner is to carry on the business of the partnership for the greatest common advantage of the partnership, may be liable to the plaintiff to account for the profits made by him in the competing firm or to make compensation to the plaintiff. Is that the plaintiff's only remedy or is he also entitled to restrain the defendant from carrying on the rival shop, which according to both the Courts below could only be carried on to the detriment of the market in which the parties are partners? The learned Counsel for the respondent has relied on a passage in the Tagore Law Lectures on Specific Relief by Dr. Banerji, page 773, which is to the following effect:—

"Partners, therefore, even in the absence of express covenants may be restrained from engaging in another concern of such a character as will necessarily give rise to a conflict of interests." In support of this proposition the learned author refers to the case of *Glassington* v. *Thwaites* (1). In that case Vice-Chancellor Leach observed:—"The principles of Courts of equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking". It is thus clear that one partner can restrain another from carrying on business in rivalry with the partnership when that business could only be carried on to the detriment of the original business. It is true that under section 56 of the Specific Relief Act, clause (*i*) an injunction should not be granted when equally efficacious relief can be obtained by any other usual mode of proceeding and it is contended by the learned Counsel for the appellant that as the plaintiff may recover profits or compensation under section 259 of the Contract Act an injunction should not be granted. Section 54, clause (*e*), however, provides for the issue of a perpetual injunction where such injunction is necessary to prevent a multiplicity of judicial proceedings. Although the plaintiff may claim profits or compensation, that would lead to multiplicity of proceedings. If the defendant's rival market be continued, the plaintiff would have to bring an action every year for the profits of that year. The case of *Whitwood Chemical Company* v. *Hardman* (2), cited by the learned Counsel for the appellant, has, in my opinion, no bearing on this case. There the defendant was a manager, who entered into a covenant to render service to the plaintiff's firm, which is not the case here. The present case is that of one of two partners carrying on a rival business in competition with, and to the prejudice of, the partnership. In such a case it seems to me that the plaintiff is entitled to an injunction restraining the defendant from carrying on the rival business and, therefore, the decree of the Court below is correct. I dismiss the appeal with costs.

Appeal dismissed.

(1) 1 Sim & St. 124; 1 L. J. (o. s.) Ch. 113; 24 R. R. 153; 57 Eng. Rep. 50.

(2) (1891) 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3106 OF 1910.

February 13, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

SAGAR MAL—PLAINTIFF—APPELLANT

versus

BHUDAN SAHU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bill of exchange—Failure to prove presentment—Decree against endorser and drawer—Appeal by endorser only—Dismissal of suit against both defendants though drawer not party to appeal, whether right—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.

A suit was brought by the endorsee of a bill of exchange against the endorser and the drawer. The plaintiff failed to prove presentment, but nevertheless he got a decree. The endorser only appealed, the drawer not being a party to the appeal. The Appel-

late Court dismissed the whole suit against both the defendants:

Held, that as proof of presentment was essential to the plaintiff's case before he could recover judgment against the drawer, the judgment dismissing the whole suit was right notwithstanding that the drawer, who did not appeal, benefited thereby.

Appeal from the decree of the Sub-Judge of Darbhanga, dated June 27th, 1910, reversing that of the first Munsif of that place, dated May 11th, 1909.

Dr. *Rash Behary Ghose* and Babu *Lachmi Narain Singh*, for the Appellant.

Dr. *Dwarka Nath Mitter*, and Babu *Chandra Shekhar Banerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of an action which was brought by the endorsee against the endorser and the drawer of a bill of exchange. At the trial the plaintiff failed to prove presentment. The Court of first instance nevertheless gave him a judgment, and that judgment was reversed by the lower Court of Appeal. But in the lower Court of Appeal, the only appellant was the endorser, the other party, the drawer, not being a party to the appeal, and the point taken before us in this Court is that the judgment in favour of the plaintiff ought at any rate, to stand against that party who did not appeal to the lower Appellate Court. In our view the judgment of the lower Appellate Court is right. The lower Appellate Court found and, indeed it was admitted, that the plaintiff had not proved presentment and that was essential to his case before he could recover judgment against the party who did not join in the appeal. The plaintiff not having proved what he had to prove, the judgment must go in respect of both sets of defendants. For these reasons, we think that the judgment of the lower Appellate Court dismissing the suit is right, notwithstanding that one of the parties, namely, the party who did not appeal to that Court, benefits thereby. The appeal is, therefore, dismissed. The defendants, first party, respondents, who have appeared in this Court, are entitled to their costs against the appellant.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 253 OF 1912.

March 26, 1913.

Present.—Mr. Justice Banerji and Mr. Justice Ryves.

KRISHNA RAO AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

DANKAR RAO AND OTHERS—OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 53—Costs in partition suit against father—Liability of son—Assets in the hands of the son.

In a partition suit, costs were awarded against one *A*. After the decree, *A*. died. The decree-holder proceeded to execute the decree for costs and attached the share which had fallen to *A*. at the partition but which after his death had passed into the hands of his sons:

Held, that the sons were liable for the costs and the property in their hands was liable to attachment under section 53 of the Civil Procedure Code.

Execution first appeal from the decision of the Subordinate Judge of Mainpuri, dated the 20th of April 1912.

Mr. *Benode Behari*, for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Baijnath*), for the Respondents.

JUDGMENT.—The decision of the Court below in this case is clearly erroneous. A decree for partition was passed against Rama Rao, the father of the respondents, and in that decree costs were awarded to the appellants against him. After decree and before it was executed Rama Rao died. Thereupon the decree-holders took out execution against the respondents as the legal representatives of Rama Rao and applied for attachment of certain property which had fallen into the share of Rama Rao under the partition. The respondents objected to the attachment and sale of this property and this objection has been allowed by the Court below. In view of the provisions of section 53 of the Code of Civil Procedure the decree-holders were entitled to proceed against the property which they sought to sell. The debt was a debt which the respondents, as the sons of Ram Rao, were liable to pay. It was, as we have said above, the amount of costs awarded against Rama Rao in a partition suit. For such costs the sons of Rama Rao were liable and, therefore, under section 53 the property, now in the hands of the respondents, must be deemed to be the property of the deceased which has come

into their hands as his legal representatives. We allow the appeal, set aside the order of the Court below and send back the case to that Court with directions to proceed with the execution of the decree as prayed for in the application for execution. The appellants will get their costs of this appeal including fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1037 OF 1911.

March 26, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Musammat THAKRI—DEFENDANT—APPELLANT

versus

GURDIT SINGH AND OTHERS—PLAINTIFFS, KHEWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Unchastity of widowed mother—Forfeiture of estate—Pleadings—Appellate Court incompetent to allow new case to be set up in appeal.

Under the Customary Law of the Punjab, as under Hindu Law, the unchastity of the widowed mother of a deceased proprietor, who is in possession of his estate on a life-tenure, does not work a forfeiture of her interest in the estate.

Where the plaintiff sued for possession of the land held by a female holder on a life-tenure on the ground that by her unchastity she forfeited her life-estate, the Appellate Court is not justified in decreeing the claim upon the ground that the permanent connection formed by the woman with a paramour amounted to a re-marriage under the Customary Law.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 16th June 1911, reversing that of the Munsif, 1st class, Hoshiarpur, dated the 12th December 1910, dismissing the claim, and remanding the case to him for decision as to the validity of Thakri's alienations.

Lala *Bhagat Ram Agarwal*, for the Appellant.

JUDGMENT.—The facts are fully stated in the judgments of the Courts below. The plaintiffs came into Court upon the allegations that *Musammat* Thakri had become unchaste after the death of her husband, Rur Singh, 21 years ago; that she had been living with one Sundar Singh, uterine brother of Rur Singh, and had had several children by him; and that after the death of her son, Dalipa, six years before suit, she had taken possession of the land left by him; and upon these allegations the plaintiffs claimed that *Musammat* Thakri had by reason of her unchastity forfeited her rights in the land in dispute and that they (the plaintiffs) were entitled to take possession of it. The plaintiffs' ground of claim was not that *Musammat* Thakri had effected re-marriage and that it was in consequence of a re-marriage that she had forfeited her life-estate.

It seems to us that upon the pleadings of the parties the Munsif took a correct view of the case, holding that *Musammat* Thakri had succeeded to the land in dispute as the mother of her son, Dalipa, and not as the widow of Rur Singh, and that, even if she had become unchaste, as alleged by the plaintiffs, her unchastity did not work a forfeiture as it might have done if she were in possession of the land as the widow of Rur Singh. In our opinion, the Divisional Judge was not justified in treating the plaintiffs' suit as one brought on the ground that *Musammat* Thakri had lost her rights in her late husband's estate by reason of her permanent connection with Sundar Singh which amounted to a re-marriage under the Customary Law. This was not the plaintiffs' case in the first Court, and the claim should not have been decreed upon that basis. *Dal Singh* v. *Dini* (1), *Vedammal* v. *Vedanayaga Mudaliar* (2) are authorities for the view that under Hindu Law the unchastity of the widowed mother of a deceased proprietor, who is in possession of his estate on a life-tenure, does not work a forfeiture of her interest in that estate, and we know of no authority laying down the contrary rule for agricultural tribes governed by the Customary Law in this Province.

We accordingly accept this appeal, and setting aside the order of remand of the lower Appellate Court we restore the decree of the Munsif with costs throughout.

Appeal allowed.

(1) 32 A. 155; 7 A. L. J. 80; 5 Ind. Cas. 521.
(2) 31 M. 100; 18 M. L. J. 70; 2 M. L. T. 533.

PHAGGU MALL *v.* BABU LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 746 OF 1912.

March 13, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.

PHAGGU MALL—DEFENDANT—APPELLANT

versus

BABU LAL—PLAINTIFF—RESPONDENT.

Contract to supply stone for building purpose—Stone not fit for the purpose—Duty of purchaser to return the stone at his own expense.

Where A. refused to take delivery of certain stones supplied to him by *B.* for purposes of building on the ground that it was not fit for the purpose, it was not his duty to return the stone to *B.* from the place of delivery at his own expense.

Grimoldby v. *Wells*, 10 C. P. 391; 32 L. T. 490; 23 W. R. 524; 44 L. J. C. P. 203, relied upon.

Second appeal from the decision of the Subordinate Judge of Agra, dated 14th of May 1912.

Mr. *Sital Prashad Ghose*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The plaintiff in this case, who is respondent here, agreed to supply the defendant with stone for building purposes; the stone was delivered at Karnal but on examination it was found to be wholly unsuitable to the purposes for which it was supplied. The defendant then brought a suit against the plaintiff in the Punjab and obtained a decree for a refund of the price of the stone and for damages. The plaintiff has now brought this suit asserting that it was the duty of the defendant to return the stone to him. The defendant's plea is that he is not bound to put himself to the expense and trouble of returning the stone and that it was the business of the plaintiff to take the stone away if he was so minded. The case appears to be covered by a decision of the Court of Common Pleas in England in the case of *Grimoldby* v. *Wells* (1). We hold that it was not the duty of the defendant to return the stone and that the plaintiff has no cause of action against him. It was sufficient for the defendant to notify to the plaintiff that the stone was lying at Karnal at his risk. That and more than that has been done by the defendant in the present case. The decision of the lower Appellate Court cannot be supported. We allow this appeal, set aside the decree of the lower Appellate Court and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

(1) 10 C. P. 391; 32 L. T. 490; 23 W. R. 524; 44 L. J. C. P. 203.

WARYAM SINGH *v.* JIWAN SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1112 OF 1911.

March 27, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

WARYAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JIWAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Adoption of only son—Burden of proof as to invalidity of adoption

Where the custom of adoption prevails in the parties' tribe the *onus* of proving that a particular adoption is invalid by reason of any restrictive custom lies upon the person who says that it is invalid.

Ordinarily, it is no valid objection that the appointed heir is the only son of his natural father.

According to Hindu Law the adoption of an only son is valid.

Sri Balusu Gurulingaswami v. *Sri Balusu Ramalakshmanma*, 22 A. 460; 21 M. 398; 26 I. A. 113, relied upon.

Teja Singh v. *Sochet Singh*, 33 P. R. 1872, not followed.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 15th July 1911, reversing that of the Munsif, 1st class, Ludhiana, dated the 15th December 1910, decreeing plaintiffs' claim.

Mr. *Harris*, for the Appellants.

Lala *Lajpat Rai*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiffs-appellants to set aside the adoption of Harnam Singh by Jiwan Singh, defendant-respondent.

Plaintiffs are more nearly related to Jiwan Singh than is Harnam Singh, who, moreover, is the only son of his father Sapuran Singh.

The first Court decreed the claim holding that there was no genuine adoption of Harnam Singh, and that his adoption would be invalid he being the only son of his father.

The Divisional Judge after remanding the case found in favour of the *factum* and validity of the adoption and dismissed plaintiff's claim. They have lodged a further appeal to this Court.

In view of the registered deed of adoption and Jiwan Singh's declaration in Court, it

would be difficult to find against the *factum* of adoption and having regard to plaintiffs' admission of 12th July 1910, their Counsel has not now argued that there was no adoption. Seeing that plaintiffs brought this suit within three months of the execution of the deed of adoption there has not been time to see whether Jiwan Singh by subsequent treatment showed that he had a real intention of adopting Harnam Singh.

The only point argued before us was whether the adoption was invalid, Harnam Singh being the only son of his father. There can be no doubt that the custom of adoption prevails in the parties' tribe, they are *Gil Jats*, and this being so, the *onus* of proving that the adoption is invalid by reason of any restrictive custom lay upon the plaintiffs as pointed out by this Court in *Khazana* v. *Kahan* (1). Ordinarily, it is no valid objection that the appointed heir is the only son of his natural father, see Article 38 of Rattigan's Digest. According to Hindu Law such an adoption is valid. *Sri Balusu Gurulingoswami* v. *Sri Balusu Ramalakshmamma* (2).

In *Teja Singh* v. *Sochet Singh* (3) there was a finding by the lower Courts that such an adoption was invalid, but this point did not come up for decision before this Court. The *onus* in that case was laid upon the adopted son to prove the validity of the adoption, whereas according to the more recent rulings the *onus* is on the person who says such an adoption is invalid.

Appellants have certainly not discharged the *onus* for they have not cited a single instance where such an adoption was set aside. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) Civil Appeal No. 722 of 1907.
(2) 21 A. 460; 22 M. 398; 26 I. A. 113.
(3) 33 P. R, 1872.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1107 OF 1912.

March 27, 1913.

Present:—Mr. Justice Banerji.

ISMAIL JOLAHA—DEFENDANT—APPELLANT

versus

JAGANNATH—PLAINTIFF—RESPONDENT.

Hindu Law--Widow—Alienation—No legal necessity—Reversioner attesting the deed of transfer—Consent—Estoppel--Presumption from witnessing a document—Reversioner dying during pendency of suit—Legal representatives, right of.

A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate with the concurrence of the reversionary heirs so as to bind the persons who are the next reversioners when the succession opens out on her death.

Bajrangi Singh v. *Manokarnika Bukhsh Singh*, 30 A. 1, 3 M. L. T. 1 (P. C.); 12 C.W.N. 74; 9 Bom. L.R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605, followed.

The fact of a person witnessing a document raises a strong presumption that he was aware of the nature of the transaction which he was witnessing.

If certain persons are brought on the record as the legal representatives of a deceased reversioner, suing for possession of land alienated by a widow, and it is found that the latter was estopped from maintaining the suit, it is not open to the legal representatives to dispute the validity of the sale in that suit in their own right.

Second appeal from the decision of the District Judge of Ghazipur, dated the 11th of June 1912.

Mr. *M. Ishaq Khan*, for the Appellant

Mr. *Mohan Lal Sandal*, for the Respondents.

JUDGMENT.—This was a suit brought by Mahabir Rai, the reversioner to the estate of one Bhirgu Nath Rai, to recover possession of a house, part of which was sold to the defendant by the widow of Bhirgu Nath Rai on the 24th of August 1907. The suit was brought after the death of the widow on the ground that the transfer was without legal necessity and that it was, therefore, not binding on the reversioner.

The Court of first instance found that the widow borrowed money from the defendant-appellant from time to time and made an oral sale of the property in his favour 11 or 12 years ago, and in pursuance of this sale, the defendant-appellant re-built two of the rooms in the house, that subsequently in 1907, he obtained a sale-deed from the widow and that Mahabir Rai, who brought this suit, consented to the sale and witnessed the sale-deed. On these findings, that Court held that Mahabir Rai was estopped

from disputing the sale and dismissed the claim in respect of that portion of the house which was comprised in the sale. It decreed the claim as regards the remainder of the house.

The plaintiff appealed to the lower Appellate Court and upon his appeal the learned Subordinate Judge decreed the whole of the claim. He says in his judgment that no legal necessity was proved, the mere fact of his signing the sale-deed as a witness did not estop Mahabir Rai from disputing the sale and maintaining the suit. He was of opinion that as no necessity for the sale was mentioned in the deed, it could not be urged that Mahabir by attesting the deed admitted the existence of legal necessity. He also was of opinion that there was "no good evidence to show that Mahabir gave his consent to the transfer."

It is contended on behalf of the appellant that if Mahabir consented to the sale, he being the next reversioner, the sale would be a valid one apart from legal necessity. This contention is supported by the ruling of their Lordships of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1). In that case, their Lordships held that a Hindu widow in possession of her husband's estate as his heir had power, apart from legal necessity, to alienate the estate with the concurrence of the reversionary heirs so as to bind the persons who are the next reversioners when the succession opens out on her death. If Mahabir Rai, who was the sole reversioner, at the time of the sale, assented to it, he could not maintain the present suit and dispute the validity of the sale. As I have said above, it was found by the Court of first instance, and this finding has not been dissented from by the lower Appellate Court, that the widow of Bhirgu Nath Rai transferred the property to the appellant and allowed him to re-build the house 11 or 12 years ago, and that subsequently the appellant took a sale-deed from her in 1907. To this sale-deed Mahabir Rai was an attesting witness. The fact that he was, as found by the Court of first instance, the sole reversioner, and that he lived in the neighbourhood of the house in question, clearly shows that he was aware of what the widow had done, and there can be no doubt that when he witnessed the sale-deed he knew what the transaction was and that he consented to the widow's act. Having regard to the conditions in life of the people of this country, the fact of a person witnessing a document raises a strong presumption that he is aware of the nature of the transaction which he was witnessing. This presumption it lay on Mahabir Rai to rebut. This was not the case of a person who merely attested the fact of the execution of a deed by another. In this case it was the reversioner who was witnessing a sale-deed executed by a widow after whose death he was to succeed to the property and it is manifest that his signature to the sale-deed was obtained in order that it might be evidence of his assent to the transaction This case is similar to that of *Mohar Misir* v. *Bishambhar Misir* (2) and some of the observations made in the judgment in that case fully apply to this case.

Having regard to the facts I have already mentioned, namely, that the defendant re-built the house several years ago, that Mahabir Rai who lived close by was fully cognizant of what was done and that with this knowledge he witnessed the sale-deed executed by the widow of Bhirgu Nath Rai, the inference is irresistible that he assented to the transfer made by her. He was, therefore, estopped from maintaining the present suit. It is true that he died during the pendency of the suit but the respondents were brought on the record as his legal representatives. They did not bring the suit in their own right, and, therefore, it is not open to them to dispute the validity of the sale. The learned Vakil for the respondent referred to the case of *Lala Rup Narain* v. *Gopal Debi* (3). That case, in my opinion, has no bearing on the question before me. It is clear from the terms of the sale-deed that the widow of Bhirgu Nath Rai sold the property itself and not her life-interest only. In my judgment, the Court below was wrong in interfering with the decree of the Court of first instance.

I accordingly allow the appeal, set aside the decree of the Court below and restore

(1) 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605.

(2) A. W. N. (1888) 294.

(3) 3 Ind. Cas. 382; 36 C. 780; 13 C. W. N. 920 (P.C.); 6 A. L. J. 567; 10 C. L. J. 58; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 146 P. W. R. 1909; 36 I. A. 103; 19 M. L. J. 548; 68 P. L. R. 1910.

that of the Court of first instance with costs in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

APPEALS NOS. 105, 70 AND 106 OF 1909.

February 18, 1913.

[*Present*:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

IN No. 105 OF 1909.

ATHAN SADAGOPA CHARIAR SWAMIGAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ELIAVALLI SRINIVASA CHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 70 OF 1909.

SRI VANAMAMALAI RAMANUJA JEER SWAMIGAL—DEFENDANT—APPELLANT

versus

ELIAVALLI SRINIVASA CHARIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 106 OF 1909.

EMPERUMANAR JEER SWAMIGAL—DEFENDANT—APPELLANT

versus

ATHAN SADAGOPA CHARIAR SWAMIGAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 9—*Honours in temple—Jurisdiction of Civil Courts—Emolument attached to office—Legality.*

Per *Sadasiva Aiyar, J.*—Section 9 of the Civil Procedure Code gives Civil Courts jurisdiction to try only suits of a civil nature and the explanation shows that questions as to religious rites or ceremonies (and religious honours, by parity of reasoning) should not be tried by Civil Courts.

Subbaraya Mudaliar v. *Vedanta Chariar*, 28 M. 23; 14 M. L. J. 171, approved.

If the honours are attached to an office as emoluments, a suit would lie for them.

Courts should require strong evidence before attaching mere honours to a temple office.

Sri Rungachariar v. *Rungaswami Bhattachariar*, 3 Ind. Cas. 881; 32 M. 291, 5 M. L. T. 33, distinguished.

When such honours are shown to persons only as marks of pure grace of the deity they cannot be legally claimed by anybody as receivable by him in a temple.

Appeal against the decree of the Subordinate Judge at Tuticorin, in Original Suit No. 22 of 1905.

Messrs. *K. V. L. Narasimham* and *T. R. Ramachandra Aiyar*, for the Appellants.

Messrs. *M. O. Parthasarathy Iyengar* and *T. Rangachariar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—These three connected appeals have arisen out of a suit brought in the Tuticorin Subordinate Judge's Court by four members of a family which is called the Athan family. The principal object of the suit was to prevent the 1st defendant from claiming to be one of the Adhyapaka Mirasidars in the famous Vishnu temple of Nammalwar and Adinathar in Alwar Tirunagari. The records of the case are very voluminous. The arguments in the lower Court occupied more than two weeks, the judgment of the lower Court covers forty printed pages and the arguments before us lasted nearly a week. My judgment, therefore, has to be of some length as too much brevity may lead to undesirable obscurity. The Athan family of the plaintiffs and the Elayavalli family of the 1st defendant are the two leading Acharya Purusha families in Alwar Tirunagari. Both families are very rich and almost all the ordinary Sri Vaishnava families (not belonging to Acharya Purusha Thirumaligais) in Alwar Tirunagari are the pupils of one or other of these two families. There has been bitter rivalry between these two families for at least 35 years past, each trying to undermine the influence of the other. Many of the Sri Vaishnava trustees of this famous temple have been disciples taken from these two families. There are two principal shrines in the said temple that of God Adinathar (Vishnu) and that of a famous Vaishnavite Saint (Nammalwar). The plaintiffs' family owns a separate temple called the Pillalokacharyar's temple in another street. The moveable Nammalwar idol used to be taken to this Pillalokacharyar temple every year on the occasion of a festival in the latter temple. Some honours used to be shown to the plaintiffs' family members at that festival. The 1st defendant's factions seem to have objected about the year 1880 to these honours being

shown to the plaintiffs' family, and there were petitions and counter-petitions to the Smartha trustee who was then holding office. He disallowed the plaintiffs' prayer as regards one of the three honours claimed by them and allowed the other two honours. See Exhibits Nos. VI and VI (*a*). Since then the feelings between the two rival Acharya Purusha families have been becoming more and more bitter by lapse of time.

As I said in the beginning, the dispute in this suit is about the Adhyapaka Miras in the temple. It is the case of both sides that this office has been held by only seven office-holders from beyond living memory. When a family is hereditarily entitled to the office, all its members are entitled to partake in the performance of the duties of the office, the really important duty attached to the office is the recitation daily of certain portions of the Tamil Veda called the Tiruvamozhi in the morning and evening and also on festival occasions in the two principal shrines of Alwar and Adinathar. As usual in many Vaishnavite temples, the shrine of the saint—Nammalwar in this case—has eclipsed in importance the shrine of Adinathar (representing the Almighty God) in the popular eye. There is a pillared Mantapam or hall in front of the shrine and the moveable idol of the saint is brought into this hall on festival occasions and is seated at the western end of the hall which runs west to east. The seven Adhyapaka Mirasidars and 15 other individuals (or families) belonging to respectable Matams or house-holds (total twenty-two individuals or sets of individuals) range themselves in two rows in the hall on either side of the Idol. The right hand side row is called the 1st row and the left hand row the 2nd row. After the worship of and the offerings to the Idol are over, holy water (called "Thirtham") in three cups besides the food offerings dedicated to the Idol are distributed to all the assembled worshippers. But the twenty-two persons including the seven Adhyapaka Mirasidars who stand in the two rows are given this Thirtham and the Prasadam doles before any other worshippers in the assembled crowd. From west to east, fourteen out of the twenty-two individuals stand in the 1st row. The remaining eight stand in the 2nd row (the 11th defendant being at their head). Of the seven Adhyapaka Mirasidars six are found in the 1st row and one (the 11th defendant) in the 2nd. This is the case of both sides.

Who are these seven Adhyapaka Mirasidars? Both sides agree as to five out of the seven. These five are the families of defendants Nos. 8 to 11 and the plaintiffs. The plaintiffs would have it that the two Sannyasis, heads of Mutts, *viz.*, the 6th and 7th defendants, called the Vanamamalai Jeer and the Emberumanar Jeer, are the remaining two of the seven Adhyapaka Mirasidars. The 1st defendant's case is that he and Sohusu Alwar Iyengar (not a party to this suit) are the two remaining Adhyapakas. The plaint is a long document of 23 paragraphs and the cause of action on which the suit is brought has to be gathered from the plaint with some difficulty. The gist of the material allegations seems to be that in November 1902 the 1st defendant for the first time, pretending to be one of the seven Adhyapaka Mirasidars, forcibly entered the Adhyapaka Goshti or row, (evidently before the Alwar's shrine) took his stand in the first or right hand row just above the plaintiffs' place in the row and tried to obtain Thirthams and Prasadams and other honours. The 17th paragraph of the plaint is as follows—"As the right to the said Adhyapaka Miras and to the Prasadam and honours has been newly set up by the 1st defendant as existing in him and as it is being enforced, it is likely to entail loss upon the above said plaintiffs in respect of their rights, rank, dignity or status and income." The principal reliefs prayed in the plaints are

(*a*) to declare that the 1st defendant is not an Adhyapaka Mirasidar and has no right to perform the service relating to Adhyapaka Miras and to receive Thirtham, Prasadam, income, honours, etc., pertaining to the office, taking his rank before the plaintiffs or in any other manner;

(*b*) to issue a perpetual injunction against the 1st defendant from joining the Adhyapaka Goshti and doing the above services and receiving Thirtham Parasadam, etc., by taking rank before the plaintiffs or in any other manner.

Though this suit is primarily directed against the 1st defendant, 11 defendants have been impleaded in all in this case. Defend-

ants Nos. 8 to 11, I have already said, are of the four admitted seven Adhyapaka Mirasidars. They have really no interest in this litigation as their rights and places in the Goshti are not disputed. (The 1st defendant who at first disputed the 11th defendant's right on the ground that the 11th defendant did not belong to the family to which one of the seven Adhyapaka Miras offices belonged gave up at a later stage of the case the said contention.) The 6th and 7th defendants naturally support the plaintiffs who admit the title of defendants Nos. 6 and 7 to two of the seven Miras offices. The 1st defendant contends that the 6th and 7th defendants have been dishonestly substituted by the plaintiffs in the place of himself (1st defendant) and Sohusu Alwar Iyengar. Defendants Nos. 2 to 5 are the four trustees of the temple of whom two (defendants Nos. 2 and 3) are the disciples of the 1st defendant and support the 1st defendant while of the other two trustees the 4th defendant (the plaintiff's 19th witness) contradicted himself hopelessly while the 5th defendant supported the plaintiffs. The principal questions of fact in this litigation, therefore, are:—(1) whether the 1st defendant is really one of the seven Adhyapaka Mirasidars in the temple, (2) whether his rank in the Ghoshti is just above the plaintiffs?

In the decision of these two questions, several subsidiary questions arise, *viz.*, whether Sohusu Alwar Iyengar is a Mirasidar, whether defendants Nos. 6 and 7 are Mirasidars, whether the test to find out whether a man holds office or not is whether he enjoys Manibham lands as attached to the office or whether he gets food offerings from the temple or whether he has a definite place in the Goshti and so on. Of course, the oral evidence as to whether defendants Nos. 6 and 7 have been doing duties as Adhyapaka Mirasidars or whether the 1st defendant and Sohusu Alwar Iyengar have been doing such duties has also to be considered.

The oral evidence was fully discussed and commented upon by both sides before us. After full consideration, I see no sufficient reason to dissent from the appreciation by the lower Court of this portion of the evidence. As the defendants Nos. 6 and 7 act in combination with the plaintiffs, defence witnesses Nos. 1 to 9 examined on their behalf are practically witnesses on the plaintiffs' side. The story of the plaintiffs' witnesses, including defence witnesses Nos. 1 to 9, is full of contradictions, improbabilities and inconsistencies. The 6th defendant's mutt is in Nanguneri more than 30 miles distant from Alwar Tirunagari. It is in evidence of the plaintiff's own witnesses that he attends this temple only during the Vaikasi festival when he gets honours during $3\frac{1}{2}$ days of the 10 days festival and, even as regards the $3\frac{1}{2}$ days' attendance, he does not attend regularly every year. In fact, the list given by the 6th defendant's own witness (defence 1st witness) shows that between the years 1867 and 1905, a period of 38 years, he attended only the festivals which took place in 8 of these 38 years. That a big rich Matadhipathi like the Vanamamalai Jeer should hold office in this temple, which requires daily attendance morning and evening, is a wild improbability, and the evidence to support his case is wholly unreliable. He has got influential disciples, called the Appalwar Kuttam, in Alwar Tirunagari. His Matam had long ago made endowments to the temple and he gets three certain honours whenever he visits the place, but those honours have no relation to any office in the temple. In this connection, Exhibit 59, which is a Yadast sent to the Vishnu Devastanam Committee by the agent of the 6th defendant's Matam, is significant. Paragraph 5 of the petition is as follows:—"In consideration of the many Kainkariyas of immense value of more than two lakhs done during the times of some previous Swamis of this Adhinam during the last many years to the said temple, certain honours have been allowed by the Sthalathars, Dharmakarthas of the temple and authorities of the respective times and are being received. The said Swami is entitled to all the said honours for $3\frac{1}{2}$ days from the Arivanam on the night on which he enters the said village during all the times when the said Swami goes to the said village and to the neighbouring villages on Sishya Yathrai." There is not a word in the whole of this petition about the Swami being entitled to the Adhyapaka Miras office in the said temple or to get any honours as Adhyapaka Mirasidar. The whole evidence has left the clear impression on my mind that the

plaintiff's allegation that the 6th defendant is one of the seven Mirasidars is a product of the imagination. The 6th defendant's place in the Goshti is also left in confusion, by the evidence on the plaintiffs' side. The evidence of the plaintiffs' 1st witness is also instructive. He has got a place in the right-hand row, though he is not one of the Adhyapaka Mirasidars, and whenever the 6th defendant comes, this witness vacates his place for the 6th defendant in consideration of $3\frac{1}{2}$ rupees yearly given by the 6th defendant to the witness. Such is the traffic in Sthanams which takes place in these temples. The Tirukurungudi Jeer, whenever he goes, occupies also this trafficking witness's place, gives Rs. 5 per annum to the witness. Coming to the 7th defendant, the attempt of the plaintiffs to make him an Adhyapaka Mirasidar has not been more successful. Exhibit 26 is a petition sent by the 7th defendant's agent to the Committee Members in 1908. It talks about honours in the Nityal Goshti and the honours due to the 7th defendant on the 8th, 9th, and 10th days of the yearly festival, but there is not a word about his being an Adhyapaka Mirasidar or being entitled to any honours as such Adhyapaka Mirasidar. Exhibits Nos. 27 and 27 (*a*), whic hare dated in 1901, show that, when the 7th defendant's predecessor appointed the 7th defendant and wrote to the temple authorities that the 7th defendant should be recognised in the temple as entitled to honours, not a word was said about the Adhyapaka Miras office. The oral evidence let in by the plaintiffs and the 7th defendant tc prove the 7th defendant's right to the Adhyapaka Miras is very unreliable. On the other side, the evidence of the 1st defendant's witnesses is consistent and several of them are temple servants. One of them, defence 11th witness, belongs to the family of the 11th defendant entitled to the Adhyapaka Miras. Defence 14th witness is a respectable money-lender. Defence 6th witness is a Non-Brahmin who conducts Mantapapadi in the temple. Defence 21st witness is a pensioned Government servant who has seen the 1st defendant conduct the duties of an Adhyapaka Mirasidar and receive honours during the three years of the witness's residence in Alwar Tirunagari. Defence 25th witness is worth Rs. 10,000 and defence 26th witness is worth Rs. 50,000 paying an income-tax of Rs. 28. Defendants Nos. 1 and 3 have also gone into the box as defence 29th and 28th witnesses respectively and given evidence in support of the 1st defendant's case. There is, no doubt, something in the excuse put forward for the plaintiffs and defendants Nos. 6 and 7 not having gone into the box *viz.*, that they consider it against their dignity to appear as witnesses in a Court of Justice, but it is admitted that the 1st defendant is entitled to (and did) entertain similar notions of dignity and yet ventured, after all, into the witness-box. The plaintiffs' learned Vakil, however, relied strongly on the deposition of a Smartha Graduate witness on the plaintiffs' side, *viz.*, plaintiffs' 20th witness, P. Sitarama Iyer by name, who was a member of the temple Committee. This Committee was admittedly torn by factions. The feelings between the two factions in the Committee are clearly shown by the intemperate Yadast, Exhibit 16, sent by this witness Sitaram Iyer to the Committee office. He does not make any reference in this letter to the alleged admission of the 1st defendant before him. No record of the alleged admission of the 2nd and 3rd defendants (alleged to bave been made during the inquiry before the Committee into the petition put in on behalf of the 1st defendant, complaining against the action of the plaintiffs and their Sishya Desikar Athan Iyengar, a trustee now dead, in denying the 1st defendant's rights to Thirtham, Prasadam and to the Adhyapaka Office) was made during the inquiry. The Subordinate Judge was, therefore, justified in not attaching much importance to the allegations of the plaintiffs' 20th witness as to certain rather inconclusive statements said to have been made by defendants Nos. 2 and 3 before the Committee Members or by the 1st defendant to the witness. I am aware that in these hotly contested sectarian disputes, oral evidence on both sides is usually of little value and that even the appreciation of the oral evidence ought to be made mostly with reference to the documentary evidence. But as the documentary evidence in this case, though voluminous, has little direct bearing on the two important questions of fact in this case and as these questions have to be decided mainly on the oral evidence and

probabilities, I postponed the consideration of the bulk of the documentary evidence, which I shall now proceed to deal with shortly. The plaintiffs admit that of the five undisputed Adhayapaka Mirasidars, four, namely, (the plaintiffs and defendants Nos. 8 to 10) have been enjoying Manibhams, as attached to their office, from 1822. The 5th individual (11th defendant), though he might not himself enjoy Manibham lands, (a disputed point), has admittedly *dayadees* who are entitled to the Adhyapaka Miras and who enjoy Manibham lands. That the 1st defendant and Sohusu Alwar Iyengar are also enjoying Manibhams which have been recognized as attached to the office in Revenue Records from 1822 is also admitted. That defendants Nos. 6 and 7, the two Sannyasi Jeers do not enjoy any such Manibhams is also clear. But the plaintiff's case is that Manibbams enjoyed by the plaintiffs, defendants Nos. 8 to 10 and the 11th defendant's *dayadees* and by the 1st defendant and Sohusu Alwar Iyengar had really nothing to do with the Adhyapaka Miras office before 1822 and that they were by a sort of pious fraud of a Non-Brahmin Tahsildar attached to this office in the temple in 1822. The principal documents relating to the contentions on both sides on this part of the case are Exhibits 46 series, J. series, 40, EE, 57, 44 series, 45 series, 41 and 42. Having given my best consideration to these documents I have little doubt that, though there are no records earlier than 1817 showing when and how these Manibhams were attached by a former Government to the Adhyapaka Miras offices, the said Manibhams (which were originally cash Manibhams) were rightly held in 1822 to be the emoluments of the office and that the half hearted attempt of a Deputy Collector in 1864 to dissociate the Inam from the temple office was rightly discountenanced by the higher Revenue Authorities responsible for the Inam Settlement. The vague statement in the letter J sent by the Tahsildar in 1821 to the Collector that daily Prasadams are being given to the Manibham holders in the temple does not necessarily show that the Prasadams also (much less that the Prasadams alone) are attached to the office. On the other hand, this statement in Exhibit J is another almost conclusive piece of evidence against the 6th defendant's alleged obligation to do daily duty as an Adhyapaka Mirasidar in the temple. Exhibits 36 (*a*) and 43 series dated 1864 again furnish strong evidence showing that the 1st defendant's family were enjoying the Inams on account of the Adhyapakam Miras office which they held in the temple. The two documents in Exhibit 54, dated January 1879, show that the 7th defendant's Matam did not claim any office of Adhyapakam in the plaint temple, though all the rights and privileges of the 7th defendant's Matam are set out fully in these documents. In 1873 (see Exhibit 65) the then Emberumanar Jeer referred to the Madhukaram cakes, that is, doles given to Sannyasis as such out of the offerings in the Adinatha temple, but did not make reference to any office held by the Emberumanar Jeers in the temple. In a litigation of 1900 between two branches of the plaintiffs' family, the High Court clearly held that the Inams enjoyed by the plaintiffs' family were attached to the right to the Adhyapakam office (in the plaint temple) of the plaintiffs' family, and that, therefore, those Inmas could not be decreed to be divided in a suit to which the temple authorities were not parties (see Exhibits 47 series) Exhibit B again dated 1895 is a Will executed by a member of the plaintiffs' family in which the Manibham lands were clearly admitted to have been assigned for the Tiruvamozhi and Vedaparayanam services in the temple. The above documents support the 1st defendant's contention that it is improbable that the 1st defendant who has been allowed to enjoy the Inam lands which have been attached to the office at least from 1822 never performed the duties of the office and is not an Adhyapakam Mirasidar.

The only other documents necessary to consider at some length are the documents in Exhibits BB series very strongly relied on on the side of the plaintiffs. The date of Exhibit BB is not known, but it really seems to be an old document. It purports to be the Thitta Kanakku or Budget account prepared for the temple. It is a long document printed at pages 45 to 88 in the printed documents. The entries in pages 52 and 82 are relied upon to show that out of the cooked food prepared daily in the temple, the 1st defendant's family is not mentioned as entitled to or having received any portion as emoluments for performing

the duties of any office in the temple, and that, therefore, the 1st defendant's family have no right to the Adhyapaka Miras office in the temple. This argument assumes that some portion of the Nityal Prasadams is attached to the Adhyapaka Miras office. The relevant entries in page 82 are brought under the heading of "Vaidikal Sekharam expenses" in Exhibit BB. The names of the 1st defendant and Sohusu Alwar Iyengar undoubtedly do not appear in the list of those to whom the cooked food is distributed and the names of defendants Nos 6 and 7 do appear. But the names of Vadagalai Jeer, Sesha Jeer, and Kandadai Annan Tirumaligai also appear in the list and, while the 7th defendant gets only three handfuls like the Vadagalai Jeer and Sesha Jeer, the 6th defendant gets 24 handfuls. And the plaintiffs and defendants Nos 8, 9 and 10 get 16 each. At page 52, the Vaidikal Sekharam includes several other persons besides those mentioned in page 82. In the High Court decision, Exhibit 47 series, which is a litigation between members of the plaintiffs' family *inter se* and in the Wills Exhibits B and 48, the Prasadams obtained from the temple apart from the honours have not been mentioned as attached to the Adhyapaka Miras office. On the other hand in the judgment of the High Court, Exhibit 47*b*, while the Manibham lands have been decided to be attached to the Adhyapakam office the Prasadams (mentioned in the 3rd schedule attached to the present plaint which were also mentioned in the schedule attached to the plaint in that suit of 1900) were held to be *the private property attached to the Acharya Purusha Sthanam belonging to the plaintiffs' family and not as attached to any office held in the temple.* There is no proof that the Vadagalai Jeer and Sesha Jeer or the Kandadai Annan Tirumaligai to whom portions of the cooked rice were distributed according to page 82 of Exhibit BB. held the Adhyapaka Miras office in the temple. On the other hand, it is clear from other portions in Exhibit BB. that every Sannyasi is given three handfuls of cooked rice as Madhukaram and hence the entry on page 82 of Exhibit BB. in Vaidikal Sekharam is not at all proved to relate to the distribution of rice as emoluments of the Adhyapaka Miras office as contended by the plaintiffs. On the other hand, it evidently relates to cooked rice gifted to all Sannyasis and to every pious Brahmin family holding a good position as Acharya Purushas or otherwise. It is next argued for the plaintiffs that out of the Nityal Prasadam brought to the hall in front of the deity for the purpose of distribution (called "Sannadhi Viniyogam") one-eighth share is divided off for distribution among the Adhyapaka Mirasidars who attend and that the remaining seven-eighths only is distributed in the Goshti including the 22 persons in the two rows as also the outside public who attend, and that this one-eighth has always been taken by the 6th and 7th defendants and the five admitted Mirasidars but not by the 1st defendant and Sohusu Alwar Iyengar. I agree entirely with the lower Court that it is not proved that one-eighth share is so set apart for the Adhyapaka Mirasidars out of the Nityal Prasadam brought for Viniyogam. With reference to the allegation in the plaint that the emolument in clause (*a*) item No. 1, of the 2nd schedule (that is, this one-eighth share) belongs to the Adhyapaka Miras office, no reference to this share is made in the Wills, Exhibits B and 48, or in the records of the suit of 1900, Exhibit 47 series. In my opinion, such an appropriation of one-eighth out of the offerings brought to the Goshti for general Viniyogam is quite unshastraic and illegal. The plaint schedules Nos. 2 and 3 mention the other emoluments alleged to be attached to the plaintiffs' duties as Adhyapaka Mirasidars. The 1st defendant does not object to the plaintiffs' getting any emoluments which may be attached to the office and he denies merely that the 3rd schedule food items are attached to the Adhyapaka office. He contends (and I think rightly) that the plaintiffs have included the third schedule food as emolument of the plaintiffs' office merely to found an argument against the 1st defendant's right to the Adhyapaka Miras as the 1st defendant's family is not given similar food item but only some raw rice etc., on Kousika Dwadesi days. I have already shown that food in varying quantities is supplied to Matams, Tirumaligais etc., without any connection with temple offices. (There is a small dispute between the

plaintiffs and defendants Nos. 2 and 3 as to whether the 3rd schedule items should include a little ghee and a little vegetable soup also. This is, however, irrelevant to the present suit, though I might state that the oral evidence seems to support the plaintiffs' case that these small things also form part of the 3rd schedule income.)

Now the 2nd schedule items fall under two heads; the 1st head being sub-divided into five clauses (*a*) to (*e*). Clause (*a*) is the one-eighth share of the daily morning Tirupavadai Viniyogam which I have already referred to. There is also no proof worth the name that the Adhyapaka Mirasidars are entitled to the food mentioned in clauses (*b*) and (*c*) of item No. 1, schedule 2. Clauses (*d*) and (*e*) are voluntary offerings made by Ubhayakkars and nobody denies the plaintiffs' right to receive such gifts from Ubhayakkars. Item No. 2 of the 2nd schedule consists of "honours", *viz.*, a little sandal, a little oil and so on and also the right to receive the distributed Viniyogam in a cloth held by a servant at the time of the general distribution of Viniyogam and the right to receive Thirthams and Viniyogams in the 1st row in a particular place and order in that row. In this litigation, the plaintiffs advance two main lines of attack against the 1st defendant. I think that they have wholly failed in the 1st line of attack, *viz.*, the attack directed to show that the 1st defendant is not an Adhyapaka Mirasidar at all. I have now to consider the next line of attack, namely, that the 1st defendant is not entitled as Adhyapaka Mirasidar (even if he were one) to take precedence of the plaintiffs in the 1st row and to receive Thirthams and Prasadams in precedence to the plaintiffs. This leads to the question of precedence in the row. That the order of standing or sitting in the row changes in the several Goshtis held before the Alwar Sannadhi, the Adinathar Sannadhi, before the Garudalwar Sannadhi, at the time of festivals and so on is clear from the evidence on both sides. But so far as the plaintiffs and the 1st defendant are concerned, the plaintiffs' case is that the 1st defendant never goes before them while the 1st defendant's case is that he always comes just before the plaintiffs. I shall confine myself to the Alwar Sannadhi Goshti. I may state at once that, as regards the order in the Goshti, it is admitted that wherever the individuals in the row may have to stand or sit, *the order of distribution* is always the same. In every Goshti, the Archakas always take the Thirtham first and they are, therefore, left out in the enumeration of the order. The first Thirtham is given after the Archakas to the 6th defendant, the Sannyasi Jeer of Vanamamalai Mutt, whenever he attends during the festival etc. Then it is given to the other Sannyasi, the 7th defendant, Emberumanar Jeer; then to all other Sannyasis whoever might be present at the Goshti. Then the Arayar, the 8th defendant, one of the Adhyapaka Mirasidars, who also has the duty of singing with an instrument the first verse and the last verse of the daily recitation gets the Thirtham and other honours. Then the 9th defendant and 10th defendant get the honours in the 1st row, and then the Manavala Mahamuni Aradhanakkars belonging to the family of the plaintiffs' 16th witness. The question is who gets next after the Manavala Mahamuni Aradhanakkars. The plaintiffs say that they get it while the 1st defendant says that he gets it next after plaintiffs' 16th witness. We have mostly to depend upon the oral evidence in this matter. The Subordinate Judge has not given any distinct finding on this question of precedence. He merely says that "the plaintiffs have failed to show that they are entitled to get their Thirtham and honours just after plaintiffs' 16th witness." He seems also inclined to hold (see paragraph 32) that Thirtham in a certain order or honours in a certain order cannot constitute a civil right. Having given my best consideration to the oral evidence in the case, I think that the evidence on the 1st defendant's side is entitled to greater weight than that on the plaintiffs' side; and I find that the 1st defendant comes before the plaintiffs. The probabilities of the case are in favour of the truth of the evidence on the side of the 1st defendant and not of the evidence on the plaintiffs' side. In Exhibit 68, a letter written by a member of the plaintiffs' family to another member, the place of the plaintiffs' family in the row is said to be the 8th from the Idol. It is admitted that the 6th defendant, though he gets the Thirtham first whenever he attends the temple stands in the row below the plaintiffs. The 8th, 9th, 7th and 10th defendants stand in the 1st row one after the other and get their Thirthams after

the 6th defendant. So the 10th defendant will be the 5th to get the Thirtham. The Manavala Mahamuni Aradhanakkars are the 6th to get the Thirtham. If the plaintiffs are just after the Manavala Mahamuni Aradhanakkars, how could they have the 8th Thirtham unless as shown by the evidence on the 1st defendant's side, the 1st defendant comes in before the plaintiffs? I think, therefore, that the 1st defendant's contention that he comes before the plaintiffs in the order of distribution of Thirtham and Viniyogam is correct. The plaintiffs rely upon Exhibit A, a rough extract of a petition put in by the plaintiffs' 15th witness in 1891, in which it is said that the members of the family of plaintiffs' 16th witness stand in the row between the plaintiffs and the 10th defendant. But that Exhibit contains only a very imperfect abstract of the petition and cannot be held to override the strong and clear oral evidence on the side of the 1st defendant. The plaintiffs' contention that the 1st defendant has invented the roll call name of "Kollikavala Dasar" for himself in order to secure a place in the row seems to me to be unsupportable. That the 1st defendant has a family roll call name (called Arulippadu) is admitted by at least two of the witnesses on the plaintiffs' side itself. The roll call name of a man in the Goshti is the proper or "casual" name of his most distinguished ancestor. The 1st defendant (like several other witnesses in the case) is unable to give the date of origin and the reason for the name forming his roll call name, but this is a very slender foundation to come to the conclusion that the whole thing was boldly invented by him and his witnesses to spite the plaintiffs.

The history of this fight shows that it had its origin in the competition between the plaintiffs' Tirumaligais and the 1st defendant's Tirumaligais as regards the number and importance of the honours to be shown to the respective Tirumaligais in the plaint temple and the surrounding temples. We have seen how the 1st defendant in 1881 tried to prevent honours being shown when the Alwar Idol was taken to the Pillalokacharyar's temple owned by the plaintiffs' family. The plaintiffs in their turn tried to prevent the 1st defendant's getting Kousika Dwadesi rice gifts from the temple according to *Mamool*. But the plaintiffs failed and the Committee passed orders to continue the said gifts to the 1st defendant's family. Then in 1899 one Ariar Desikam Iyengar was appointed as Superintendent of the temple, he being a disciple of the plaintiffs. The 1st defendant's party thought that they should have the 2nd and 3rd defendants, who are disciples of the 1st defendant, as trustees to counteract the influence of Desikar Athan Iyengar who might show additional honours to the plaintiffs' family in the temples and thus depreciate the 1st defendant in the eyes of the public. Then after a long fight by means of petitions and counter-petitions to the Committee members by both sides, defendants Nos. 2 and 3 were appointed trustees with the condition that they should not show new honours to the 1st defendant. Meanwhile in 1901, the plaintiff's man, Athan Iyengar, seems to have tried to bestow new honours at the Pillalokacharyar's Mantapapadi upon the plaintiffs. The defendants Nos. 2 and 3 who are the 1st defendant's Sishyas tried to prevent it. Then the ball was set rolling (which led to the present litigation) by Desikan Athan Iyengar sending the Yadast, Exhibit 17, in June 1902 to the temple Committee, in which he detailed the obstructions made by the 2nd and 3rd defendants to the showing of honours in the Pillalokacharyar's temple to the plaintiffs. He further says that the 1st defendant is entitled to Thirtham similar only to *Desantari Thirtham* (given to the ordinary worshipping public who come after the twenty-two people standing in the rows) and that defendants Nos. 2 and 3, because no additional honours could be shown to the 1st defendant in the Alwar temple (according to the terms of the order appointing defendants Nos. 2 and 3 as trustees), obstructed the usual honours being shown to the plaintiffs at the time of the Pillalokacharyar's Mantapapadi. I was at first inclined to think that there might possibly be a modicum of truth in the plaintiffs' case, that is, that it might be that the 1st defendant was claiming a rank above the plaintiffs in the Goshti to which he may not be entitled; but I have, after going carefully through the whole evidence, come to the conclusion that it is not improbable that the case of the plaintiffs might be wholly false and might have been instituted out of spite against the 1st defend-

act having through his disciples, the defendants No. 2 and 3, tried to obstruct in June 1902, the showing of honours to the plaintiffs at the Pillalokacharyar's Mantapapadi. On the above findings of fact the plaintiffs' Appeal No. 105 of 1909 fails and must be dismissed with costs.

I, however, wish to add a few words on an important and difficult question of law (or rather of mixed law and fact) argued at the hearing before us. I do not wish to base my decision in this case on my opinion on this question. For, I think it advisable to prevent, as far as possible, further litigation on the questions of pure fact involved in this suit, though the omission to make Sohusu Alwar Iyengar a party to this suit (notwithstanding the 1st defendant's objection in the written statement to his non-joinder) has left some loop-hole open for some of these questions of fact being again litigated in some suit, to which Sohusu Alwar Iyengar is made a party. The legal question, I wish to say something about, is whether a suit for the honours mentioned in the second item of the 2nd schedule to the plaint is maintainable in a Civil Court. It is clear that if those honours are not attached to any office in the temple, no such suit could lie. The first branch of the question, therefore, is a question of fact, *viz.*, whether these honours are attached to the Adhyapaka Miras office in the temple. I am aware that both sides have stated in the pleadings that they are so attached. But I think that such admission on both sides in a case of this sort should be given far less weight than in ordinary cases as both sides wish to establish their right to receive such honours under the authority of a Civil Court decision (if possible), though, as a sort of clever move in the game, the defendant might make a formal general plea that the Civil Court has no jurisdiction to decide the question of honours. The Legislature in section 9 of the Civil Procedure Code has given Civil Courts jurisdiction to try only suits of a civil nature and the explanation shows that questions as to religious rites or ceremonies (and by parity of reasoning in my opinion, religious honours) should not be tried by Civil Courts. In *Subbaraya Mudaliar* v. *Vedantachariar* (1), Davies and Boddam, JJ., held that where the damages are merely hypothetical (the damages claimed being honours in the form of Tulasi, Sadakopam, Thirtham, etc, as well as the distribution of Prasadam, sugar, thosai and sandal, sandal betel and nut, flowers and so on), the Civil Courts had no jurisdiction to go into the question of the right to recover such hypothetical damages. Seeing that sectarian disputes are rife in big Hindu temples (and especially in Vaishnava temples), I think that Courts should discourage as far as possible the attempts of rival litigants to fight out sectarian and "honour" disputes in a Court of law. It is also obvious that the ingenuity of such litigants and their legal advisers is continually being exercised in trying to evade the provision in section 9 (Civil Procedure Code) as to the necessity of suits being "of a civil nature" by trying to bring sectarian disputes under the wording of the explanation to that section. I am also of opinion that where a mere honour is alleged by a person to be attached to a temple Miras office, Courts should be careful in scrutinising the evidence advanced to prove that the honour is not shown merely out of respect for the religious merit attached to the holder of the office, as such holder, or because he is otherwise held in pious estimation by some of the public or because he has made endowments to the temple, but that the honours really form part of the emoluments of an office. I am aware that in *Sri Rungachariar* v. *Rungasami Battachar* (2), it was decided, that if the honours are claimed as attached inseparably to an office as part of its emoluments and not simply accorded to its holder as marks of respect, which may be extended to any person to whom the same degree of respect is due, Civil Courts might make a declaration of his right to receive the honours. On the facts of that case, the learned Judges held that the first Thirtham was attached to the office in dispute in that case. All that I wish to suggest now is that seeing that "honours" are shown usually in temples at the discretion of the trustees to even distinguished strangers, Courts should require strong evidence before attaching a mere honour to a temple office. If it is shown that

(1) 8 M. 23; 14 M. L. J. 171.

(2) 3 Ind. Cas. 881; 32 M. 291; 5 M. L. T. 33.

the "honour" is a thing which is considered as part of the ritual or as necessary to fit the recipient spiritually to perform the duties of his office, it may be held to be indissolubly attached to the office. In the present case, the 6th defendant, I have found, gets honours because some of his predecessors had done Ubhayams to the temple at the cost of two lakhs of rupees. Even a Sub-Magistrate is sometimes given big honours by the trustees in temples like the present one, if his official influence is sought for or feared in the usual temple disputes pending or likely to come before him for inquiry. In the Goshti of 22, only seven are office-holders and the other 15 get their honours, some before, some after and some in the midst of the office-holders, merely on account of their being entitled to respect as belonging to the Acharya Purusha families or as being Sanyasis or as being Aradhanakkars in some other temple or as belonging to respectable families. I see no difficulty whatever in holding on the evidence in this case that the plaintiffs and the 1st defendant and the five other Adhyapaka Mirasidars get their rank in the Goshti and their rank in the distribution of Prasadams not because those honours are part of the Adhyapaka Miras office, to which they are entitled, but because of their being Acharya Purushas or of their families having been very respectable religious families for long or because the mere respect due to their offices has been considered as making them fit in a social and religious point of view to obtain such honours. Assuming, however, that the "honours" had been attached as emoluments, so far as these seven are concerned, though not in respect of the other fifteen, the next question of law is whether such honours to be shown in the presence of God can be legally attached to the office as emoluments, in other words, can honours be legally claimed by anybody as receivable by him in a temple? When a trustee chooses to parade the temple elephants and dancing girls before a high official or any other person and gives him Prasadams, etc., he does it in order to show "honours" to that person and when he does it without prejudice to the conduct of the rituals and ceremonies in the temple, he always says that the God of the temple Himself condescends to treat the official or other person as God's guest and shows him these "honours." Such persons to whom respect is shown cannot, in my opinion, claim such "honours" as a legal right, but as a favour shown by the temple Deity. Such honours in the strict eye of the Shastras cannot be called honours at all but as doles condescendingly given by the temple Deity as a "favour." One of the honours, as is well-known, shown to a Hindu in a Vaishnava temple is to place the impression of the feet of the Deity upon the head or shoulders of the devotee. Another is the distribution of the "leavings" of the food offered to the Deity to the distinguished devotee. The sandal paste of the feet of the Deity and the leavings of his food and the garland worn by the God are given as marks of pure grace and not as rights and honours claimable by the devotee. In his commentary to Sloka 17 of the 8th Chapter of the 6th Skandam of the Srimad Bhagavatam, Sridharacharya quotes from Narada the thirty-two sins which should not be committed in a temple. A few of these 32 sins are, quarrelling in the temple, punishing or rewarding others, cruel words, showing honour or dishonour to others and prostrating before others. This clearly shows that while we ought to humbly accept the Deity's leavings given through the trustee or an Archaka a claim for "honour" to be shown in the presence of God is a sinful claim and is illegal and unshastraic. I would, therefore, respectfully confine the decision in *Sri Rungachariar* v. *Rungasami Battachar* (2) to cases in which the receiving of the first Thirtham by an office-holder has become an indissoluble part of the ritual to be performed by the recipient as an office-holder and the extension of the principle should be carefully guarded against. As regards an office in a temple, a very learned Indian, who was a religious expert, remarked as follows:—"It has been held from the most ancient times in our country that it is a degenerating occupation to be an office-holder in a temple, even the highest office in a temple, that is, a temple priest. It is even considered so degrading as to make a Brahmin worthy of reproach. That servants of the Deity should obtain office or emoluments for their work is considered as making a merchandise of sacred things." We have seen how in this very case trafficking in even posts of honour for lucre is being indulged

in. The principle of heredity attached to any temple office is in itself, in my opinion, unshastraic, but it is too late now to go back, as the decisions have established the validity of claims to hereditary offices even in temples. I am aware that the Privy Council have ruled in more than one case that the usage of these institutions is the law of these institutions but if the usages are clearly illegal or opposed to public policy or clearly tend to destroy the devotional and religious spirit which should obtain in temples, such usages cannot be binding upon Courts. The usage of claiming "honours" as of right in a temple so as to excite jealousy and quarrels and a claim as of right to receive such honours in the presence of the Almighty before Whom every human being, even of the highest status, is a mere worm, should not be countenanced, by Courts. Of course where the right to occupy and recite *mantrams* in any particular place is part of the ritual of a temple, that is, where the office-holder has to perform that part of the ritual in a particular rank and in a particular place, the duty of standing in that particular place, and performing that particular ritual in that particular place may be enforced by Courts as part of the *duties* of the office. As the poet has said, "God's puppets, best and worst are we, there is no last or first." Fights and quarrels for honours are not countenanced by any religion and trafficking within the precincts of temples, whether in honours or in money-changing or in other buying and selling is opposed to all religion; and we know that Lord Jesus Christ "cast out all them that sold and bought in the temple and overthrew the tables of the money-changers and the seats of them that sold doves" in order that "the house of prayer" may not be converted into "a den of thieves." The Mussalman religion, it is well-known, also discountenances the making of differences in "honour" and status in the Temple of God.

In the result, Appeal No. 105 will stand dismissed with the costs of defendant Nos. 1 to 3. The connected Appeals Nos. 70 and 106 are by the two Sanyasi Jeers, the 6th and 7th defendants, who want to establish the rights kindly allowed to them by the plaintiffs as Adhyapaka Mirasidars in the plaint temple. For the reasons which I have given in deciding the plaintiffs' appeal, I find that they have no right to the Adhyapakam office, and I dismiss these Appeals Nos. 70 and 106 also with costs of defendants Nos. 1 to 3.

MILLER, J.—I agree with my learned colleague's conclusions on the evidence and in the dismissal of all the appeals.

I do not wish to express any opinion on the question whether honours in a temple can legally be attached, by way of remuneration, to an hereditary office in the temple or elsewhere. That question was not fully argued, because it was the case of both sides that the honours claimed are attached to the Adhyapaka office, and for the same reason I do not wish to express any opinion on the question whether the honours claimed to be attached to the Adhyapaka office are in fact attached thereto legally or illegally. It was the case of all parties, even the trustees, that they are so attached and it may be, therefore, that we had not before us all the evidence which might be produced.

The case reported as *Sir Rungachariar* v. *Rungasami Battachar* (2) was a second appeal in which we based our decision on what we believed to be the facts found by the lower Courts and no question of legality was raised. I quite agree that it is easy to make a mistake in such cases where honours are regularly accorded to hereditary office-holders and where it is difficult to find satisfactory evidence on which to decide whether they are so accorded as a part of the remuneration of the office or as a mark of respect to the person or the family of the office-holder.

Appeals dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 4, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

RICHARD ROSS SKINNER—APPELLANT

versus

Kunwar NAUNIHAL SINGH AND OTHERS—RESPONDENTS.

Will—Construction—Application of principles of interpretation of English Court of Equity—Will executed before Succession Act—Succession Act (X of 1865), ss. 84, 331—Merger—Merging of prior mortgage into subsequent ones—Pleading—Practice—Claim for absolute unconditional possession—Property found burdened with mortgage—Decree, form of.

A., who had mortgaged some of his property, made a Will in 1864 in favour of "*B.*, his son, and his lawful

male children according to the law of inheritance and in the event of *B.*'s death without lawful male children, the same to descend to any male heir". After *A*'s. death, *B.* created a fresh mortgage in lieu of the mortgage by his father and in addition to a few new mortgages.

B. died without male children and *C.* was the next male heir of *A*. *C.* brought a suit in ejectment claiming absolute proprietary possession of the mortgaged property. The plaint concluded with a prayer for such further relief as may be found necessary. In both the lower Courts, the case was conducted upon the footing that *C.* was entitled to proprietary possession in a full and unconditional sense without payment. Before the Privy Council, *C.* claimed in the alternative a decree for possession conditional on the payment of debts binding on *A.*'s estate;

Held, (1) that *B.* got only a life-estate.

(2) that the creation of fresh mortgage by *B.*, in lieu of the mortgage by *A.*, did not affect the radical rights under the mortgage by *A*, and that, consequently, these mortgages were binding on the estate of *A.*;

(3) that as *B.* held the property only on a life-tenure, the fresh mortgages created by him were inoperative as against the rights of *C.*;

(4) that in order to avoid further litigation between the parties, *C.* should be granted a decree for possession conditional on the payment of the amounts due on the mortgage created by *A.*

The English rules of interpretation, in so far at least as those are artificial rules of construction which have arisen in the administration of Courts of Equity, must not be allowed to govern the case and questions affecting the construction of such a settlement made before the Succession Act came in force, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to justice, equity and good conscience. The Succession Act, 1865, does not apply to Wills made before January 1, 1866.

Musammat Fanny Barlow v. *Sophia Eveline Orde*, L. R. 3 P. C. App. 164; 13 M. I. A. 277; 13 W. R. 41; 5 B. L. R. 1; 20 Eng. Rep. 555, referred to.

Consolidated appeals from eleven judgments and decrees of the High Court of Allahabad, dated March 2nd, 1909, reversing those of the Subordinate Judge of Meerut, dated March 28th, 1907.

FACTS.—Certain villages were granted to Thomas Skinner by the Government as a reward for good services during the Mutiny. He died in November 1864 leaving a Will, dated November 22, 1864, by which his property was "to descend to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance" but "in the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned property shall descend to my next male heir." Thomas Brown died on July 3rd, 1900, without lawful male children and was succeeded by the appellant, Richard Ross Skinner, the second son of the testator.

In 1863 Thomas Skinner, the testator, created a mortgage on the villages in question for Rs. 50,000 in favour of Seths Lakhmi Chand Rao Bahadur and Gobind Das. In 1857 Thomas Brown Skinner executed a mortgage-deed in favour of the Seths wherein it was stated that after the adjustment of the accounts a sum of Rs. 43,294-14-3 for principal and interest was found due to the mortgagees under the mortgage of 1863 and a further sum of Rs. 6,705-1-9 was borrowed to pay off the testator's debt to some bankers. The whole of this amount was charged on the property comprised in the mortgage of 1863. He also borrowed several other sums from different persons. At last the properties in dispute were sold in execution of decrees obtained against Thomas Brown Skinner. Seth Lachman Das purchased the villages sold in execution of decrees of August 28, and September 19, 1871, and the equity of redemption was brought by Lal Singh and Kishan Singh on February 20, 1873, other villages were sold on December 20, 1872.

On the death of Thomas Brown Skinner on July 3, 1900, the appellant, Richard Ross Skinner, instituted a suit against the auction-purchasers, on various dates between the 25th August 1905 and 2nd July 1906 in the Court of the Subordinate Judge of Meerut claiming immediate possession of the villages in dispute on the ground that by Thomas Skinner's Will Thomas Brown Skinner was only a tenant for life, on whose death the appellant became the tenant for life and was entitled to possession free from all encumbrances created by Thomas Brown Skinner and alleging that the auction-purchasers acquired only the right to the right, title and interest of Thomas Brown Skinner, *i.e.*, an estate for the life of the judgment-debtor.

On March 28, 1907, the Subordinate Judge delivered his judgment and held Thomas Skinner's Will to be genuine, confirming a life-estate only on Thomas Brown Skinner. The encumbrance created by Thomas Brown Skinner did not operate as a discharge of the bond executed by Thomas Skinner in 1863. He gave judgment for possession and mesne profits. On appeal to the High Court the finding of the lower Court holding that the appellant was not entitled to dispossess the mortgagees or their representatives until the mortgage of 1863 had been redeemed was

affirmed. From this finding the appellant appealed to His Majesty in Council.

Mr. *DeGruyther*, *K. C.*, with him Mr. *O'Gorman*, on behalf of the Appellant, contended that each of the auction-purchasers only acquired the right, title and interest of the judgment-debtor. The mortgages executed by Thomas Brown Skinner bound only his own interests and operated as a discharge of any previous mortgage executed by Thomas Skinner. The High Court should, in any case, not have dismissed the suits but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner.

Sir *R. Richards*, *K. C.*, and Mr. *Brown*, for Respondent No. 1, contended that the execution of the Will of Thomas Skinner was not proved in a Court of Probate and could not on the present record be admitted to proof. The appellant on the right construction of the Will had no interest thereunder and that he is estopped from denying Thomas Brown Skinner's possession being that of an absolute owner, having acknowledged it before. The mortgages were binding upon Thomas, Brown. Skinner and, therefore, no action for ejectment as against the respondent lay.

Musammat Fanny Barlow v. *Sophia Eveline Orde* (1) was referred to.

Mr. *Raikes*, appeared for Respondent No. 6.

Mr. *Dube*, appeared for Respondents Nos. 2, 8, 9 and 11.

Messrs. *Parikh* and *Roy*, appeared for Respondent No. 10.

JUDGMENT.

LORD SHAW.—These are consolidated appeals from eleven judgments and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant, Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees and the appellant was granted absolute proprietary possession, with mesne profits, of certain villages situated in the District of Bulandshahr in the United Provinces. These judgments and decrees of the Subordinate Judge were reversed by the High Court.

In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed.

With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For as the result of the discussion before the Board, the appellant made a concession, which was (whatever may have been the nature of the other discussions before the Courts below) no part of his original pleadings or case. In the plaint he prayed "that a decree for full proprietary possession of the entire villages . . . . be granted to the plaintiff." He further prayed for mesne profits and for c sts of the suit, with interest upon these mesne profits up to the date of realisation. It is true that the plaint also concluded "that any further relief which may be considered desirable and necessary be granted to the plaintiff," but, in their Lordships' opinion, this conclusion was treated by the plaintiff himself throughout the proceedings as merely ancillary to or consequential upon the radical demand he made for "full proprietary possession." The case in the Courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognised. His position, in short, was that the whole of these burdens and mortgages might be ignored.

When, however, the case for the appellant to this Board was drawn, an alternative view was submitted, which is contained in the seventh reason. That reason was in this form:—"In any event, the High Court of Judicature, Allahabad, should not have dismissed the suits, but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner." Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian Courts, and that great embarrassment to the learned Judges therein, and great delay and loss, have ensued to the respondents by reason of the appellant's action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground of

(1) 13 M. I. A. 277; 13 W. R. 41 (P. C.); 5 B. L. R. 1 (P. C.); L. R. 3 P. C. App. 164; 20 Eng. Rep. 555.

judgment now; and it is only because, in their view, it may be possible out of a large wreckage of procedure, to construct the material for a just decision of the true rights of parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from *simpliciter* sustaining the appeals and dismissing the suits.

The villages were the property of one Thomas Skinner, a member of a family not unknown in the history of the North-Western Provinces. In 1863, Thomas Skinner mortgaged *inter alia* these villages for a sum of Rs. 50,000, with interest.

It is unnecessary to refer to other mortgages than that of the year 1863 which has just been mentioned, for the principles of the judgment which is to follow are meant to apply comprehensively to the mortgages granted by Thomas Skinner. Detailed reference need not, therefore, be made, for instance, to the mortgage of 1861 granted by him over the village of Ainchar to secure a sum of Rs. 4,000. On the 7th September of that year, this village was mortgaged to the Collector of Bulandshahr. The plaintiff's claim to this village, as to the other villages, has been dismissed. But although this procedure is to be corrected as the result of the judgment of this Board, their Lordships are entirely of the opinion expressed in the judgment of the High Court of date the 2nd March 1909, to the effect that "the plaintiff is not entitled to oust the appellant without payment of the amount which the predecessors-in-title of the appellant paid in discharge of the mortgage in favour of the Collector."

The mortgage deed of 1863 above mentioned provided that the mortgagees should be put in possession if principal and interest were not paid in accordance with its terms. On the 22nd October 1864, Thomas Skinner executed a Will. In the next month, namely, November 1864, he died. Under his Will an important question to be immediately referred to arises as to what was the nature of the right conferred in the villages upon his son.

That son, Thomas Brown Skinner, had possession delivered to him in the year 1867 by the Court of Wards. At that time, the Board were informed that there was due on the mortgage for Rs. 50,000, granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him, and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties, therefor. In 1872, Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the rights under the mortgages both of the father, Thomas Skinner, in 1863, and of the son, Thomas Brown Skinner, in 1869 and 1872. Other transactions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, as all parties to the transactions appear to have acted, on the footing that he was the owner of his father Thomas Skinner's estate in the villages, and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand?

This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's Will of 1864. They are in these terms:

"(4) That my private *zemindari* presented to me by Government as a reward for services rendered during the Rebellion of 1857, as well as all villages, houses, and other property added by me from time to time to the original grant may, at my demise, descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance.

"(5). In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private *zemindari*, etc., shall descend to my next male heir, and should all my sons die without lawful male children, the *zemindari* etc., shall descend to my female children, or, in event of their death, to the female children born in wedlock of my sons in succession."

It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was, at the date of his father's death, about fourteen years of age) took in absolute estate as contradistinguished from an estate for his life. Reference is made to the Succession Act, section 84, which provides that "where property is bequeathed to a per-

son, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the Will" and one of the illustrations in the section is specially founded upon, namely, "to *A.* and the heirs male of his body." The Act was passed in the year 1865. By section 331 of the Act it is enacted that "the provisions of this Act shall not apply . . . to any Will made or any intestacy occurring before the first day of January 1866." But, as stated, Thomas Skinner the testator died in 1864. It is contended, however, that, although this may be so, yet, according to the law of India, prior to the enactment of that Act, a destination to "Thomas Brown Skinner and to his lawful male children according to the law of inheritance" was, in point of fact, an effective form of conveyance of no less than absolute ownership.

In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following the words quoted there occur these: "In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private *zemindari*, etc., shall descend to my next male heir." The argument of Richard Ross Skinner, who, in point of fact, was the next male heir, is that his brother, Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination, it is found that the appellant is not entitled himself, if his own argument be sound, to the position of absolute owner, for the destination continues: "And should all my sons die without lawful male children the *zemindari*, etc., shall descend to my female children, or, in the event of their death, to the female children, born in wedlock of my sons in succession." His learned Counsel accordingly conceded that the appellant is, as was his brother before him, only a tenant for life. The event has not yet been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will, it is argued, take place.

The question is full of embarrassment and difficulty. It is, no doubt, a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner; but—for this temptation must be put aside—the only question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adopted, to create by his Will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow* v. *Orde* (1), (in which, it may be observed, the history of the Skinner family is referred to in a judgment of Lord Westbury), it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity—must not be allowed to govern the interpretation of Thomas Skinner's Will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to "justice, equity and good conscience."

So looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude would be to affirm that the former a month before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the detailed regulations for successive enjoyment and descent were entirely in place; they were natural and necessary. There are considerations either way; but it seems to their Lordships a more likely and more reasonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son, and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his property. In their Lordships' opinion, accordingly, the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any estate exceeding the tenancy for life of which Thomas Brown Skinner was possessed. The appellant, accordingly as the next male heir, is entitled to the enjoyment of this estate for life, as of an estate out of the corpus of which no rights could issue which proceeded from Thomas Brown Skinner, and that the respondents, in so far as they represent such rights and the succession thereto, have no title to interfere with his entry into possession.

But the case, in their Lordships' view, stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellant's brother, but by the appellant's father, Thomas Skinner. With regard to the appellant's brother, it is decided by this judgment that the estate which he possessed was that of a tenant for life, and that mortgages proceeding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession, he granted mortgages in renewal of those granted by his father and then outstanding, the rights of the mortgages could not in justice or equity be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply, what certainly never was the intention of any of the parties to the transaction, that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upon the radical right.

Their Lordships, accordingly, have little difficulty in holding that such a result must be avoided, that full effect must be given to the mortgages granted by Thomas Skinner, and that the appellant can only enter upon possession of his rights *qua* tenant for life of these villages now after satisfying the mortgage debts of his father upon the estate. Their Lordships are glad to observe that the substance of this equity is fully recognised in the judgment appealed from. They express no surprise, looking to the state of the pleadings, and particularly to the unqualified nature of the demand made in the plaint, that these learned Judges should have dismissed the same *simpliciter*, and they view the judgment of the High Court as meant to leave open the determination of the rights of the mortgagees of Thomas Skinner and their successors in some further suit or suits.

Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigations to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage-deeds granted by Thomas Skinner. Should this condition be not, within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

Had the condition of a grant of possession which was conceded at their Lordships' Bar been made upon the plaint or the pleadings in the Court below, the whole of this protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's Will.

In their Lordships' opinion, accordingly justice to the parties will be most nearly approached if the appellant make payment to the respondents of the costs of the proceedings in both Courts of India, and if, in regard to the appeal before this Board, neither party be found entitled to costs. Their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed, that the causes should be remitted to the High Court to be dealt with upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors, that upon these payments being made and that within such reasonable time as shall be fixed in the Court below, a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.

Solicitors for the Appellant, Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: *India Office*, Messrs. *Barrow, Rogers* and *Nevill*, Messrs. *P. Dalgado*, and *T. C. Summerhays & Sons.*

DEBI PROSAD CHOWDHRY *v.* GOLAP BHAGAT.

CALCUTTA HIGH COURT.
FULL BENCH.
REGULAR CIVIL APPEAL NO. 153 OF 1908.
April 1, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Richard Harington, Bart., Mr. Justice Stephen, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

DEBI PROSAD CHOWDHRY—
PLAINTIFF—APPELLANT
versus
GOLAP BHAGAT—DEFENDANT—
RESPONDENT.

Hindu Law—Widow—Alienation—Mortgage—Portion of husband's estate—Mortgage with consent of next reversionary heir—Without proof of legal necessity or reasonable inquiry and honest belief on mortgagee's part—Validity—Whether binding on actual reversioner—Presumption of validity—Rebuttable by more cogent proof.

The alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence on the part of the mortgagee, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof.

Reference to the Full Bench by Mr. Justice Stephen and Mr. Justice D. Chatterjee with the following

ORDER OF REFERENCE.

STEPHEN, J.—This suit was brought by the appellant to recover possession of certain *mauzas* as the heir of one Shib Nag Chandi, who became entitled to them after the death of Shib Nag's widow Rani Radha Chowdhurani. The case came before us on second appeal and it was not disputed that the appellant is Shib Nag's heir, and the only question that has been argued is whether his claim is subject to a usufructuary mortgage executed by the widow in favour of defendant No. 2 on the 23rd *Bhadro* 1293 to secure a loan of Rs. 7,000. It is contended by the defendant that this mortgage is valid as against the plaintiff because it was made for legal necessity and because it was consented to by a man named Harbans Tewary, the son of a daughter of Shib Nag, who was at the time Shib Nag's heir and, therefore, entitled to the mortgage property after the widow's death. The lower Court has found both points in the defendant's favour and has dismissed the suit.

On the first point we cannot agree with the lower Court. According to the recitals in the bond the Rs. 7,000 was borrowed to pay off debts to four men, Surja Narain, Panna Lal, Shib Nath and the defendant. Evidence is produced to show that these debts existed and were for the most part eventually paid, but there is none to show that they were incurred for any purpose that can be considered a legal necessity. As regards the debts to the defendant we have recitals in a mortgage to Surja Narain Singh, that money was required for the payment of Government revenue, the expenses of Harbans' marriage and the performance of a religious ceremony. As regards the debt due to Shib Nath we have practically no evidence at all. This discloses no evidence of legal necessity in respect of either of these debts, and very little reliance is placed by the respondent on the debts due to either of these men. As regards the debts due to Surja Narain and Panna Lal the case is rather strong, because the plaintiff eventually paid off the balance of their debts. The circumstances of this payment, however, do not appear from the record and there is nothing to show that the plaintiff's statement that he paid only to avoid litigation is incorrect, we consequently, cannot find that he is estopped from questioning the legal necessity of the expenses for which the debts, which he partly paid off, were incurred. The only evidence that we have as to the circumstances of the widow at the time she executed the bond on which reliance is placed, goes to show that in 1312 the income of the estate was something like Rs. 20,000 a year which does not help the defendant. On the evidence relating to the existence of necessity, apart from Harbans' conduct, we are of opinion, therefore, that it is not proved that the bond relied on in this case was executed for any purpose of legal necessity.

On the second point the facts are simple. The mortgage is a usufructuary mortgage. It is signed by the widow and witnessed by Harbans, who adds, "I accept this document." Had Harbans survived the widow he would, in any event, have become exclusively entitled to the property which was the subject-matter of the mortgage. He managed the widow's affairs at the time of the mortgage, and had

witnessed certainly two other similar documents and expressed himself as accepting and consenting to one of them. The present defendant is not his heir.

Under these circumstances the appellant before us, the plaintiff in the suit, has argued that whatever may be the law as to an alienation of the whole of a widow's interest in her estate with the consent of the reversioner, it does not apply to alienation by way of mortgage and he relies on the decision of *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (1) to support his contention. In that case, which is not distinguishable on the facts from the present, Doss, J., says "I think that the doctrine of surrender, upon which the validity of a sale, out and out, of the whole or any portion of the inheritance, with the consent of all the immediate reversioners is based cannot legitimately be extended to the case of a mortgage where *ex-hypothese*, the widow still retains the ownership of the estate though subject to the liability created by the mortgage". As I am unable to accept this holding as a correct exposition of the law applicable to the case, I will notice briefly the state of the law at the time of that decision. For present purposes it is not necessary to go further back than the decision of a Full Bench of this Court in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2), where it was decided that a Hindu widow could relinquish her estate to the next male heir of her husband, she could, therefore, alienate it merely with his consent and without any legal necessity. Some Judges of the Court expressed a doubt as to the consonance of this decision with sound principles of Hindu Law but felt themselves constrained to come to the conclusion they did by a long course of decided cases. Much the same position was adopted in *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (3), where the power of a widow to alienate, as distinguished from relinquishing her estate, is referred to authority rather than principle. The matter has been recently considered by the Privy Council in the case of *Bajrangi Singh* v. *Monikarnika Bakhsh Singh* (4), where the decisions in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) and subsequent cases were considered and the decision in the former was left undisturbed.

There is thus no doubt as to the power of a widow to alienate the whole of her interest in her husband's estate with the consent of the reversioner. The question is whether she can alienate a portion of her interest in the same way. It has been decided that she may alienate the whole of her interest in a portion of the estate: see *Pulin Chandra Mandal* v. *Balai Mandal* (5) and the cases there quoted. This impinges to some extent on the theory suggested in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) that the relinquishment by the widow makes alienation possible because it produces effects similar to those which would follow on the death of the widow, and suggests that she may be competent to alienate part of her interest in the whole. In *Shanker Nath Mukherji* v. *Bejoy Gopal Mukherji* (6), it was held that a lease by a Hindu widow for 60 years, which was ratified by the next reversioners, was valid, which does not seem as if her power of alienation depended on her surrender of her life-estate.

On the other hand, it was laid down by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (7) that in order for a widow to accelerate the estate of an heir "it was essentially necessary" that she should "withdraw her own life-estate, so that the whole estate should get vested at once in the grantee." This would seem to make an alienation by way of mortgage invalid but in that case the effect of the alienation was to leave the management of certain ceremonies in the hands of the heir while the widow retained her life-estate and the necessity for the removal of the life-estate was based on the desirability of a check on the frequency of such conveyances. The words, therefore, as to the withdrawal of the whole of the life-estate should perhaps not be read as being of general application and the case may be considered as deciding no more than that the widow's alienation is invalid if it is illusory, as was the case as regards a moiety of the estate alienated

(1) 1 Ind. Cas. 434; 13 C. W. N. 544; 9 C. L. J. 453.
(2) 10 C. 1102.
(3) 22 C. 354.
(4) 12 C. W. N. 74; 3 M. L. T. 1 (P. C.); 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 30 A. 1; 35 I.A. 1; 17 M. L. J. 605.
(5) 35 C. 939; 12 C. W. N. 837; 8 C. L. J. 280.
(6) 4 Ind. Cas. 513; 13 C. W. N. 201; 8 C. L. J. 458.
(7) 19 C. 236; 19 I. A. 30.

in *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (3).

In this state of the authorities I cannot consider that the doctrine of surrender or relinquishment has been recognised as so completely the basis of the validity of an out and out sale by a widow with the reversioner's consent as to justify the conclusion that an alienation by mortgage with the same consent is invalid. It is for this reason that I entertain the doubts as to the correctness of the decision in *Hari Kissen Bhagat's* case (1) that I have mentioned. But I may also add that that decision was based on the decision of the Privy Council in *Sham Sundar Lal* v. *Achhan Kunwar* (8) in commenting on which Doss, J., says—"This decision clearly shows that where a Hindu widow borrows money on mortgage of her husband's estate, though the transaction may be concurred in, or consented to, by the next reversioner, such consent or concurrence cannot have the effect of conferring on the deed a larger operation than a mortgage of the limited interest only". I cannot agree in this view of the effect of the decision, as the Privy Council expressly hold that there was no such consent by the kindred of the widow as would raise a presumption that the transaction was a fair one, or one justified by Hindu Law, and they then point out what kind of consent would be necessary to validate the mortgage bonds in question.

Under these circumstances we refer the following question to the Full Bench.

Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?

If the question is answered in the affirmative this appeal is dismissed with costs. If it is answered in the negative, the appeal is allowed, the decree of the lower Court is set aside, the suit is decreed in favour of the plaintiff as far as the three *mauzas* are concerned, and the plaintiff is entitled to his costs in this Court and the Court below.

(8) 25 I. A. 183; 2 C. W. N. 729; 21 A. 71.

CHATTERJEE, J.—I agree with my learned brother in holding that no legal necessity has been proved in this case.

The next question that arises is whether the mortgage by Rani Radha Chowdhurani with the consent and co-operation of Harbans, the then next reversioner is binding upon the plaintiff who is not the heir of Harbans. This question has been decided in favour of the appellant in the case of *Hari Kissen Bhagat* v. *Barang Sahai Singh* (1). It is contended, however, by the learned Vakil for the respondent, *first* that the said case is distinguishable from the present and *secondly* that it is not correct. The distinction pointed out is that in that case the next reversioner merely attested the deed as a witness whereas in this case he has accepted the deed. I do not think that the distinction is material the object in both cases being the same that of having the approval of the next reversioner. The objection to the correctness of the ruling, however, seems to be substantial. Mr. Justice Doss, who delivered the main judgment in the case first, says that even if the attestation by the then reversioner could be construed as an assent to the transaction "that consent by itself would not be sufficient to establish the existence of legal necessity" and he relies on the case of *Bepin Behary Kundu* v. *Durga Charan Bandopadhya* (9). That was, however, a case in which the next reversioner who gave the assent was a female and Mr. Justice Doss who was a party to that case said: "The result, no doubt, would have been different, if the next reversionary heirs had not been females but males etc." The learned Judge then refers to the case of *Sham Sunder Lal* v. *Achhan Kunwar* (8) and says:—"This decision clearly shows that where a Hindu widow borrows money on mortgage of her husband's estate, though the transaction may be concurred in or consented to by the next reversioner such consent or concurrence cannot have the effect of conferring on the deed a larger operation than a mortgage of the limited interest only." I do not, however, understand the judgment of their Lordships to lay down that rule. Their Lordships say:—"It is not a case in which all the kindreds of Khairati have assented or could assent to the bonds or either of them, and the circumstances are not such as to raise any

(9) 12 C. W. N. 914; 8 C. L. J. 120.

presumption from such concurrence as there was . . . . that the transaction was a fair one or one justified by Hindu Law. In order to raise such a presumption the consent . . . . must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect." Their Lordships then show that there was no such consent as both Achhan Koer and Enayet Singh were under the influence of Lalji Singh. Then the learned Judge says:— "I think that the doctrine of surrender upon which the validity of a sale, out and out, of the whole or any portion of the inheritance, with the consent of all the immediate reversioners is based, cannot legitimately be extended to the case of a mortgage etc." and quotes the case of *Bajrangi Singh* v. *Manokarnika Baksh Singh* (4). In that case the widow had sold the property of her deceased husband piecemeal to her son-in-law and the presumptive reversioners subsequently executed deeds one after another ratifying the sales. Their Lordships reviewed the several cases decided on the point and came to the conclusion that the consent of the whole body of persons, constituting the next reversioner, although subsequently given and not simultaneously was sufficient for the validation of the alienation made by the widow. The first case considered was that of *The Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (10). That case decided that "it may be taken as established that an alienation by her (the widow), which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred." The case of *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (11) decided that the consent must generally be by all those who are likely to be interested in disputing the transaction and that at all events there must be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law. Their Lordships then refer to the decision of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (12) which held that the presumptive reversioner could not by joining with the widow defeat the rights of the actual reversioner. Then their Lordships refer to the Full Bench case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2). The ground of decision, as put by Sir Richard Garth, C. J., is then set out "if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make" and as set out by Mr. Justice Mitra "but, if the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as a logical consequence, that she can alienate it merely with his consent without any legal necessity." This view is then shown to have been adopted by the Madras High Court in the case of *Marudamutha Nadan* v. *Srinivasa Pillai* (13). The Bombay view is then set out in the words of Jenkins, C. J., and Ranade, J., that "the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity"* and "the consent of the reversioners must be of such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one."* Their Lordships ultimately disapprove of the Allahabad view and agree with the view of the Calcutta High Court, *Radha Shyam Sircar* v. *Joy Ram* (14). It can hardly be said that their Lordships base their judgment on the so-called surrender theory. On the other hand their Lordships seem to place more reliance on the presumption of necessity from the consent of persons interested for the time being in impeaching the alienation. The matter was considered by Norris and Banerjee, JJ. in the case of *Hem Chundra Sanyal* v. *Sarnamoyi Debi* (3). Tho learned Judges first refer to the express provisions of the Dayabhaga in favour of an alienation in favour of certain relations: Dayabhaga Chapter XI, section 164. "In the disposal of property by gift or otherwise she is subject to the control of her husband's family." The word 'Damadi' in the text literally means gift and the like and must, therefore, include sale and mortgage. (See

(10) 8 M. I. A. 529; 2 W. R. (P.C.) 61; 19 Eng. Rep. 631.

(11) 12 W. R. 47 (P. C.); 3 B. L. R. 57 (P. C.); 13 M. I. A 209; 20 Eng. Rep. 529.

(12) 6 A. 116; A. W. N. (1883) 243.

(13) 21 M. 128; 8 M. L. J. 69.

(14) 17 C. 896.

*See *Vinayak* v. *Govind*, 25 B. 129 at p. 133 and at p. 140.—*Ed.*

G. Sastri's Hindu Law 448), and then continue, "The text of the Dayabhaga referred to above evidently formed the basis of the earlier decisions upholding the Hindu widow's alienations with the consent of the reversioners. See *Jalomoney Dabee* v. *Saroda Prosonno Mukerjee* (15)," and then referring to the Full Bench case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) they say that the real ground of the Full Bench decision was that it would be wrong to upset a long course of decisions. It seems that the relinquishment theory was relied upon not as the basis of the decision but as an illustration of the higher powers of the Hindu widow which logically led to the inference that she could sell with the consent of the reversioners. After *Bajranghi's* case (4), it was held, in the case of *Pulin Chandra Mandal* v. *Balai Mandal* (5), that the alienation of a portion of her husband's estate by a Hindu widow with the consent of the next reversioner is valid. In the case of *Shanker Nath Mukherjee* v. *Bejoy Gopal Mukherjee* (6), it was held that a lease for 60 years by a Hindu widow which was ratified by the next reversioners was valid. If the so-called surrender theory was the basis of the rulings on the subject, alienation of a part of the estate of her husband by a widow would not be valid nor would a lease lasting beyond her life. It is true that if there is a "surrender" or, more correctly "relinquishment" it must be of the whole. See *Behari Lal* v. *Madho Lal Ahir Gayawal* (7), but the validity of an alienation is founded on a different principle of Hindu Law. In this view of the law I cannot agree with the view expressed in the case of *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (1) and agree in making this reference.

Mr. *S. P. Sinha*, Babus *Dwarka Nath Chakravarti* and *Biraj Mohan Majumdar*, for the Appellant.

Dr. *Rash Behary Ghose*, Babus *Uma Kali Mukherjee*, *Mohendra Nath Roy*, *Upendra Nath Chatterjee* and *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—The question submitted for the determination of this Full Bench is in these terms:

"Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity but with the consent of the next reversioner for the time being valid and binding on the actual reversioner who is not the heir of the consenting reversioner ?."

The husband in this case died without male issue and the widow became, and at the date of the alienation still was, his heir. A widow's power of alienation for purely worldly purposes over her sonless husband's estate has been a constant theme of discussion and in some respects it has been placed beyond the possibility of further argument.

Thus it may be taken as settled beyond dispute that she can alienate for legal necessity either the whole or a part of her deceased husband's estate and that even in the absence of such necessity the alienee's title will prevail if he made reasonable inquiry and acted in the honest belief that such necessity existed. But the problem how far apart from this she can alienate merely with the consent of her husband's kindred is beset with difficulty.

A multitude of authorities bearing on this point has been cited to us; and though I have considered them all, I propose to refer only to a few in expressing my opinion on the question submitted for our determination. In 1826 a Hindu widow's position was considered by the Privy Council and Lord Gifford in delivering their Lordships' opinion said of her, "she is entitled to the possession of the property but that she is only entitled to enjoy it according to the rights of a Hindu widow which it appears to me to be absolutely impossible to define. I mean the extent and limit of her power of disposing of it; because it must depend upon the circumstances of that disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition" [*Kashinath Basak* v. *Harasundarri Dasi* (16).] In *The Collector of Masulipatam* v. *Cavaly Vencata Narasnapah* (10), decided in 1861, it was said at page 551 of a Hindu widow that "For religious or charitable purposes, or those which are supposed to conduce to the

(15) 1 Boulnois. 121.

(16) 2 Shama Charn's Vyavastha Darpana p. 41.

spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely wordly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred.....The exception in favour of alienation with consent may be due to a presumption of law that, where that consent is given, the purpose for which the alienation is made must be proper". The case of *Raj Lukhee Dabee* v. *Gokool Chunder Chowdhry* (11) came before the Privy Council in 1869 on appeal from the High Court at Fort William in Bengal. The transaction in controversy was a sale by a widow, the deed of conveyance being executed by her and attested by one Juggut Ram. The High Court held that the consent of Juggut Ram unquestionably given at the time of the sale and against his own obvious interests was a very strong piece of evidence in favour of the purchaser as Juggut Ram was then the sole heir and reversioner and at the date of the sale was the person most likely to know the real state of the case and the urgent necessities of the widow. In delivering the opinion of the Privy Council Sir James Colvile, dealing with this question of consent said: "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *præsumptiones juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction". Their Lordships after expressing their inability to affirm that Juggut had concurred in the deed and their opinion that he was not proved to have been the next heir then proceeded as follows: —

"On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was in all probability, likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim.". Then after pointing out that no issue as to concurrence had been raised in the pleadings or in earlier stages of the cause they say: "The case of the party who sought to support the validity of this transaction was, that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a consent equivalent to such proof". In *Sham Sunder Lal* v. *Achhan Kunwar* (8) Lord Davey delivering their Lordships' opinion, says:—"To give validity to the bonds.....the plaintiff must show that there was legal necessity for raising the money by a charge on the estate or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindreds of Khairati have assented or could assent to the bonds or either of them, and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption from such concurrence as there was of Achhan Kunwar and Enayet Singh in the first bond or of Enayet Singh in the second bond that the transaction was a fair one or one justified by Hindu Law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect".

The law as enunciated by their Lordships in these cases is clear; the difficulty is occasioned by a decision of a Full Bench of this Court in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (2) where an answer in the affirmative was given to the question "whether according

to the law current in Bengal a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner, will conclude another person, not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property?"

This decision rests on the theory of an acceleration of the next heir's interest occasioned by the widow's relinquishment in his favour.

The reasoning in effect is this:—it is only the widow's interest that stands in the way of the next heir's succession; that obstacle is removed by the determination of the widow's interest, that determination can be effected by her death civil or natural, by disclaimer at the husband's death and so by relinquishment later.

In English law it is true a disclaimer by an heir will have no effect, all he can do is to dispose of his property by an ordinary conveyance, but *Nobokishore's* case (2) lays down different rule at any rate for a Hindu widow.

But as there cannot be a disclaimer of a part so the relinquishment must be of the whole, for it is only by a total relinquishment that the condition of heirship can be determined. [*Moazam Hussain Chawdhury* v. *Bhouddin* (17).] It was suggested by the respondent that in *Nobokishore's* case (2) the dealing was with a part of the property and, as supporting this, reliance was placed on the language of Banerjee, J., in a later case.

But there is nothing in the report of *Nobokishore's* case (2) that supports this view and an examination of the original record in no way helps the respondent's contention. Moreover, it is opposed to the line of reasoning on which the decision rests. This view is in accord with the language of the Privy Council in *Behuri Lal* v. *Madho Lal Ahir Gayawal* (7), where it was said in an appeal from Bengal: "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances." Starting then from the established position that the next heir's succession can be accelerated by relinquishment it was determined in *Nobokishore's* case (2), as a logical consequence, that the widow with the next heir's consent could alienate without any necessity.

But if logic is to have any place the alienation so sanctioned must be of the husband's entire estate. How far it can be said that the doctrine of acceleration consequent on relinquishment applies where the widow retains an interest in the purchase price or the sale is little more than a change of investment, it is difficult to say; the cases do not refer to this: The road to the decision in *Nobokishore's* case (2) was not without its difficulties but the learned Judges felt it had to be travelled that titles might be quieted. But it is settled that there should be no extension of this Bengal doctrine. *Bajrangi Singh* v. *Manokarnika Baksh Singh* (4).

Much reliance has been placed on this last decision of the Privy Council by the respondent in the argument before us and Dr. Rash Behary Ghose has even contended that it is conclusive in his favour. There by successive instruments a widow purported to transfer for valuable consideration to her son-in-law the whole estate of her deceased husband whose heir she was. Subsequently the consent of the nearest reversionary heirs was obtained but they predeceased the widow. This consent took the form of a relinquishment embodied in two deeds. The transaction was impugned by those who at the widow's death were the next heirs and the question raised was whether the "deeds confirming the sales by the widow to Maheshwar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute were binding on their descendants, the appellants who were the nearest reversioners at the time when the succession opened at the widow's death." [See *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4)]. No new principle was formulated; that already established by prior decisions was applied to a novel set of facts.

The judgment, after stating that the principle is admitted, points out that the only question remaining for determination was the quantum of consent necessary. On

(17) 5 C. W. N. 189.

this the stricter doctrine of Allahabad was rejected in favour of the more tolerant view that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, though there might be cases in which special circumstances might render the strict enforcement of this rule impossible.

At the same time it was distinctly said that their Lordships would be unwilling to extend the widow's power of alienation beyond its present limits.

The result then of the authorities binding on us appears to me to be this :—

To uphold an alienation by a widow of her deceased husband's estate, where she is his heir, it should be shown (1) that there was legal necessity, or (2) that the alienee, after reasonable inquiry as to the necessity, acted honestly in the belief that it existed, or (3) that there was such consent of the next heirs as would raise a presumption either of the existence of the necessity or of reasonable inquiry and honest belief as to its existence, or (4) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's interest and the consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established the alienation may be of the whole or any part of the husband's estate but where the 4th alone is proved there the alienation must be of the whole.

Here the alienation is only of a part of the husband's estate and that by way of mortgage so that the 4th position cannot apply. I would, therefore, answer the question propounded by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof.

The case must be returned to the Division Bench for disposal in accordance with this answer to the reference.

HARINGTON, J.—The question in this reference is :—

"Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity but with the consent of the next reversioner for the time being valid and binding on the next reversioner who is not the heir of the consenting reversioner ?"

The question whether the widow can dispose of the whole of the estate of her deceased husband with the consent of the next reversioner for the time being must be regarded as having been settled as far back as 1884 by a Full Bench of this Court in the case of *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (2).

But in that case the decision does not appear to be based on any principle of Hindu Law; it rather proceeds on the ground that there had been a long series of decisions affirming this proposition and that many sales had taken place and titles had been accepted on the faith of these decisions which it would be unjust to disturb. And although the Chief Justice describes the transaction as a relinquishment rather than a surrender—the decision can hardly be placed on that ground. No doubt, when a woman becomes incapable of holding property by physical death or by entering a religious order she relinquishes her husband's estate, this can hardly be said to be the case when she converts his estate into money and continues in the enjoyment of it in another form.

The views of the various High Courts in India on the question of alienations by a widow were considered by the Judicial Committee in 1907 in the case of *Bajrangi Singh* v. *Monokarnika Bakhsh Singh* (4), in which, without pronouncing an opinion as to the grounds on which the principle is to be placed their Lordships say the principle being admitted by the High Courts in India the quantum of consent has to be considered.

The result of these two decisions, which are both binding on us, is to establish that a widow can without proof of legal necessity alienate the whole of her husband's estate with the consent of the then next reversioner, but they leave the principle on which such alienations are to be supported open, the Full Bench being decided on the

ground that it would be unjust to disturb what had been settled by a long series of decisions while the Judicial Committee affirm that the principle is admitted but do not say on what ground it is to be taken as established.

It is contended by the appellant that the widow's power to make a title to a portion of her husband's estate cannot be placed on the ground that she has a power to relinquish, but that to justify a sale or mortgage of a portion of the estate there must be legal necessity and that the consent of the then reversioner is, at its highest, only evidence that legal necessity existed or, at any rate, that the transaction was a proper one while for the respondent it is contended that the widow and the reversioner for the time being represent the estate and are able to make a good title to the whole or any part of it or to mortgage it in any part of it so as to bind those who happen to be the heirs of the deceased husband at the widow's death.

The former view is supported by the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (7) which was decided by the Privy Council in 1891. This was, however, a case of a peculiar character. The widow did not convey out and out to the next reversionary heir but gave the estate to him subject to her having the estate for life. Before the widow died another reversionary heir had come into existence and it was held that the *ekrarnama* executed by the widow could not operate to defeat that reversioner.

But the conveyance passed no estate in possession at the time it was executed. It was not to affect the possession of the property until after the widow's death. This might well be said not to be a conveyance of the estate to the then next reversioner for it was a conveyance to a person who might or might not be next reversioner at the time when the property passed under the conveyance.

The Privy Council lay down that it was essentially necessary that the widow should withdraw her whole life estate so that the whole estate should get vested in the grantee and say that this will be a practical check on the frequency of such conveyances. It is not quite clear, I think, whether their Lordships meant by the words "whole estate" every *bigah* of land of which the estate consisted or whether they meant the absolute estate as contrasted with an estate subject to a preceding life-interest. For the purposes of the judgment the latter proposition was necessary, not the former.

I do not think that this case can be regarded as affording an answer in the negative to the question submitted to us. If the words "whole estate" mean every foot of land then the case would afford an answer to the question but I think that the words "whole estate" refer to the nature of the estate in the property conveyed and that the case does not afford an answer to the question before us.

It is, however, inconsistent with the proposition that the widow and the next reversioner completely represent the estate and are able to make such disposition of it as they choose if they could they would be able to make the disposition which the Privy Council have held cannot be made, and it is an authority for the proposition that a widow cannot even with the consent of the next reversioner retain possession of the estate and make a disposition of it to take effect at a future time.

We are led, therefore, to the proposition that a widow can alienate with the consent of the next reversioner but such an alienation must be complete and effective, *i. e*, she must not retain possession of the property.

The question of difficulty is to say on what principle of law is this power in the widow to be supported. Is it on the ground that she can relinquish in favour of a reversioner or on the ground that the consent of the reversioner is evidence that she is acting within her powers in alienating the estate?

The instances given of relinquishment are those in which the widow does something which destroys her capacity for holding property such as incurring a voluntary death or entering a religious order. I think if relinquishment is to be taken in its strict sense it would involve something which rendered the widow no longer capable of being her husband's heir. It is true nevertheless that the texts recognise gifts by the widow of a portion of the estate to her husband's kindred as meritorious.

She appears, therefore, to have had a power of alienating portions of the estate while she still filled the position of being the possessor

of the estate but these powers, whether of relinquishing the whole estate by entering a religious order or alienating part by giving it to her husband's kindred, only enabled to benefit the heirs of her husband and did not enable her to get any advantage for herself.

I do not think, therefore, that her power to alienate for valuable consideration can be placed on either of these grounds for I think that when a widow converts her husband's property into money and enjoys that, she cannot be said to relinquish it nor can she be said to make a gift when she receives valuable consideration for the conveyance.

Is it then to be taken that the consent of the next reversioners is evidence of the propriety of the transaction? If it be taken merely as evidence then it is open to be rebutted and it can be shown that there was in fact no legal necessity for the conveyance; if, on the other hand, it is conclusive evidence then it affords an answer to the question.

It is clear that a widow for her religious or charitable purposes or for those which were supposed to conduce to the spiritual welfare of her husband or under pressure of legal necessity is entitled to sell or mortgage the whole or any portion of her husband's estate.

The transaction, therefore, was not one which lay wholly outside the power of the widow, she might dealwith the estate under certain circumstances, and if the consent is to be taken as conclusive evidence that those circumstances exist, there is an end of the question.

In the case of *Kalee Mohun Deb Roy* v. *Dhununjoy Shaha* (18), decided in 1866, the consent of the then next reversioner was treated as evidence of the existence of legal necessity. The Judges do not say it was conclusive evidence, they say it gives rise to a strong presumption that such necessity existed in the absence of evidence of the want of legal necessity.

The case of *Pulin Chandra Mandal* v. *Balai Mandal* (5), decided in 1903, goes so far as to affirm the proposition that an alienation of a portion of the husband's estate by the widow is valid, even though there is no legal necessity, if made with the consent of the then reversioner. This case goes further than the case of *Hem Chunder* v. *Sarnamoyi Debi* (3), decided in 1894, in which it is laid down that the widow may convey to the next reversioner or to a third party with the consent of the next reversioner the whole or any portion of the estate and the transferee will acquire an absolute interest. The Judges, however, after discussing the texts and the cases say that they are not prepared to hold that the widow and next reversioner are competent to deal with the property so as to convert the widow's estate (the property remaining in her) into an absolute estate.

The former of these two cases supports the proposition contended for by the respondent but on the question whether the alienation would be held to be good, even if it were established that no legal necessity existed, the case of *Pulin Chandra Mandal* v. *Balai Mandal* (5) is inconsistent with the earlier case of *Kalee Mohun Deb* v. *Dhununjoy Shaha* (18), and, moreover, it lays down what is not consistent with the judgments of the Privy Council. In *Rajlukhee Debia* v. *Gokool Chandra Chowdhry* (11), their Lordships say in reference to the effect of the consent of the husband's kindred: "there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one"; and while saying it is not a *præsumptiones juris et de jure* they say: "It is, no doubt, an element to be taken into consideration and deserving of considerable weight in the estimation of all the evidence of the transaction."

I think that the conclusion to be drawn from the cases is to show that the widow with the consent of the then next reversioner has the power of making an alienation of the whole or any portion of her deceased husband's estate but that the power is limited to this extent that no act done by the widow with the concurrence of the then next reversioner or by the then next reversioner can have the effect as against the actual reversioner of giving the widow a greater estate in the property than she has under the Hindu Law, see *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (3). The widow and next reversioner are not, therefore, enabled jointly to deal with the estate as though their joint power was equivalent to that of an absolute owner.

(18) 6 W. R. 51.

DEBI PROSAD CHOWDHRY *v.* GOLAP BHAGAT.

I think the principle on which an alienation by the widow with the consent of the next reversioner is to be supported is that it raises a strong presumption that at the time of the alienation the persons then interested in preventing the alienation were unable to dispute its propriety or, in other words, that circumstances existed which enabled the widow in accordance with the rules of Hindu Law to alienate the estate so as to destroy the interest which might in future descend on the next reversioners as heirs to her deceased husband. The presumption is a very strong one: and though not absolutely irrebuttable, evidence to rebut it would not affect the validity of the transactions if it were established that the mortgagee or purchaser had given valuable consideration and had acted *bona fide* believing on the faith of such consent that circumstances justifying the alienation existed. I would, therefore, answer the question submitted to us in the terms which have been proposed by my Lord.

STEPHEN, J.—In answering the question referred to us, we have to deal with only one of the two methods by which a Hindu widow can alienate the property of her deceased husband in which she has inherited an estate. For present purposes, it may be taken for granted that her alienation of the whole or part of it, can be supported by proof that it was necessary or, what is practically the same thing, for the purpose of benefiting her husband's kindred in one of the limited number of ways prescribed in the Hindu texts with which we are not immediately concerned. Furthermore, proof of due inquiry by the purchaser into the necessity of the alienation leading to an honest belief on his part that necessity existed, is taken to be a proof of necessity as far as he is concerned.

Taking this to be so, the question to be decided is, what is the effect of the consent to the alienation of the next heir to the deceased husband for the time being? And, on a review of the authorities, that have been quoted to us, by which we are bound, the answer seems to me as follows. In the first place, there is no doubt that the consent of the kindred, not necessarily the next heir, of the deceased husband to alienation by a Hindu widow, is evidence that "the transaction was a fair one, and one justified by Hindu law;" but it seems that the effect of such concurrence is at most to raise a presumption, *Rajlakhee Debia* v. *Gokul Chandra Chowdhry* (11). Even for this purpose the consent of all the kindred is necessary and the circumstances of the concurrence of any of them must be considered. *Sham Sunlar Lal* v. *Achhan Kunwar* (8). "Ordinarily the consent of the whole body of persons constituting the next reversion should be obatined, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible". *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4). I feel some difficulty in appreciating the full scope of this rule; but I have no doubt that it applies to a case when the consent of a reversioner is relied on as affording evidence of the necessity of an alienation. On principle and on authority, these rules apply where the alienation is of the whole or a part of the widow's estate.

In the second place, consent to the widow's alienation has an effect on that alienation in cases where the widow may be supposed to have relinquished her rights over her deceased husband's property. That a Hindu widow can cede and relinquish her rights in favour of the reversioner is clearly laid down by Romesh Chunder Mitter, J., in *Gunga Pershad Kur* v. *Shumbhoonath Burman* (19), relying on the decision in *Jadomoney* v. *Saroda Prosonno Mukerjee* (15). The decision in this case was confirmed on a Letters Patent Appeal and its principle is recognised by the Privy Council in *Behari Lal* v. *Madho Lal* (7), where it is said that "the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate," but it is "essentially necessary," for her "to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee." The principle is also recognised by a decision of a Full Bench of this Court in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2), but a conclusion is drawn from it by which I conceive that we are bound, and which, in my opinion, carries the matter very much further. In that case, a widow sold to a stranger a share in a *taluk*, which I understand to have been treated as the whole of the property inherited by her from her

(19) 22 W. R. 393.

deceased husband. The reversioner then executed a separate document in which he assented to the conveyance by the widow, and covenanted for himself and his heirs that he would not lay claim to the property at any future time. The reversioner then predeceased the widow, and on her death the person who succeeded to the property was one who was not bound by the covenant of the previous reversioner. On these facts, Garth, C. J., after referring to the principle of relinquishment, points out "that it frequently happens that a widow, who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction," and thus the person who would be the next male heir to the deceased husband at the time of the widow's death is deprived of his right. He then goes on, "but if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the husband may thus agree to make." After quoting authorities, he goes on, "to allow the widow to relinquish her estate to the next male heir of her husband, is one thing, but to allow her to sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, so as to bar the rights of other heirs of her husband in the future, is another thing." He then concludes, on authority and on grounds of practical convenience, that it is impossible to hold that the widow may not sell the estate in the way described. Mitter, J., after pointing out that a widow can relinquish the whole of her estate to the next heir, adds:—"But if the wife is competent to relinquish her estate to the next male heir of her husband, it follows, as logical consequence, that she can alienate it merely with his consent without any legal necessity", referring to the decision of *Mohunt Kishen Geer* v. *Busgeet Roy* (20) to show that the one proposition follows as a logical consequence of the other.

This decision is based on the principle of relinquishment though that principle is not distinguished from or contrasted with the principle of consent being evidence of the propriety of the alienation, and, as I understand the matter, a sale by the widow with the consent of the reversioner is held, on authority and for purposes of practical convenience, to be equivalent to a relinquishment by the widow in favour of the reversioner, and a conveyance by him.

The difference between a sale by the widow with the consent of the reversioner, and a sale by the reversioner after a relinquishment by the widow may be to some extent a matter of form, a view to which the Judges, who decided *Mohunt Kishen Geer's* case (20), seem to have inclined, but Garth, C. J., expressly contemplates a case in which the sale is not only formally, but actually, by the widow, because he supposes it to be made for the common benefit of the widow and the reversioner, and that they share in the profits of the transaction. A sale by which the widow receives the price of her husband's property does not seem to be a relinquishment, as that term is used in earlier cases and in the later case of *Behari Lal* v. *Madho Lal* (7), but then I read this case as extending the meaning of relinquishment so as to make it indistinguishable, as far as I am concerned, from alienation, and I find nothing in the later cases in the Privy Council overruling this construction. Personally I am fortified in this view by finding that Banerjee, J., in *Hem Chandra Sanyal* v. *Sarnamoyi Debi* (3), acquiesced in the decision in *Nobokishore's* case (2), however unwillingly he may have done so, and we are as much bound by it as he was.

On my view of the effect of the decision in this case, a difficulty arises as to whether the decision covers an alienation of a part as well as of the whole. In its terms, it seems not so, but in principle there is no reason why it should not, and the Court in *Hem Chunder Sanyal's* case (3) seems to have thought it did; on the other hand, the decision in *Behari Lal's* case (7), which was given after *Nobokishore's* case (2), though it does not notice it, and before *Hem Chunder Sanyal's* case (3), is unmistakeably clear as to the necessity for a relinquishment being of the whole property.

Under these circumstances I consider that the decision in *Nobokishore's* case (2) makes a sale by a Hindu widow of all her interests

(20) 14 W. R. 379.

in the property, that she has inherited from her husband, competent to pass an absolute title to the transferee, if it is made with the consent of the then heirs of her husband and it has not been suggested in this case that a mortgage is to be distinguished in this respect from a sale. How far this rule may extend, it is not necessary to consider exactly on the present occasion, though I think it may safely be said that it might lead us out of sight of our starting point in Hindu law. But I do not think we are bound to apply the rule in question to a case where, as in the one before us, only a portion of the property in which the widow is interested is affected by her action. In *Bajrangi Singh's* case (4), where the law laid down in *Nobokishore's* case (2), seems to be approved of, the widow executed successive transfers of all the property she inherited from her husband, she then died and subsequently persons, who in view of the judgment of the Privy Council must be taken to represent the reversioners at the time, ratified the widow's alienations. If we take this case to be decided on the theory of relinquishment as well as on that of necessity being presumed from consent, which I think we must, the ratification applies at least to a complete alienation, and the case is, therefore, no authority for extending the rule laid down in *Nobokishore's* case (2) to an alienation of a part. This follows from a consideration of the facts of the case but it is also to be observed that their Lordships do not consider that they are laying down any new principle, and express themselves as being "unwilling to extend the widow's power of alienation beyond its present limits." I, therefore, concur in the answer to the question before us suggested by the Chief Justice.

MOOKERJEE, J.—The question referred for decision to the Full Bench has been formulated as follows:—

"Is the alienation, by way of mortgage, by a Hindu widow of a portion of the estate of her husband without any proved legal necessity but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The texts relevant for the determination of this question are those of Katyayana, Vyasa, and Narada quoted by Jimutavahana in the Dayabhaga Chapter XI, section 1, paras. 56, 60, 64.

"Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."—Katayana.

"For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."—Mahabharata.

"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself, as well as in her maintenance, they have full power. But if the husband's family be extinct or contain no male or be helpless the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*."—Narada.

From these texts, Jimutavahana draws the inference that it is competent to the widow to enjoy the estate for life which goes upon the termination of her interest to the heirs of her husband, it is also competent to her to make a gift or sale for the obsequies of her husband and for other religious and charitable purposes she may also in case of necessity mortgage the property or sell or otherwise alienate it. We have consequently the principle that a widow can alienate the corpus of the property, inherited by her for purposes of necessity she can sell it or mortgage it and in certain cases she can even make a gift of a reasonable portion of it [*Collector of Masulipatam* v. *Cavaly Venkata Nrainapah* (10).] Upon this fundamental principle has been engrafted by judicial decisions, the equitable doctrine that a transferee is protected if he proves that he made proper and *bona fide* inquiries as to the actual existence of such alleged necessity and did all that was reasonable to satisfy himself as to the existence of such necessity [*Amarnath* v. *Achan Kuar* (21), *Bhagwat Dayal* v. *Debi Dayal* (22), *Hanoomanpersaud* v. *Munraj Koonweree* (23).] It is, therefore, firmly settled that a widow takes

(21) 19 I. A. 196; 14 A. 420.

(22) 35 I. A. 48; 35 C. 420; 12 C. W. N. 393 (P. C.); 10 Bom. L. R. 220; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49.

(23) 6 M. I. A. 393; 18 W. R. 81.

only a restricted estate in the property of her husband and that at her death it pases to the heirs of her husband except as to such portion as may have been alienated by her for legal necessity [*Kashinath* v. *Hara Sundari* (24)]; and it is beyond controversy that upon this point there is no difference between the Dayabhaga and the Mitakshara Schools of Hindu Law [*Keerut* v. *Koolahul* (25); *Collector of Masulipatim* v. *Cavaly Venkata* (10); *Thakoor Deyhee* v. *Rai Baluk Ram* (26); *Bhagwandeen* v. *Mayna Baee* (27).]

The question next arises whether, apart from legal necessity, a widow is competent to alienate the corpus of the property inherited by her with the consent of the then next reversioners so as to bind the person who turns out to be the actual reversioner at the time of her death. This question was answered in the affirmative by the Bengal Sudder Court in *Hem Chund* v. *Turamoni* (28); *Gokul Chand* v. *Rajrani* (29); *Bijya Dibeh* v. *Unnapurna* (30) and *Bindraban Chandra* v. *Bisheechand* (31). The reason for this conclusion does not appear to have been clearly formulated, even if appreciated in the earlier decisions. But reference is made in more than one place to the fact that according to the text of Narada, the relations of the husband are the natural guardians of the widow and they are not likely to consent to an alienation unless there is justifying necessity for it. In a very early case, however, *Mohan Lal* v. *Rani Siromani* (32), the question was pointedly raised as to who were the relations of the husband whose consent was essential to validate the alienation by the widow. It was ruled that an alienation by the widow to be valid must bear the assent of the next heirs and the paternal kindred of her husband and the same view was affirmed in *Rup Charan* v. *Anandlal* (33). The point arose for consideration before the Judicial Committee in *Rany Srimati Debi* v. *Rany Kund Luta* (34) but was not decided, though their Lordships referred without disapproval to *Mohan Lal* v. *Rani Siromani* (32), the decision wherein was stated to have been "founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line who, though they were not heirs, were guardians or protectors of the widow." A similar view was accepted by the Bengal Sudder Court in *Hafizunnisa* v. *Radha Binode* (35) [see also *Nund Kumar* v. *Rajendra* (36)] *Bhuwani* v. *Sulokhan* (37). This view, however, was repudiated by the Supreme Court in a case, decided shortly after *Jadumani Debi* v. *Saroda Prosad* (15), in which it was ruled that the reversioners whose consent was necessary to validate an alienation by the widow consisted of that class of persons only who would immediately succeed to the estate if the widow's interest was determined and did not include that wider class of persons who might by possibility become heirs on the happening of that event. Sir Charles Jackson, J., observed that where the widow's conveyance is executed with the consent of all the nearest heirs living at the time of conveyance and there are no other heirs of preferable or equal degree living at the decease of the widow, the whole estate in possession and the reversion has been sufficiently represented for the purpose of such conveyance and the conveyance itself is valid. The learned Judge referred to the note of Mr. Colebrooke to the case of *Mahoda* v. *Kuleani* (38), to the effect that a "widow's gift of the estate to the next heir is good in law as such a gift is a mere relinquishment of her temporary interest in favour of the next heir, it may, however, happen that the person who would have been entitled to take the inheritance at her decease might be different from the one who obtained it under gift or relinquishment to him as presumptive heir and if the title of that person be either preferable or equal it may invalidate such gift in whole or in part." Here we see the origin of what may be

(24) 1 Clarke R. & O. 91.
(25) 2 M. I. A. 331; 5 W. R. P. C. 131; 18 Eng. Rep. 325.
(26) 11 M. I. A. 139; 2 Ind. Jur. (N. S.) 106; 10 W. R. (P. C.) 3; 20 Eng. Rep. 54.
(27) 11 M. I. A. 487; 9 W. R. (P. C.) 23; 20 Eng. Rep. 184.
(28) 1 Mac. Sel. Rep. 481.
(29) 2 Mac. Sel. Rep. 213.
(30) 1 Mac. Sel. Rep. 215.
(31) 4 Mac. Sel Rep. 180.
(32) 2 Mac. Sel Rep. 40.
(33) 2 Mac. Sel. Rep. 45,
(34) 4 M. I. A. 292; 18 Eng. Rep. 710.
(35) (1856) Ben. Sad. D. A. R. 595.
(36) 1 Mac. Sel. Rep. 349.
(37) 1 Mac. Sel. Rep. 431.
(38) 1 Mac. Sel. Rep. 82.

called the relinquishment theory first formulated by Mr. Colebrooke, and applied possibly unconsciously in the cases of *Bejoya* v. *Annapurna* (38), *Colly Chand* v. *Moore* (39), and *Ramdhone* v. *Panchanan* (40). Sir James Colvile, C. J., in the same case *Jadumani Debi* v. *Saroda Prosunna* (15), expressly adopts the relinquishment theory as consistent with the letter and spirit of the Hindu Law. He first described the nature of the estate of a Hindu widow in the words of Lord Gifford in *Kossinath* v. *Harasundari* (24), and accepts the view of the true position of a reversioner as defined by Sir Lawrence Peel, in, *Oojulmoney* v. *Sagarmani* (41) and *Hurrydas* v. *Ranganmani* (42). The learned Chief Justice then points out that the policy of the Hindu Law is not to keep the estate as long as possible inalienable and subject to a species of entail in favour of persons unascertained but to prevent the alienation of family property from taking place either by operation of law in favour of the widow's natural heirs, who would generally be other than the heirs of her husband, or in favour of strangers by the gift or other disposition of the widow. Reference is made in support of this view to the Dayabhaga of Jimutavahana Ch. XI, section 1 paras. 63 and 64. As a matter of fact, the theory of relinquishment is foreshadowed in the Dayabhaga Ch. XI, section 1, para. 59, where Jimutavahana lays down that the persons who would be the next heirs on failure of prior claimants succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested in the same manner as they would have succeeded if the widow's right had never taken effect. The words used by Jimutavahana * *, ("if her right ceases or never takes effect"), are comprehensive enough to include, not merely the case of the death of the widow but all cases where her right ceases, in other words, the reversioners take the estate not merely when the widow dies but also when her title is extinguished, for instance, by renunciation, re-marriage or the like. It is plain, therefore, that in 1856 two principles were recognised by our Courts: according to one principle an alienation, by a widow made with the consent of all the possible heirs of her husband, was held operative, because the consent of persons who were the guardians of the widow and who were, as the next possible takers of the estate, most deeply interested in its preservation indicated the propriety of the transaction *Kali Mohun Deb Roy* v. *Dnununjoy* (18); *Madhub Chunder* v. *Gobind Chunder* (43); according to the other principle an alienation by a widow made with the consent of the entire body of the immediate reversioners was held operative, because between the widow and the reversioners the entire estate was represented inasmuch as the widow might relinquish her estate in favour of the reversioners and create in them a present indefeasible interest. These two doctrines, as is plain from an examination of the texts and from the history of the judicial decisions on the subject, were entirely distinct in their inception and development. But, as an examination of the cases shows, the distinction was subsequently overlooked and the indiscriminate application of the two principles has caused much embarrassment.

In so far as the consent theory is concerned it is plainly indicated by Turner, L. J., in *Collector of Masulipatam* v. *Cavaly Venkata Narainappah* (10) in the following passage:

"It may be taken as established that an alienation by her (the widow), which would not be otherwise legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. *The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper.*"

The same view is emphasised by Sir James Colvile in *Rajlakhi* v. *Gokul Chunder* (11): "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there

(39) Fulton 73.
(40) (1853) Beng. S. D. A. R. 641.
(41) 1 Taylor & Bell. 370.
(42) 2 Taylor & Bell 279.

(43) 9 W. R. 350.

should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law. That it can be a presumption of law in the sense of *præsumptiones juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

Again in *Sham Sundar Lal* v. *Achhan Kunwar* (8), Lord Davey gives expression to the theory that consent of reversioner merely affords proof of the propriety of the transaction, in the following terms:

"At the date of the bond of 1877, Hulas Kunwar, as the heir of Khairati Lal, was the owner of his estate, but with a restricted power of alienation. Achhan Kuar was next in succession, and would, if she survived her mother become her father's heir, and take the estate subject to the same restriction. Enayat Singh was one of the two male heirs next in succession to the restricted estates, who would be full owners in the event of their surviving their grandmother and mother. Enayat was, moreover, a minor. At the date of the bond of 1881, Achhan Kuar was owner of the property for a daughter's estate with restricted power for alienation and Enayat Singh was one of the heirs apparent. At both dates Enayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kuar nor Enayat Singh, even if he had been of age, could by Hindu Law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Enayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds or either of them, and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption for such concurrence as there was of Achhan Kuar and Enayat Singh in the first bond, or of Enayat Singh in the second bond that the transaction was a fair one or one justified by Hindu Law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect."

On the other hand the relinquishment theory was clearly explained by Lord Morris in the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (7) in the following terms:—

"At the time of the execution of the *ekrarnamah* Madholal was not born, so that the plaintiff was then the apparent reversionary heir, subject to the life-estate of his grandmother, Lachoo Dai. It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such coveyances."

The two doctrines, thus formulated and applied came up for examination by their Lordships of the Judicial Committee in *Barjangi Singh* v. *Manokarnika Bakhsh Singh* (4), and it is remarkable that neither theory was expressly repudiated or approved though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4), that both the doctrines are well-founded on principle, the only question is what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due inquiry as to the

existence of the legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable but plainly there is no room for the application of the relinquishment theory. In each of these cases, either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners the relinquishment theory becomes forthwith applicable, the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate and the whole estate had vested at once in the entire body of immediate reversioners, who, upon this acceleration of their estate, had conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked and if it is borne in mind, we can appreciate without difficulty why, Sir Andrew Scoble observes in *Bajrangi Singh* v. *Manoharnika Bakhsh Singh* (4) that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained as laid down in *Radha Shyam Sircar* v. *Joy Ram* (14), but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. This view is consistent only with the doctrine that consent of reversioners in certain classes of cases as already explained merely furnishes presumptive evidence of the propriety of the transaction from this standpoint, the rule laid down in *Ramphal Rai* v. *Tula Kuari* (12) cannot be sustained. On the other hand, the class of cases to which the relinquishment theory is applicable is easily defined; they are cases in which two elements are present, namely, *first* a transfer by the widow of the entire inheritance in her hands and *secondly* the consent of the entire body of persons who would be entitled to succeed upon the extinction of the qualified estate of the widow. This view, I venture to think, does not really militate against the decision of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2). Sir Richard Garth clearly contemplated a case in which the analogy of relinquishment of her estate by the widow could be applied he speaks explicitly of the death of the widow or, of the renunciation of the world by her or of some act by her which might, in the eye of law, justify the inference that she was civilly dead. The learned Chief Justice also refers to the contingency of a disclaimer by her at the time of the death of her husband. In each of these instances her interest in the entire estate left by her husband would be withdrawn from her and become vested in the then immediate reversioners. Mr. Justice Romesh Chandra Mitter is equally explicit on the point. He plainly contemplated a relinquishment of the entire estate by the widow in favour of the then next male heir of her husband. I am not unmindful that Mr. Justice Banerjee, who, when at the Bar, successfully argued the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) on behalf of the respondent, stated in the case of *Hem Chunder Sanyal* v. *Sarnamoyi* (3) that the principle of the Full Bench decision is applicable to transfers of part of the estate as of the whole and this was subsequently accepted without question in *Pulin Chandra* v. *Balai Mandal* (5). An examination of the record, however, in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2), does not confirm the view taken by Mr. Justice Banerjee on the other hand, so far as I can gather the alienation in controversy covered the entire estate and was made with the consent of the entire body of immediate reversioners. The two points which were considered by the Full Bench were in essence these, namely, *first* whether a transfer by the widow with the consent of the immediate reversioner could be treated as equivalent to a transfer by the widow to the reversioner followed by a transfer by the latter to the alienee and *secondly* whether a transfer by the widow to the immediate reversioner stood on the footing as a real relinquishment by her. Upon the first point it was ruled in consonance with previous decisions *Shama Soonduree* v. *Shurut Chunder Dutt* (44); *Mohunt Kishen Geer* v. *Busgeer Roy* (20); *Gunga Pershad* v. *Shumboo nath* (19); *Doe dem. Muddoosoodun Dass* v. *Mohender Lall Khan* (45), that the question was one of form rather than of substance and that, consequently, a conveyance by the widow with the assent of the immediate

(44) 8 W. R. 500.
(45) 2 Boulnois 40.

reversioner might be deemed to operate precisely in the same manner as two conveyances one by the widow to the reversioner and the other by the reversioner to the transferee. Upon the second point, Sir Richard Garth was inclined to take the view that a sale of the whole inheritance by the widow to the immediate reversioner did not stand on the same footing as a real relinquishment by her and apparently Mr. Justice Pigot was of the same opinion but in view of a series of prior decisions of this Court [*Raj Bullubh* v. *Oomesh Chunder* (46). *Trilochun* v. *Umesh Chunder* (47)] they acceded to the contention that a transfer of the whole inheritance to the next male heir might be treated as a relinquishment by her in his favour. If the matter were *res integra* I would without hesitation adopt the view that a sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her as contemplated by Hindu Law-givers. A widow who transfers the property for a consideration or retains an interest in the purchase money cannot by any stretch of language be deemed to have relinquished her interest in the estate of her husband, the estate by her action has in essence only undergone a transformation and the immoveable property has been converted into money which may be shuffled out of sight as land never can be. But if this strict view was not acceptable in 1884 on the ground of *stare decisis* much less can it be pressed now, I do not, therefore, rest my conclusions on this the strictly logical view of the matter especially in view of the fact that if the relinquishment theory is restricted in application only to cases where there is a real relinquishment that is a real abandonment by the widow of her interest, the stringency of the rule may be evaded in practice by the execution of a formal deed of relinquishment and a secret payment of consideration to the widow or a separate agreement to pay her maintenance allowance for life. I assume, consequently, as Sir Richard Garth did, that when a widow sells the entire inheritance to the immediate reversioner, she relinquishes her estate in his favour, this view was in substance adopted by Lord Morris in *Behary Lal* v. *Madho Lal* (7) when he stated that according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. Beyond this proposition based as we have seen on somewhat questionable grounds we need not go and as I read the judgment of *Nobokishoe Sarma Roy* v. *Hari Nath Sarma Roy* (2), we are not required to go even by that Full Bench decision. The principle of that decision is applicable only when the transfer by the widow is of her entire interest in the estate inherited by her from her husband and is made with the consent of the whole body of immediate reversioners, an extension of that principle to cases where either of these elements is absent is not warranted by the language used by the learned Judges nor can it be deemed a logical development of the principle acknowledged by them as the foundation of their decision.

Upon an examination then of the texts and judicial decisions applicable to this matter and upon a review of the principles which underlie them the following propositions appear to be deducible:

1. When a Hindu widow has alienated in whole or in part the estate inherited by her from her husband the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

2. When a Hindu widow has alienated in whole or in part the estate inherited by her from her husband the transferee can establish a good title as against the reversionary heir after her death if he proves that he made proper and *bona fide* inquiry as to the actual existence of legal necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.

3. When a Hindu widow has alienated in whole or in part the estate inherited by her from her husband with the consent of the reversionary heirs such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and *bona fide* inquiries and had satisfied himself as to the existence of such necessity. The quantum of consent necessary to raise this presumption depends upon the facts of each particular

(46) 5 C. 44; 3 C. L. R. 384.
(47) 7 C. L. R. 571.

case and in all cases the presumption raised by such concurrence on the part of the reversioners is rebuttable.

4. When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs the transferee acquired a good title as against the actual reversionary heirs at the time of her death.

In view of this exposition of the law I hold in entire concurrence with the learned Chief Justice that the question referred to the Full Bench should be answered as follows:—

When an alienation by way of mortgage has been effected by a Hindu widow in respect of a portion of the estate of her husband with the consent of the next reversioner for the time being, such consent may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein after proper and *bona fide* inquiry and had satisfied himself as to the existence of such necessity, but this presumption when it arises is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and that there has been no proper and *bona fide* inquiry by the mortgagee.

HOLMWOOD, J.—I agree with my Lord. The facts of this case and many similar cases which come before the Courts clearly show that the consent of the next reversioners for the time being must be hedged in with safeguards if there is to be any limits to the widow's power of alienation.

A spend-thrift young man who happens to be the next reversioner at the time of the alienation induces the widow to raise money on mortgage for his benefit to be spent by him on his own immoral or wasteful purposes. The only legal principle upon which such a condition of things could be justified is that the widow has entirely relinquished the estate to the next reversioner so as to cast on him the whole responsibility for the waste of the ancestral property. In the absence of such relinquishment there must be such a consent by the nearest reversioner as to raise a presumption that the transaction was a fair one and one justified by Hindu Law. Such a presumption can only arise with reference to the circumstances of each case.

It is unnecessary to refer to those cases which have been dealt with in the judgment delivered by my Lord when legal necessity is proved or presumed from facts. If the question is answered in the way my Lord, the Chief Justice, proposes to answer it, it seems to me that all difficulties will be met and a salutary check will be put on the extension of the widow's powers of alienation which is deprecated by their Lordships of the Judicial Committee in their later decision.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT

APPEAL NO. 107 OF 1911.

March 6, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Lala SONI RAM—APPELLANT

versus

KANHAIYA LAL AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), s. 19, Sch. II, Arts. 120, 148—Mortgage—Date for redemption not specified—Redeemable immediately—Acknowledgment of mortgage rights by widow does not bind reversioners—Law of limitation at time of suit applicable—Acknowledgment of liability extends time but does not confer right—Period of limitation once begun cannot be suspended—Civil Procedure Code (Act XIV of 1882), s. 13—Practice—No new case to be made in Privy Council.

A.'s predecessor-in-title mortgaged certain properties in 1842 to *K.* In 1866, *J.*, who had succeeded to a Hindu widow's estate on the death of her husband, *K.*, sold a moiety of the mortgage rights to *D.* hypothecating to him at the same time the other moiety of the said rights.

After the death of *J.* the daughter of *J.* and *K.* in 1867 sold the hypothecated moiety also to *D.*, who in his turn assigned to *A.* the entire mortgage rights purchased by him. Both the mother and the daughter had described themselves in their deeds of sale to *D.* as mortgagees and had acknowledged the existence of the mortgage of 1842. The daughter died in 1898, and on her death her sons, *C.* and *S.*, brought a suit in 1904 for possession as mortgagees of the properties on the ground that the transfers made by their mother and grandmother became ineffectual as against them on the death of the ladies, and obtained a decree for possession. In the suit, however, there was no allegation or admission by the plaintiffs of the mortgagor's interest having become vested in *A.*

SONI LAL *v.* KANHAIYA LAL.

In 1907 *A.* sued *C.* and *S.* for redemption of the mortgage of 1842. The defendants alleged that in the suit of 1904, *A.* had pleaded that he had a right to redeem, but the Court had decreed their claims for possession, and hence the suit was barred by section 13 of the Code of Civil Procedure. Limitation was also pleaded:

Held, (*a*) that the suit of 1904 did not by the operation of section 13 of the Code bar the present suit;

(*b*) that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary;

(*c*) that the defendants derived title through *K.* and were not bound by the acknowledgments of their mother and grandmother;

(*d*) that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a 'thing done' within the meaning of section 6 of the General Clauses Act;

(*e*) that once the period of limitation has begun to run, it cannot be suspended;

(*f*) that the suit was barred by time;

(*g*) their Lordships of the Privy Council would not, as a matter of long established practice, allow on appeals to His Majesty in Council new cases to be made which were not made below;

(*h*) where no date for redemption is specified, the mortgage becomes liable to be redeemed immediately after it is made.

Appeal heard *ex parte* from a judgment and decree of the High Court, dated August 7th, 1909,* reversing a judgment and decree of the Court of District Judge of Aligarh, dated March 24th, 1908, which had affirmed those of the Court of Subordinate Judge of Aligarh, dated September 16th, 1907.

FACTS.—The facts of the case are sufficiently setforth in their Lordships' judgment.

Messrs. *Cave*, *K. C.*, *M. P.* and *Parikh*, for the Appellant, contended that between the years 1883 and 1898 there was a union of rights of the mortgagor and those of the mortgagee in the appellant and the operation of the statute of limitation was suspended during the whole of that period. The Act XIV of 1859 applied to the case under which the acknowledgments by the widow were binding upon the respondents and that by General Clauses Act, 1868 "things done" before Act XV of 1877 came into operation which being a repealing Act did not affect them. The appellants acquired a title under Act XIV of 1859 and Act IX of 1871 and nothing contained in Act XV of 1877 should, under section 2, affect the title. Even by Act XV of 1877, section 19, the acknowledgments were binding upon the respondents.

Burrell v. *The Earl of Egremont* (1), *Bhagwanta* v. *Sukhi* (2), *Chhiddu Singh* v. *Durga Dei* (3) *Kattama Natchier* v. *The Raja of Shivaganga* (4). Mayne's Hindu Law, (7th Edition) paragraphs 605 and 624, were referred to.

JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the 4th March 1907 by Lala Soni Ram the appellant here for the redemption of a mortgage which had been made on the 2nd January 1842 by the then owners of *Mauza* Kheria Buzurg in favour of Khushwakt Rai, who was on the making of the mortgage put in possession by the mortgagors. The mortgage was usufructuary, the profits, except Rs. 80 per annum, were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually the Rs. 80 as *malikana*.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and, consequently, the mortgage became liable to be redeemed immediately after it was made. The whole 20 *biswas* of Kheria Buzurg were included in the mortgage, but the original mortgagors or some of them redeemed the mortgage so far as it affected 6 *biswas* $17\frac{1}{2}$ *biswansis* of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 *biswas* $2\frac{1}{2}$ *biswansis* of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the Court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the plaintiff-appellant, as representing the original mortgagors, and to the title of the defendants-respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on the

* See *Shib Shanhar Lal* v. *Soni Ram*, 3 Ind. Cas. 725; 6 A. L. J. 931; 6 M. L. T. 348; 32 A. 33.

(1) (1844) 7 Beav. 205; 13 L. J. Ch. 309; 8 Jur. 587 64 R. R. 63; 49 Eng. Rep. 1043.

(2) 22 A. 33; A. W. N. (1899) 159.

(3) 22 A. 382; A. W. N. (1900) 118.

(4) 9 M. I. A. 539; 2 W. R. (P. C.) 31; 19 Eng. Rep. 843.

18th May 1904 by the present defendant-respondent, Babu Charan Behari Lal, and his brother Lala Shib Shankar Lal against the present plaintiff-appellant, Lala Soni Ram. Lala Shib Shankar Lal was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the plaintiff-appellant, acquired the rights and interests of the original mortgagors in the 13 *biswas* $2\frac{1}{2}$ *biswanis* of Kheria Buzurg to which this suit relates. These rights and interests so far as they can be enforced are now vested in the plaintiff-appellant, Lala Soni Ram.

Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, *Musammat* Jamna, who died on the 10th May 1866, and a daughter *Musammat* Janki, who died on the 30th May 1898. Babu Charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiffs in the suit of 1904, were the sons of *Musammat* Janki.

On the 31st March 1866, *Musammat* Jamna, who had succeeded to a Hindu widow's estate on the death of her husband, Khushwakt Rai, executed a sale-deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Parshad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th April 1867, *Musammat* Janki executed a sale-deed in favour of Debi Parshad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by *Musammat* Jamna in 1866. The mortgagee's interest in Kheria Buzurg which, by the sale-deeds of 1866 and 1867, had vested for the lives of *Musammat* Jamna and *Musammat* Janki in Debi Parshad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 883 until *Musammat* Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff-appellant, who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 *biswas* $2\frac{1}{2}$ *biswansis*.

In the deeds of the 31st March 1866, *Musammat* Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th April 1867 *Musammat* Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the inference which their Lordships draw from the proceedings and the judgments in the Courts below.

After the death of *Musammat* Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th May 1904 against Lala Soni Ram, the present plaintiff-appellant, to obtain possession as mortgagees of the 13 *biswas*, $2\frac{1}{2}$ *biswansis* of Kheria Buzurg on the ground that the transfers which were made in the life-time of *Musammat* Jamna and *Musammat* Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th October 1904 obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu, or was vested in Lala Soni Ram, the present plaintiff-appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by *Musammat* Jamna and *Musammat* Janki had determined so far as Lala Soni Ram was concerned, on the death of *Musammat* Janki, and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was, that after the death of *Musammat* Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit, was vested in any one, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in any one. Their title to possession on the death of *Musammat* Janki, which was the title they claimed, related back to and was based on the mortgage of 1842 whether the right to

enforce by suit redemption of that mortgage had or had not been extinguished before the 18th May 1902 by limitation. The mortgage had not been redeemed and nothing had happened between the death of *Musammat* Janki and the 18th May 1904 to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of *Musammat* Janki, in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January 1902 but apparently he hoped, by holding on to the possession of the 13 *biswas* $2\frac{1}{2}$ *biswansis* to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years, computed from the 2nd January 1842, had expired.

In this appeal, which is *ex parte*, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgment of the 12th October 1904 and from the judgments of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother *Musammat* Janki on the 30th May 1898.

Lala Soni Ram, the present plaintiff-appellant, on the 4th March 1907 brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January 1842 so far as it affected the 13 *biswas* $2\frac{1}{2}$ *biswansis* of Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd January 1842 was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and, consequently, that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon section 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by *Musammat* Jamna and *Musammat* Janki were not binding upon them the answering defendants after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of section 13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Lal's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying section 15 of Act XIV of 1859 to the case, held that the acknowledgments of the existence of the mortgage by *Musammat* Jamna and *Musammat* Janki in their respective deeds brought this suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on appeal from the decree of the Subordinate Judge, affirmed the judgment of the Subordinate Judge, and by his decree of the 24th March 1908 dismissed the appeal. From the decree of the District Judge, the defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV of 1877 and not Act XIV of 1859, was the Limitation Act which was applicable to the suit. By section 19 of Act XV of 1877 it is so far as is material for present purposes enacted as follows:—

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the

party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed".

This is a suit to redeem, and the period prescribed by Article 148 of the second Schedule of Act XV of 1877 within which a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned Judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by *Musammat* Jamna and *Musammat* Janki in their respective deeds, but they also held that the defendants derived title through their grandfather, Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortgagee, and did not derive title through *Musammat* Jamna or *Musammat* Janki who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgments they had no power to bind any interests except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1833 and 1898: and that no mortgage was in existence during that period; and that Article 120 of the second Schedule of Act XV of 1877, and not Article 148 applied; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that, if Article 120 applied, the suit was not within time, as *Musammat* Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and, consequently, there had been no merger. The High Court, by its decree of the 7th August 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff, Lala Soni Ram, has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV of 1859, and consequently the acknowledgments of the existence of the mortgage of 1842 which were contained in the deeds which were executed by *Musammat* Jamna and *Musammat* Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV of 1877, and further that the acknowledgments which were made by *Musammat* Jamna and *Musammat* Janki were not acknowledgments within the meaning of section 19 of Act XV of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships, consequently, consider that these acknowledgments were ineffectual to give a new period of limitation. The contention in this appeal which is based upon section 6 of the General Clauses Act and section 2 of Act XV of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of section 6 of the General Clauses Act.

In this appeal it was also contended that the operation of Act XV of 1877 was suspended during the whole period 1883-1893 when Mannu or his son, Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being that that period should be excluded from the computation of the 60 years provided by Article 148 of the second Schedule of Act XV of 1877, as between 1883 and 1893 no suit for redemption could have been brought by Mannu or after his death by the plaintiff, Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court, the contention there apparently was—not that the operation of Article 148 was suspended during

the period 1883-1898—but that by reason of the fusion of the interests of mortgagor and mortgagee Article 148 did not apply to this case and that the Article which did apply was Article 120. In support of the contention in this appeal this Board was urged to apply in this suit the principle which Lord Langdale, Master of the Rolls, applied when construing section 40 of 3 & 4 William IV, Chapter 27, in *Burrell* v. *The Earl of Egremont* (1). Their Lordships are unable to accede to that contention, as Article 148 of Act XV of 1877 is essentially different in its language and intention from section 40 of 3 & 4 William IV, Chapter 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under section 40 of 3 & 4 William IV, Chapter 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years' period of limitation allowed by Article 148 of Act XV of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell* v. *The Earl of Egremont* (1) there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgment that it was due. In this case the right to redeem the mortgage of the 2nd January 1842 accrued to the mortgagors the moment the mortgage was executed, and the 60 years' period of limitation must be computed as having begun on the 3rd January 1842. There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to section 9 of Act XV of 1877 applies—be deciding contrary to the express enactment of that section that "when once time has begun to run, no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by anyone at any stage of this suit, either in the Court of first instance or on either of the appeals, and, consequently, had not been considered either by the Subordinate Judge, or the District Judge or the learned Judges of the High Court. Further, neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any Counsel on their behalf having appeared. Their Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Appeal dismissed.

Solicitor for the Appellant: Mr. *Edward Dalgado.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

APPEAL NO. 57 OF 1912.

March 6, 1913.

Present:—Lord Atkinson, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

TEKAIT KRISHNA PRASAD SINGH —APPELLANT

versus

MOTI CHAND—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 311, 312, 588—Execution of decree—Irregularities in publishing and conducting of sale—Gross under valuation and sale for a low price—Substantial injury—Setting aside sale—Final orders under section 588—Appealable to Privy Council—Court of Ward taking over management of a portion of infant's property—Other property sold in execution of decree—Mother competent to protect the property as natural guardian.

TEKAIT KISHNA PRASAD SINGH *v.* MOTI CHAND.

In execution of a decree the property to be sold consisted of 109 villages and the order for the proclamation of sale directed that the proclamation should be served on each of the villages by announcement to the public with beat of drum, and that a copy of it should be fixed at a conspicuous place on each property. The proclamation, however, was read out without beat of drum in one only of the villages, and affixed to a tree in that village alone. The schedule of the property attached to the proclamation contained no statement of the encumbrances to which the property was liable, and grossly undervalued the property. At the time of sale with the exception of the Collector and the decree-holder no bidder was present, and the property was knocked down to the decree-holder for a sum far below its actual price:

Held, that the sale must be set aside, as the matters above referred to constituted material irregularities in the publishing and conducting the sale within the meaning of section 311 of the Code of Civil Procedure, 1882, and the judgment-debtor sustained substantial injury through such irregularities.

The provision at the end of section 588 of the Code of Civil Procedure, 1882, providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in Council from them, and, therefore, the orders for confirming or setting aside a sale under sections 311 and 312 are appealable under Chapter XLV of the Code.

Where the interests of an infant with regard to a particular property are not in fact represented by the Court of Wards, that has taken over the management of some part only of the property of the infant, it is open to the mother of the infant as natural guardian to appear in the name of the infant to protect this particular property from sale.

Appeal from the decree of the High Court, dated the 18th May 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February 1906, setting aside the sale of an impartible *zemindari* descending by primogeniture.

FACTS.—The facts of the case material to the sale are sufficiently set forth in their Lordships' judgment.

Messrs. *De Gruyther*, *K. C. and Eddis*, for the Appellant, contended that he was not properly represented in the execution proceedings and the notice of proceedings ought to have been given to the Court of Wards. The execution proceedings were vitiated by various irregularities. The property was sold at a grossly inadequate price and that it lay on the respondent to rebut their presumption which he had failed to do. It was grossly under-valued by the respondent in his application for execution.

Sir *E. Richards*, *K. C.*, and Mr. *Grey*, for the Respondent, contended that the order of the Deputy Commissioner of December 5th, 1904, confirming the sale, not having been appealed against by the Court of Wards, is final and conclusive as against the appellant. The Court of Wards, after inquiry, allowed the sale to be confirmed without objection, it was not open to any other person to institute proceedings for setting it aside on behalf of the minor. It has not been shown that any material irregularity in publishing or conducting the sale took place and that it caused any substantial injury to the appellant. The inquiry by the Court of Wards, the minor's statutory guardian, into the value of the property, showed that it was hopelessly incumbered and that it exercised a wise and proper discretion in allowing it to be sold.

JUDGMENT.

LORD MOULTON.—This is an appeal from an order of the High Court of Judicature of Fort William in Bengal, dated the 18th May 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February 1906, which set aside the sale of a property known as Gadi Gandey, which is an impartible *zemindari*, descending by primogeniture situated in that district.

The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but in the view taken by their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided, it will be convenient to state first the facts of the case so far as they relate to the sale and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant appellant, against whom the respondent on the 27th November 1900, obtained a decree in the Court of the Subordinate Judge of Benares for Rs. 6,599-9-6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh, and the respondent applied to that Court for execution of the same by attachment and sale of the property. While these proceedings were going on, the appellant's father died. The respondent continued the attachment proceedings, and on the 28th October 1903 applied for and obtained the issue of a sale proclamation fixing the sale for the 2nd January 1904. It does not appear that

notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 *mauzahs* or villages, and the order for the proclamation of sale directed that the sale proclamation should be served on each of the *mauzahs* by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property. What was actually done was as follows. The proclamation was read out without beat of drum in one only of the *mauzahs*, and the proclamation affixed to a tree in that village alone. The evidence as to this is perfectly clear, and it shows not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities, there is another, which, as it appears on the documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in section 287 of the Code of Civil Procedure, 1882. As a matter of fact, it contained no statement of the encumbrances to which the property was liable. It stated the annual profit income to be Rs. 4,953-7-3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission to bid which the decree-holder obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross under-valuation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, etc.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the Collector and the decree-holder no bidder was present. The Government bidding was Rs. 2,000, the amount due for taxes, etc., from the property. The decree-holder then bid Rs. 2,020 and the property was, of course, knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting the sale within the meaning of section 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant-appellant sustained substantial injury through such irregularities. The evidence of Maulvi Syed Ejabat Hossain, who was a manager under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale, shows that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment-creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the encumbrances thereon, and the Court referred the matter to a special referee. He heard evidence on both sides and reported that the property was worth more than two lacs of rupees after allowing for all the encumbrances. Against this evidence nothing has been cited to show that the valuation on the sale proclamation was a fair one or that the price obtained was adequate. It is true that Counsel for the respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale unless the estate (which was, no doubt, heavily encumbered) could be wound-up with the assistance of the Encumbered Estates Act. But the statements in such letter, even if they supported the contention of the respondent, would not be evidence unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of the matter, and this can have no evidential value. Even if accepted it would point to the property being of a value of more than four times the sum which the decree-holder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question,

therefore, is whether the legal proceedings for setting aside the sale have been regular, so that their Lordships have jurisdiction to give the relief prayed for in this appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of the Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on the 11th June 1903, he issued an attachment order against the property. The decree-holder applied for the issue of a sale proclamation which for some reason was ineffective. A fresh sale proclamation was then applied for which was directed to issue fixing the 1st September for the sale. The report relating to the service of this sale proclamation was submitted on the 6th August. In the meantime the judgment-debtor had died on the 27th July 1903. At that date an order had been made for the issue of a sale proclamation for sale on the 1st September, but the sale proclamation had not been served. On the 30th July the decree-holder applied for the issue of notice on the heir of the deceased judgment-debtor, and the record states that an order was made for that issue, but there is nothing to show that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation of the 27th July 1903, and the decree-holder applied for the issue of a fresh one on the 7th September and obtained the issue of a sale proclamation fixing the sale for the 2nd November. The service of this sale proclamation was, however, irregular, and on the 28th October he applied for and obtained one fixing the sale for the 2nd January 1904. Subsequently, he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the original judgment-debtor were without notice to anyone representing the infant. It is true that in the original proceedings in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a post-ponement, but it was refused, and on the 26th January 1904 she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date, the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter.

On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner on the 16th February 1906 allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Chapter XLV of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This Chapter regulates appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "judgment" and "order" unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the orders mentioned in section 588. The reasoning is as follows:—In the definition of "decree" in section 2 "orders" specified in section 583 are not included in the word "decree." Moreover section 588 provides that "the orders passed in appeal under this section shall be final." It is, therefore, contended that it would be repugnant to give to the word "decree" in Chapter XLV a meaning which would include "orders" under section 588. "Orders" setting aside or refusing to set aside sales of immoveable property are, therefore, not appealable to the King in Council.

Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of Chapter XLV a definition of "decree" which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in section 2 is, therefore, not applicable, and the word "decree" in this Chapter must be read as equivalent to "decree, judgment or order." As so read there is no difficulty in construing section 595, which determines when an appeal lies to the King in Council. If this substitution be made it is evident that final orders may be appealed against, and therefore the provision at the end of section 588 providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in Council from them. It should be added that appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the respondent. Moreover no reason can be given why orders of so important a character as those made under sections 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal.

But the main contention of the respondent was to the effect that the mother of the infant could not represent him in these proceedings. It is so obvious that the Nazir of the local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh that neither before their Lordships nor in the Courts below was there any substantial contention that he continued to represent the infant after the removal of the proceedings to that Court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on the 23rd December 1903 the Court of Wards made an order taking over the management of some part of the property of the infant. That order was not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the Court of Words did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Courts below and their Lordships have independently arrived at the same conclusion. Their Lordships are, therefore, of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interest with regard thereto being sacrificed. The proceedings taken by

her were, therefore, in order and the appeal from them is properly before their Lordships.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed and the order of the High Court be discharged with costs and the order of the Deputy Commissioner restored and that the respondent be ordered to pay the costs of this appeal.

Solicitors for the Appellant: Messrs. *Dallimore, Pilbrow & Co.*

Solicitors for the Respondents: Messrs. *Watkins & Hunter.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 375 OF 1912.

April 4, 1913.

Present:—Mr. Justice Rattigan.

QAZI—PLAINTIFF—APPELLANT

versus

SHARFA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Exchange or sale—Question whether exchange or sale—Question of law,—When amount of mortgage charges to be paid by purchaser—No part of purchase money—A small sum of money paid in a transaction of exchange—Merely adjusting factor does not alter nature of transaction.

The question whether a particular transaction purporting to be an exchange of properties was in reality a sale amounts to a question of law, when the contention is that in the determination of the question the Court should have regard to the fact that one of the properties dealt with being under mortgage, the transferee must be taken to have paid as part consideration to the transferor, or on his behalf to the mortgagee, the amount of the mortgage charges.

The amount which the purchaser of property will eventually have to pay in respect of mortgage charges upon it, cannot be said to form part of the purchase money when such property is sold for a definite amount.

In a transaction of exchange, the mere fact that one of the parties has in addition paid a small sum of money by way of adjusting the values, cannot alter its nature.

Nathu Mal v. *Hardial*, 97 P. R. 1900; 16 P. L. R. 1901, referred to.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 5th March 1912, confirming that of the Munsif, first class, Pindigheb, dated the 26th December 1911, dismissing the claim.

Mr. *Bhagat Ram Puri*, for the Appellant.

Mr. *Manohar Lal*, (for R. B. Lala *Sukh Dial*), for the Respondents.

JUDGMENT.—By a registered deed, bearing date 4th January 1911 and purporting to be in terms an instrument of exchange, one Sharfa (defendant No. 1) transferred to Sukh Dyal (defendant No. 2) 13 *kanals* 8¼ *marlas* of land held in *muqarridari* tenure, and received, in return, from the said transferee 26 *kanals* 10 *marlas* of land held in occupancy tenure and a sum of Rs. 50 in cash. Plaintiff alleges that the so-called "exchange" was in reality a "sale" by Sharfa to Sukh Dyal and claims a right of pre-emption in respect thereof. It appears that Sharfa's land was at the time under mortgage and that the charge upon it amounted to about Rs. 1,267. The interest in the land as transferred to Sukh Dyal was valued in the deed at Rs. 250. On the other hand, the value of the land held in occupancy tenure by Sukh Dyal and transferred to Sharfa, was estimated by the Munsif at Rs. 200 and by the Divisional Judge at Rs. 70.

It is admitted that if the transaction was really a sale, plaintiff has the right to claim pre-emption but the Courts below are agreed in holding that the transaction was not a sale, but an exchange as upon the face of the deed, it purports to be.

A second appeal was admitted on the ground that the question whether the transaction was in reality a sale amounts to a question of law, appellant's contention being that in a case of this kind, the Court in determining that question should have regard to the fact that the property was under mortgage and that, consequently, the transferee must be taken to have paid as part consideration to the transferor, or on his behalf to the mortgagees, the amount of the mortgage charges. In other words, the plaintiff contends that what Sukh Dyal actually gave to Sharfa was (1) the 26 *kanals* 10 *marlas* of land, valued at either Rs. 200 or Rs. 70, (2) a sum of Rs. 50 in cash, and (3) a quittance in respect of the sum of Rs. 1,267 which Sukh Dyal would, in the ordinary course of things, have to pay to the mortgagees. Mr. Bhagat Ram Puri thus ingeniously argues that the consideration moving from Sukh Dyal to Sharfa was, in fact, a sum of Rs. 1,267 *plus* a sum of Rs. 50 *plus* a plot of land valued by the Divisional

Judge at Rs. 70, and that the money was thus the important part of the consideration and not "merely a small adjusting factor," [see per Robertson, J., in *Nathu Mal* v. *Har Dial* (1)]. In support of this argument, the learned Counsel refers, by way of analogy, to illustration (2) to section 24 of the Indian Stamp Act.

The argument is, as I have said, ingenious, but, in my opinion, fallacious. The fact that the land in suit was under mortgage and that the owner of it would have to pay off, at some time or other, the mortgage charges upon it, no doubt, affected the value of the land when the parties decided to make an exchange, and it was, no doubt, for that very reason that this land, which would otherwise have been of much greater value, was valued in the deed of exchange at only Rs. 250. But the amount which the purchaser of property will eventually have to pay in respect of mortgage charges upon it, cannot be said to form part of the purchase money when such property is sold for a definite amount. For example, if this land had been sold by auction, the purchaser, knowing that there was a heavy mortgage charge upon it, would probably not have bid more than (say) Rs. 250 but if his bid had been accepted, the actual price at which he bought the property would be the amount of his bid. Upon payment of that amount, he would have become the owner of the property, quite irrespective of the fact that by becoming such owner he would eventually have to pay off the mortgage charge. Thus in the case of such property sold in execution of a decree, the purchaser would, under Order XXI, rule 84, Civil Procedure Code, have to deposit 25 per cent. of the purchase money, and not 25 per cent. of the amount which he might eventually have to pay to the mortgagees.

So, in the present case—the fact that the land was encumbered reduced its selling value, but that fact cannot be taken as implying that Sukh Dyal actually paid Sharfa the amount due to the mortgagees. On the contrary, what actually occurred was as follows:—Sukh Dyal had a plot of land of comparatively little value which he was willing to transfer to Sharfa and in return to receive from him a plot of land which would have been of considerable value but for the mortgage charge upon it. By reason of that charge the latter land was reduced in value approximately to that of Sukh Dyal's and consequently the two parties agreed to make an exchange. Thus regarded the transaction was, as the Courts below find, merely one of exchange and not of sale, and the mere fact that Sukh Dyal in addition paid a small sum of money by way of adjusting the values, cannot alter its nature.

I accordingly agree with the findings of the lower Courts and dismiss this appeal with costs.

Appeal dismissed.

(1) 97 P. R. 1900; 16 P. L. R. 1901.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION APPLICATION No. 148 OF 1912-13.

April 15, 1913.

Present:—Mr. Fenton, F. C.

TAJA AND OTHERS—APPLICANTS

versus

KARAM ALI AND OTHERS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 37 (a)—Correction of entry in annual record—Occurrence of fact need not be subsequent to the entry—Revenue Officer taking cognizance of error by new mutation—Not reviewing or reversing the previous order directing the entry.

An erroneous entry in the annual record may under section 37 (*a*) of the Land Revenue Act be varied in accordance with facts proved to have occurred.

It is not necessary for the purposes of the section that the fact should have occurred since the date of the entry which it is sought to vary.

In taking cognizance of errors caused by mistaken or fraudulent action on the part of a *patwari* or *kanungo* when discovered and dealing with them by the method of a new mutation entry a Revenue Officer is not reviewing or revising any order of a predecessor or other Revenue Officer.

Application for revision of the order of the Commissioner of Multan, dated the 21st February 1913, confirming that of the Collector of Montgomery, dated the 14th November 1912, rejecting the application for correction of entry.

Bhagat *Govind Das*, for Applicants.

Lala *Nihal Chand*, for Respondents.

ORDER.—The question raised by the revision application in this mutation case is one of some importance. The question is whether a

mistake made by a *patwari* in drawing up an annual record and not detected by the Revenue officer at the time of attestation, can be corrected by a mutation entry when subsequently discovered. The facts are that Taja and others whom I will designate as the first party and Karam Ali and others of the second party are co-sharers in a joint holding. In the Record of Rights of 1893-94 and previous years their respective shares in this holding were recorded as half and half, and this division is in accordance with the pedigree table, the parties being descended from the two sons of a common ancestor. In the Record of Rights of the year 1895-96 the shares are recorded as $\frac{1}{3}$rd and $\frac{1}{2}$ respectively. There is nothing on record to explain the alteration. No mutation order is forthcoming or alleged to have been made. The *patwari*, who is responsible for the entry, confesses that he made a mistake for which he asks to be pardoned. The Assistant Collector, Collector and Commissioner who have considered the first party's application to have this mistake rectified by an order under section 37, Land Revenue Act, have all come to the conclusion that such rectification cannot take place in a mutation proceeding in view of the fact that the second party does not agree to the entry being varied.

I am unable to concur in this conclusion. An entry in the annual record may, under section 37 (*a*) of the Land Revenue Act, be varied in accordance with facts proved to have occurred. In the present case it has been proved that a mistake was made, that is to say, that the entry which it is sought to have altered was made otherwise than in accordance with law. Lawfully the alteration made in the 1895-96 record could only be so made as the result of mutation proceedings and there were no mutation proceedings. It is to be observed that section 44 of the Land Revenue Act gives a presumption of truth only to such entries as are made "in accordance with the law for the time being in force." It is incumbent on the Revenue staff to see that entries are made in accordance with law, and proof of a mistake having been made in this respect is proof of a fact having occurred within the meaning of section 37 (*a*) of the Land Revenue Act.

It is not necessary for the purposes of the section just mentioned that the fact should have occurred since the date of the entry which it is sought to vary. In this respect the law as laid down in Act XVII of 1887 differs from that of section 19 of the Land Revenue Act of 1871. Under the older Act the fact justifying variation of the entry must have occurred at some time subsequently to the date of the entry. No such condition is now applicable. In this connection it is relevant to quote the opinion in an analogous case of the Government Advocate which is re-produced on page 137 of Douie's Settlement Manual:– "The record is prepared in accordance with facts believed at that moment to be true. If at any later date it be proved that this belief was erroneous, *e g.*, that a person entered as merely absent had as a fact died at an earlier date, although his death was not known or suspected when the entry was being written, this, in my opinion, is, undoubtedly, a fact, proof of which would warrant an alteration of the entry."

It would create an intolerable situation if, as Financial Commissioner, I were to rule that those right-holders whose rights are prejudiced by mistaken or fraudulent action on the part of *patwari* or *kanungo* have no remedy other than a regular suit in any case in which the mistake or fraud is not discovered until after the final attestation of the Record of Rights or annual record in which the mistaken or fraudulent entry is made. In taking cognizance of such errors when discovered and dealing with them by the method of a new mutation entry a Revenue Officer is not reviewing or revising any order of a predecessor or other Revenue Officer.

I accordingly accept this revision application and direct that the first and second parties be recorded as holding equal shares respectively in the joint holding to which the present application relates.

Revision accepted.

RAM CHANDER NAIK KALIA *v.* ABDUL HAKIM.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 239 OF 1912.

February 17, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RAM CHANDER NAIK KALIA—DECREE-HOLDER—APPELLANT

versus

ABDUL HAKIM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Indivisible decree for dower and costs—Separate execution—Transfer of portion of decree—Execution.

A decree for recovery of a dower debt and the costs incurred in the suit, made against the heirs of the husband of the plaintiff, is one and indivisible: the bare fact that a portion of the sum decreed is made recoverable only from the assets of the deceased does not make the decree one which can be divided into two separate decrees thereby enabling the decree-holder to execute separately.

Rule 16 of Order XXI lays down distinctly that in cases of transfer the decree can be executed in the same manner and subject to the same condition as if the application were made by such decree-holder.

Therefore, the transferee of a portion of an indivisible decree is not entitled to take out execution for the portion transferred to him.

Execution first appeal from the decree of the District Judge of Mirzapur.

Mr. *Sital Prasad Ghosh* (with him Mr. *J. N. Chaudri*), for the Appellant.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of the following circumstances:—*Musammat* Najmunnissa, the widow of one Maulvi Farzand Ali, brought a suit against the other heirs of her deceased husband to recover a sum of Rs. 97,500 due to her as dower. She also asked for the costs of her suit. The District Judge decreed the claim in her favour. The judgment ends as follows: "I, therefore, decree the claim in full with costs and future interest at 6 per cent. per annum. The decree will be executed against the assets of Maulvi Farzand Ali, and not against the personal property of the defendants." This was also entered in the decree. The defendants appealed to this Court. But the appeal was dismissed with costs. There was no order in the decree of this Court as to the realization of the costs of this Court from the assets of the deceased. *Musammat* Najmunnissa has transferred, to the present appellant, her right to recover costs as against her judgment-debtors. The present appellant applied to the District Judge for execution of so much of the decree as related to costs. Objection was taken, *first* of all as to the right of the appellant as transferee of a part of the decree to put a portion of the decree into execution, and *next* it was also objected that the costs could only be recovered from the assets of the deceased Farzand Ali. The lower Court has held on a construction of the decrees that the costs incurred by the plaintiff in the High Court are recoverable from the persons and other property of the defendants, that the costs incurred in the Court of first instance are only recoverable from the assets of the deceased, and *thirdly*, that the appellant was not in law entitled to apply as a transferee of a part of the decree for execution of that portion only. The transferee has come here on appeal and it is urged that the District Judge has misconstrued the decree and that he has erred in law in holding that the appellant as a transferee of a part of the decree could not put that portion of the decree into execution. In so far as the construction of the decree is concerned, in our opinion, the District Judge is perfectly correct. As regards the second point, assuming that there is nothing in law to prevent the transfer of a portion of the decree, and assuming that the transferee can apply for the execution of the whole decree, in the present case the transferee is not entitled to apply for execution of a part of the decree as the original decree-holder herself could not have done so. The decree appears to us to be one and indivisible for recovery of the dower *plus* the costs incurred in the suit. We do not think that the bare fact of a portion of the sum decreed being recoverable only from the assets of the deceased makes the decree one which could be divided in the two separate decrees with regard to which the decree-holder will be entitled to execute separately. Rule 16 of Order XXI lays down distinctly that in cases of transfer the decree can be executed in the same manner and subject to the same condition as if the application were made by such decree-holder. In our opinion the application was properly disallowed and we dismiss the appeal with costs

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 399 OF 1912.

CRIMINAL REVISION PETITION No. 317 OF 1912.

November 18, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

KANDA KAMARLA VENKATA REDDI —PETITIONER—ACCUSED

versus

KUMARI RAE, THE REVENUE INSPECTOR, BUKKAPATNAM—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 23, 430—Mischief —Wrongful loss—Right to drainage waters.

Where drainage water from higher grounds and other Government tanks flows in a defined channel above an embankment the overflow from which flowed without diminution also in a defined channel below and the bed of the channel was *poramboke*, the owner of the embankment has no right to raise the same to intercept the flow for irrigating his own lands.

Where the surface water of the upper land has once fallen into the defined channel, no body has a right to obstruct the flow of the same as usual over the embankment into the lower channel.

The accused, the owner of the embankment, applied to the Government to raise the *bund* and raised it before he received the permission:

Held, that the accused could not be presumed to have acted with wrongful intention or knowledge and hence could not be held guilty of mischief.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Dharmavaram, in Criminal Appeal No. 15 of 1912, confirming the conviction and sentence of the Stationary Sub Magistrate of Penukonda, in Calendar Case No. 359 of 1911.

Mr. *C. K. Mahadeva Iyer*, for the Petitioner.

Mr. *E. R. Osborne*, for the Public Prosecutor.

ORDER.—I see no reason to interfere with the finding on the physical fact arrived at by the Stationary Sub-Magistrate and the Sub-Divisional Magistrate in appeal, though their findings are somewhat loosely expressed. I take it that the following facts and acts are proved:—

(*a*) That there was a Vanka or defined channel which took its rise at some distance above the petitioner's (accused's) embankment,

(*b*) That the water flowing along that defined channel passed over the petitioner's embankment without diminution into another channel commencing on the other side of the embankment and supplied Government tanks lower down.

(*c*) That the upper Vanka received surface drainage of the higher grounds above it and also the drainage of certain Government tanks.

(*d*) That the accused, who is the revision petitioner before this Court, raised the height of this embankment so as to prevent the free flow of the waters of the upper Vanka and converted the portion of the bed of the upper Vanka just above the embankment and also a certain width of ground on both sides of that bed into a tank for the irrigation of some of his lands though these lands were not entitled to the water which was coming along that Vanka and which used to overflow that embankment. The lower Courts also found that the bed of the Vanka and of the tank newly created by the accused is Government *poramboke*.

On their findings, there can be no doubt that the accused was not entitled to raise his embankment so as to intercept the free flow of water passing along the upper Vanka. The Tahsildar was, therefore, justified in widening and deepening the breach made by the accused in that embankment so as to drain fully the tank newly created by the accused. The accused's contention that the Government and the *ryots* holding lands under the lower tanks supplied by the Government channels below the *bund* have no right to the water of the Vanka flowing over the embankment cannot be upheld. Though the Vanka received the surface drainage of the lands above it, it also receives the surplus water of upper tanks, the said water flowing through defined channels. Even as regards surface waters, drained from the higher lands, after they have once drained into the Vanka, no body has a right to prevent the water which has once fallen into the Vanka or defined channel from flowing off as usual over the embankment into the Government Vanka below the embank-

ment as it had been flowing for a long time.

There still, however, remains the question whether the accused in raising his embankment committed mischief under section 430 of the Indian Penal Code. Section 430 deals with a particular kind of mischief. The general definition of mischief under section 425 implies intention to cause or knowledge of the likelihood of causing wrongful loss to the public or to any person. Wrongful loss under section 23 of the Penal Code is defined as loss by unlawful means of property to which the person losing it is legally entitled. The explanation (1) to section 425 states that it is sufficient for the offence of mischief if the wrong-doer intends to cause or knows that he is likely to cause wrongful loss or damage to any person. The question in this case, assuming the facts as above and assuming the wrongful loss was caused to the Government and the lower landed proprietors by the accused's act in raising his embankment, is whether the accused intended to cause or knew that he was likely to cause such wrongful loss or damage. The Appellate Magistrate says:—"There is no doubt that the accused was aware of the diminution of supply to the tank in question. The appellant had no sort of right to take more water for his lands than what he would get before improving the *bund*. His intention to cause wrongful loss to the *ryots* under Vengalamacheruvu is, therefore, to be presumed" On going through the records, however, I find that the accused had applied to the Revenue Authorities for permission to raise the *bund* and to form a tank above the *bund* and to irrigate his lands from that tank. I think that wrongful intention or knowledge should not have been presumed in this case especially as accused seems to have raised no objection to the Tahsildar's making breaches in the embankments so as to carry off all the water stored by him in his tank. If he persists hereafter in storing water in the tank after this warning and after he has undergone the trouble, intention to cause wrongful loss might be properly presumed. But when he raised his embankment in the beginning, he might have honestly thought that as he had applied for the Government's permission, he might safely expect such permission to be granted and that as the Government was the owner of all the water coming along the banks no wrongful loss could be caused to any body by his storing the water in the newly created tank, subject to their grant of his application. I think the benefit of the reasonable doubt as to his intention should have been granted to the accused in this case. I, therefore, set aside the conviction and order the fine to be refunded.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 276 OF 1911.
CRIMINAL REVISION PETITION No. 214 OF 1911.
November 23, 1911.

Present:—Justice Sir Ralph Benson, Kt.

TUMMALAGUNTA KOTIAH AND OTHERS—COUNTER-PETITIONERS—PETITIONERS

versus

POPURI PEDDANNA AND OTHERS—PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 148 (3)—Costs—Penalty on document not properly stamped—Jurisdiction of Magistrate.

A Magistrate has no jurisdiction under section 148 (3) of the Criminal Procedure Code to include in costs the penalty paid on a document not properly stamped.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Joint Magistrate of Ongole Division, in Miscellaneous Case No. 1 of 1910.

Mr. *T. Prakasam*, for the Petitioners.

Mr. *T. Ramachandra Row*, for the Respondents.

JUDGMENT.—Under clause 3 of section 148, Criminal Procedure Code, the Magistrate had no jurisdiction to include in costs, the penalty paid on a document not properly stamped. The order of the Magistrate must be amended by omitting the sum of Rs. 82-8-0 in the schedule of costs.

Order amended.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 37 OF 1913.
February 24, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
EMPEROR—APPELLANT
versus
GULABU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 288, 364, 533—*Evidence Act (I of* 1872), *s.* 91—*Confession —Oral evidence not admissible—Statement of witness in the absence of accused not admissible, confession must be voluntary.*

The confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act.

No evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure.

Section 533 of the Code does not apply to a case where no record whatever has been made of such a confession.

The statement of a witness made in the absence of the accused is not admissible in evidence under section 288 of the Criminal Procedure Code.

A confession in order to be admissible in evidence must be made voluntarily and without any pressure.

Where a Tahsildar, having the powers of a Magistrate, third class, and being invested by the Local Government with powers to take cognizance of offences upon complaint or upon Police report, conducts an inquiry on information received in the shape of a complaint, he must be deemed to have conducted the inquiry as a Magistrate.

Criminal appeal against an order of acquittal passed by the Sessions Judge of Saharanpur.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

Mr. *Nehal Chand*, for the Accused.

JUDGMENT.—This is an appeal under section 417 of the Code of Criminal Procedure against an order of the Sessions Judge of Saharanpur acquitting one Gulabu of a charge of having murdered his wife *Musammat* Khushalsia. It appears that the Tahsildar of Chakrata, who has the powers of a Magistrate of the third class and who has been invested by the Local Government with power to take cognizance of offences upon complaint or upon Police reports, received information in the shape of a complaint that the woman had been murdered by her husband. He sent for a number of persons and had their statements recorded in his presence by a *wasilbaqi nawis*. He also interrogated Gulabu. The case was subsequently taken up by the Cantonment Magistrate and Gulabu was committed for trial. At the trial the Tahsildar was asked by the Public Prosecutor to repeat a confession said to have been made to him by Gulabu. The Sessions Judge declined to allow this to be done. On behalf of the Crown it is contended that the Sessions Judge ought to have allowed the Tahsildar to repeat the confession. The Tahsildar's evidence shows that he was conducting an inquiry into this affair at the time when the statement was made to him. In the Court below it was contended on behalf of the accused that the Tahsildar had the powers of a Police officer and was acting as such, but there is nothing to show that he had been invested with the powers of a Police officer. The prosecution say and, we think, rightly, that he must be deemed to have been conducting an inquiry as a Magistrate. Section 364 of the Code of Criminal Procedure provides that whenever an accused person is examined by a Magistrate, the whole of the examination, including the questions put to him and every answer given by him, shall be recorded in full. But no record whatever was made of Gulabu's statement. Section 533 of the Code provides that if any Court, before which a confession, recorded or purporting to be recorded under section 364, is tendered, finds that any of the provisions of that section have not been complied with by the Magistrate recording the confession, it shall take evidence that such person duly made the statement recorded, and notwithstanding anything contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This reference to section 91 of the Evidence Act shows that the Legislature intended that the provisions of that section should apply to the case of a confession made by an accused person to a Magistrate holding an inquiry. Reading section 364 of the Code of Criminal Procedure with section 91 of the Evidence Act we must hold that a confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of the latter section, and that no evidence can be given of the terms of such a confession except the record, if any, made

under section 364. Section 533 has no application to a case where no record whatever has been made of such a confession. The learned Government Advocate is unable to refer to any case in which oral evidence of the terms of a confession made to a Magistrate during the course of an inquiry has been admitted and we know of no case in which this has been done. Apart from this objection to the reception of oral evidence of the confession we would point out, as the learned Sessions Judge has done, that the confession was made under peculiar circumstances. It is more than doubtful whether it was made voluntarily. The evidence of the Tahsildar shows that it was made after the Tahsildar had arrested the accused and told him that evidence had been obtained which showed that he had committed murder. The Tahsildar admits that he took no steps to ascertain whether the confession was made voluntarily or under pressure. Lastly, assuming that the confession can be admitted in evidence, we do not think that the case calls for further inquiry. The only evidence in support of the alleged confession is the statement of a man named Jaswant. At the trial this man gave evidence to the effect that the woman had died as the result of a mis-carriage. A previous statement made by the witness to the Tahsildar on April 24th, 1912, was put to him and he denied that he had made it. But he said that through fear he had told the Tahsildar that Gulabu had brought out the body and that blood was then oozing from the mouth and the nostrils. The statement made by the witness on the 24th of April 1912, in the absence of the accused, is not admissible in evidence under section 288 of the Code of Criminal Procedure. The witness was examined again by the Cantonment Magistrate on the 4th June and he then admitted that he had made the statement of the 24th April and also admitted that it was true. It is possible that the statement of April 24th might be treated as having been incorporated in and so forming part of the statement of June 4th which was made in the presence of the accused. If so, it might be admitted under section 288 of the Code of Criminal Procedure. But on June 4th, while admitting the truth of his previous statement of April 24th, Jaswant made other statement wholly inconsistent with that statement. It is impossible to place much reliance on such a witness. It seems to us that even if the confession were admitted in evidence it would be unsafe to rely on it and that the other evidence is wholly insufficient to justify a conviction. We, therefore, dismiss this appeal and direct that Gulabu be set at liberty.

Appeal dismissed.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 568 OF 1905.
June 12, 1906.
Present:—Mr. Justice Mitra and Mr. Justice Holmwood.
SITAL CHANDRA MAITRA AND ANOTHER —ACCUSED—PETITIONERS
versus
EMPEROR—PROSECUTOR.

Charge—Two persons charged with causing hurt to three—One charge—Irregularity—No case of hurt by one of the accused—Prejudice to accused in trial—Re-trial by another Magistrate - Criminal Procedure Code (Act V of 1898), ss. 233, 239.

In one charge two persons were charged with causing hurt to three others with a *dao*, but there was no case of hurt by *dao* by one of the accused and he was convicted under section 352 for using a *lathi* against two of the complainants:

Held, that this was an irregularity which might have prejudiced the accused in their trial and that a re-trial by a new Magistrate must be held on charges properly framed.

Rule against the order of the District Magistrate of Burdwan, modifying that of the Sub-Deputy Magistrate of Kalna, on appeal.

Babu *Dasarathi Sanyal*, for the Petitioners.

JUDGMENT.—The petitioners before us were charged under section 324 of the Penal Code and were convicted by the Sub-Deputy Magistrate of Kalna and each of the petitioners was sentenced to undergo three months' rigorous imprisonment. On appeal the District Magistrate of Burdwan altered the conviction to one under section 353, Indian Penal Code, as regards Moti Sheikh and sentenced him to rigorous imprisonment for 14 days. The conviction and sentence of the petitioner, Sital Chandra Maitra, were upheld.

DURGA PROSHAD PATTAK *v.* LACHMAN BANIA.

The main ground on which we issued the Rule was that the charge, as framed, was improper and extremely confusing. It says that "you, on or about the 1st day of February 1906, at Malatipur voluntarily caused hurt to Babnullah, Sadhu Sheikh and Lal Chand by a *dao*, a cutting instrument, and thereby committed an offence punishable under section 324, Indian Penal Code." There were two persons charged with causing hurt to three persons with a *dao*.

The fact is that there was no case of hurt by *dao* by one of the accused and Motilal Sheikh has now been convicted under section 352 for using a *lathi* against Sadhu and Babnullah. This irregularity in the charge might have prejudiced the accused in their trial.

The judgment of the District Magistrate shows that there was some provocation and a little confusion at the time.

Having given our best consideration to the evidence and the judgments of the two lower Courts we think that the conviction of the accused should be set aside and that they should be re-tried on charges properly framed.

The case should not be tried by the same Magistrate again. The District Magistrate will appoint some Magistrate at the headquarters to take up the case. We further direct that in the event of a fresh conviction being come to against the petitioners the imprisonment they have already undergone be taken into consideration.

Rule made absolute:
Re-trial by a new Magistrate ordered.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1 OF 1913.
February 20, 1913.
Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.
DURGA PROSHAD PATTAK—
PETITIONER
versus
LACHMAN BANIA—OPPOSITE PARTY.

Sanction—Second sanction—Repetition of first sanction—Period of limitation not to be extended.

There can be no second sanction for a prosecution and, any subsequent order purporting to be a second sanction must be taken to be nothing more than a repetition of the first, and the same period of limitation, therefore, will apply running from the date of the first sanction.

Darbari Mandar v. *Jagoo Lal*, 22 C. 573, relied upon.

Rule against the order of the Third Judge of the Calcutta Presidency Small Cause Court, dated September 5th, 1912, granting sanction for the prosecution of the petitioner under section 195 of the Criminal Procedure Code, against whom proceedings were taken by the Chief Presidency Magistrate, Calcutta, on September 21st, 1912.

Mr. *Asghar* and Babu *Tara Keswar Pal Chowdhury*, for the Petitioner.

Mr *P. L. Roy* and Babu *Chandra Sekhar Banerjee*, for the Opposite Party.

JUDGMENT.—This Rule was issued upon four grounds, *first*, that the Small Cause Court had no power to grant a subsequent sanction, one having already been granted on the 27th July 1912 which sanction had not been cancelled by a higher Court, *secondly*, that the Small Cause Court had no jurisdiction in granting a second sanction without giving any notice upon the petitioner, *thirdly*, that the Small Cause Court Judge acted without jurisdiction in granting a second sanction inasmuch as a prosecution was started and was pending in the Police Court upon the first sanction; and *fourthly*, that the second sanction was illegal inasmuch as it extends the period of limitation which is to be calculated from the original date of sanction.

As regards the first three grounds it is only necessary to point out that there was no second sanction, and all the rulings which have been cited to us by the learned Counsel, of which we need only refer to that in the case of *Darbari Mandar* v. *Jagoo Lal* (1), clearly lay down that there can be no second sanction and that any subsequent order purporting to be a second sanction must be taken to be nothing more than a repetition of the first, and that the same period of limitation, therefore, will apply running from the date of the first sanction.

The fourth ground is that by this illegal second sanction the period of limitation is extended; but as we have just pointed out it is not extended in any way. But the question does not arise in this case, because

(1) 22 C. 573.

as a matter of fact, the revival of proceedings in the Criminal Court took place within two months of the original sanction. As regards the question of the propriety of the revival in the Criminal Court, that was considered by the learned Judges who issued the Rule. It formed the fifth ground of the petition and the learned Judges after considering rejected it and did not issue any Rule. That question, therefore, can never be raised again.

We are bound to hold that the Presidency Magistrate was within his jurisdiction in reviving these proceedings, as it appears clear on the record that he was, and the Rule must be discharged simply on the ground that there was no second sanction and that the proceedings were taken within the period of limitation.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 196 OF 1913.

March 28, 1913.

Present:—Sir Henry Richards, KT., Chief Justice.

MASHUK ALI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security—Sufficient cause to refuse to accept surety.

A Magistrate refused to accept sureties on the ground that they lived at a distance of nine miles from the residence of the accused and, consequently, had no influence over him and could not be expected to exercise proper vigilance over his actions:

Held, that the reason for refusing was insufficient.

Application in revision against an order of the Magistrate of Bulandshaber.

Mr. *P. L. Banerji*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—The applicant is called upon to give security under section 110 of the Code of Criminal Procedure. The order directed that the applicant should "execute a bond in Rs. 200 with two sureties (respectable *zemindars*) of Rs. 200 each, to be of good behaviour for one year." After some little time the present applicant produced two sureties. The learned Magistrate made the following order:—"I do not think it would be safe to let out Mashuk *alias* Maswa

on the surety of the present applicant. They live at a distance of nine miles from the residence of the accused and, therefore, cannot be expected to exercise proper vigilance over his action nor do I know that they possess any influence over him so as to prevent him from taking to his evil ways when he is at large." It will thus appear that the present applicant complied with the Magistrate's order and produced two respectable *zemindars* who were willing to go security for him as ordered by the Magistrate. The sole ground upon which the Magistrate seems to have refused to accept the sureties was that they resided nine miles away. The learned Magistrate does not say that the sureties were not respectable men and he does not seem to have made any inquiry as to whether they had or had not influence with the applicant but inferred from the fact that they live nine miles away that they had no such influence. In my opinion there was no sufficient reason for refusing to accept the sureties. If the learned Magistrate had felt that under the circumstances of the particular case it was necessary that the sureties should reside at a very short distance from the residence of the applicant the order should have so stated.

I allow the application, set aside the order of the Magistrate and direct that the security offered by the two sureties produced be accepted together with the bond of the applicant himself and he be released directly the bonds are filed.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 502 OF 1910.

CRIMINAL REVISION PETITION No. 413 OF 1910.

September 6, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

K. GANAPATHI BHATTA—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 195, 235 (1), 236, 403—Penal Code (Act XLV of 1860), ss. 182, 211—Charge under section 211—Acquittal bar to subsequent trial under section 182—Competency of Court—Interpretation—Sanction—No condition of competency of Court.

GANAPATHI BHATTA *v.* EMPEROR.

Once a person is acquitted of a charge under section 211, Indian Penal Code, he cannot subsequently be tried on the same facts for an offence under section 182 of the Penal Code.

Section 235 (1) of the Criminal Procedure Code is inapplicable when it is sought to charge the accused with another offence on the identical facts on which he was charged before with one offence.

Section 236 of the Criminal Procedure Code applies to a case where on the same facts it is doubtful whether the accused has committed one offence only or both that offence and another.

Clause 4 of section 403 of the Criminal Procedure Code refers to the character and status of the tribunal when it refers to competency to try the offence.

A sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal, it is only a condition precedent for the institution of proceedings before the tribunal. The fact that at the time of the previous trial, sanction had not been obtained for the institution of proceedings under section 182, does not prevent the operation of section 403.

Petition, under sections 435 and 439 of the Criminal Procedure Code, to revise the order of the Court of Session of the South Canara Division, in Cr.M.P. No. 18 of 1910, confirming that of the 2nd class Magistrate of Puttur, in C. C. No. 190 of 1910 on his file.

Mr. *J. L. Rozario*, for the Petitioner.

Mr. *S. Swaminathan*, for Public Prosecutor, *contra*.

ORDER.—This is an application asking this Court to revise an order of the 2nd class Magistrate of Puttur disallowing a preliminary objection of the accused to his prosecution for an offence under section 182 of the Indian Penal Code and the order of the Sessions Judge of South Canara refusing to recommend to this Court the quashing of that order.

The facts necessary for the disposal of this appeal are briefly as follows:—

On the 5th February 1907, the accused made a complaint to the Police that certain articles had been stolen from his house. On the 11th February the Police made an inquiry in consequence and at that inquiry the accused repeated his complaint and said that he suspected the complainant as the person who committed the theft. It was found that no theft took place at all in the accused's house and that his complaint was false. The complainant then made a complaint in which he alleged, the information laid by the accused on the 5th February and on the 11th February 1907 was *false*. The case was tried by the Deputy Magistrate of Puttur and a charge was framed against the accused under section 211 of the Indian Penal Code in that he instituted a false charge of theft against the complainant on the 11th February 1907. He was convicted of the offence and the conviction was affirmed by the Sessions Court but it was set aside by this Court in Criminal Revision Case No. 405 of 1909. This Court observed: "Both Courts have found that there was no theft and we assume that that finding is correct and that the information given to the Police was false to the knowledge of the accused, that is to say, that knowing that no theft had been committed, he stated that he suspected two men who were his enemies. This would clearly amount to an offence under section 182, Indian Penal Code, but, in our opinion, the accused has made no charge against the complainant within the meaning of section 211, Indian Penal Code." It should be stated that before the presentation of the present complaint, the complainant had applied to the Superintendent of Police for sanction to prosecute the accused for an offence, under section 182, Indian Penal Code, but it was refused. After the acquittal of the accused by the High Court, the complainant applied again to the Superintendent of Police for sanction and obtained it.

In the present proceedings, the accused is charged with an offence under section 182, Indian Penal Code, of which offence the accused was clearly guilty according to the opinion of this Court in Criminal Revision Case No. 405 of 1909. The preliminary objection to the prosecution with which we are concerned in this petition is that the acquittal of the accused by this Court in Criminal Revision Case No. 405 of 1909 constitutes a bar to the present proceedings under section 403 (1) of the Criminal Procedure Code. The 2nd class Magistrate disallowed this objection on the ground that "the offence contemplated by section 182 is not the same as that contemplated by section 211, Indian Penal Code." The two offences may not be the same as observed by him, because under section 182, it is necessary that the person who gives information to a public servant must know or believe it to be false. Under section 211, on the other hand, the person who institutes a criminal proceeding against another need not know it to be false; it is sufficient that he should

know that there is no just or lawful ground for such proceeding or charge against that person. But this finding is not sufficient for disposing of the objection. A bar under section 403, Criminal Procedure Code, operates not only where a person has been tried for an offence and convicted or acquitted of it and is sought to be tried again for the same offence, but also where he is sought to be tried "on the same facts for any other offence for which a different charge from the one made against him might have been made on the same facts under section 236 or for which he might have been convicted under section 237".

Now, in this case the facts, on which the accused was charged in the previous case, were that he gave false information on the 5th February 1907 and that on the 11th February he repeated this information and stated that he suspected the complainant of the offence disclosed by the information. The prosecution case was that there was no theft committed at all as alleged by the accused. On that footing it was open to the Deputy Magistrate, who tried the previous case, to frame a charge against him under section 182 as well as a charge under section 211, Indian Penal Code. Section 236 of the Criminal Procedure Code enacts that "if a single act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." Now, on the facts alleged, it was doubtful whether the accused was guilty of making a false charge under section 211, Indian Penal Code, because it was not clear that his information would amount to the making of a charge against the complainant so as to bring it under that section. But those facts, as pointed out by the High Court in Criminal Revision Case No. 405 would clearly bring the act of the accused under section 182, Indian Penal Code.

We are inclined to think that section 236 would be applicable to a case where, on the same facts it is doubtful whether the accused committed one offence only or both, that offence and another. Dr. Swaminathan appearing for the Crown contends that the case is one falling under section 235, clause (1) and not under section 236. The former section runs in these terms "If, in one series of acts, so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence." Section 403 cluase (2) provides that "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)". It seems to us that section 235 (1) applies to cases where on some of the facts so connected together as to form the same transaction one offence may be charged against an accused person, and on other facts forming part of the series of acts another offence may be charged against him. Illustration (*b*) to section 403 is an instance of this:—"*A.* is tried upon a charge of murder and acquitted. . . . but it appears from the facts that *A.* committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery." Section 235 (1) seems to us to be inapplicable when the accused is sought to be charged with another offence on the identical facts on which he was charged before with one offence. Clause 4 of section 403 supports this contention. In *Suresh Chandra Sinha* v. *Banku Sadhu Khan* (1) the accused was first charged with an offence under section 447, Indian Penal Code, and after he was acquitted of it owing to the non-appearance of the complainant, he was again charged with offences under sections 447, 504 and 506, Indian Penal Code, on the same facts. Mookherjee and Casperz, JJ., held that section 403 (1) barred the second trial. The learned Judges say: "The record shows that the second trial is being held in respect of all the offences alleged on the previous occasion, including the offence under section 447, Indian Penal Code. The cases relied on by the Magistrate are distinguishable.

(1) 2 C. L J. 622; 3 Cr. L. J. 115.

GANAPATHI BHATTA *v.* EMPEROR.

The order of the Magistrate directing the issue of processes under sections 447, 504 and 506, Indian Penal Code, is, therefore, set aside". In *Queen Empress* v. *Erram Reddi* (2) the learned Judge held the same view. There the accused was first charged with committing mischief by cutting certain branches from a tree claimed by the complainant and acquitted. He was again charged with the offence of theft on the same facts. The learned Judge held that the second trial was not maintainable. He observed that a charge of theft might also have been made under section 235 and that "Clause 2 of section 403 does not apply to this case, because the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts but one act or transaction only, the cutting of the tree and the removal of the branches cut". In *Sharbekhan Gohain* v. *Emperor* (3) Pargiter and Woodroffe, JJ., held that a person who was tried for offences under sections 201 and 202, Indian Penal Code, and acquitted, could not be tried again for an offence under section 176 on the same facts. They say:—"Now this case does not appear to us to come under section 235, sub-section (1), because the offence of which he has now been convicted is based on the very same facts on which the previous charge under section 202 was based. The case comes rather under section 235, sub-section (2) which lays down that if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by, which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for each of such offences. This charge under section 176, Indian Penal Code, might have been made at the former trial on the very same facts. It does not, therefore, come within sub-section 2 of section 403, Criminal Procedure Code, and is not, therefore, excluded from the operation of sub-section 1 of that section." Now in this case the falsity of the statement that there was a theft, was a part of the charge with respect to the institution of false proceeding under section 211, Indian Penal Code, and if there was no theft at all he must have necessarily known that his information that it took place was false. The present complaint under section 182, Indian Penal Code, is, therefore, on the same facts as were necessarily involved in the previous charge. Dr. Swaminathan contends that although the false statement of the 11th February 1907 of the occurrence of a theft might be a part of the facts included in the charge in the previous case, the accused's information of the 5th February might be made the subject of a separate charge under section 235 (1). But as already observed the information of the 5th was also complained of in the previous case, though the charge framed, after the evidence for the prosecution was recorded, referred only to the repetition of the information on the 11th. The present complaint, therefore, is based on a part of the facts which were the foundation of the previous proceedings. Besides the information given by the accused on the two days the 5th and 11th February must in reality be regarded as the same. The repetition of an information given to a public servant may be said to constitute a distinct act of libel but could hardly be said to be different information.

Dr. Swaminathan has urged another contention in support of his argument that section 403 (1) cannot be a bar to the present proceedings. He urges that clause 4 of section 403 is applicable to the case. That clause provides: "A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged." The learned Counsel's argument is that inasmuch as at the time of the previous trial, the complainant had not obtained the sanction of the Superintendent of Police, which was necessary for a complaint of an offence under section 182, Indian Penal Code, the Court which held the previous trial was not competent to try the offence with which the accused is now charged. We are of opinion that the clause refers to the character and status of the tribunal

(2) 8 M. 296.
(3) 10 C. W. N. 518; 3 Cr. L. J. 388.

when it refers to competency to try the offence, as shown in the illustrations (*f*) and (*g*) to the section. The Deputy Magistrate was perfectly competent to try a charge under section 182, Indian Penal Code. A sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal; it is only a condition precedent for the institution of proceeding before the tribunal. No authority has been cited to us by Dr. Swaminathan in support of his argument. In *King-Emperor* v., *Kishna Aiyyar* (4) the learned Chief Justice and Davies, J., held that the circumstance that the previous case was tried by a Judge with assessors, while the offence sought to be inquired in the subsequent case was triable by a Jury, would not exclude the applicability of section 403 (1). The learned Judges pointed out that "illustrations (*f*) and (*g*) show that the words 'was not competent to try' meant 'had no jurisdiction to try'". It was the duty of the prosecution in the present case to obtain the required sanction for the trial of an offence under section 182, Indian Penal Code. We are of opinion that section 403 (4) is not applicable to this case.

The result is that, in our opinion, section 403 (1) constitutes a bar to the proceedings now taken against the accused and we, therefore, direct the 2nd class Magistrate to discharge the accused.

Accused discharged.

(4) 24 M. 641.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 181 OF 1913.

March 14, 1913.

Present:—Justice Sir George Knox, KT.

SARFERAZ KHAN AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190, 203—Cognizance of an offence—Procedure—"Police report"

Before proceedings are taken against an accused person, such as would bring him before a Court of justice, a Magistrate must have before him knowledge, independent of his own knowledge, based either upon a complaint or upon a Police report. If he chooses to take action without such independent report he is bound to inform the accused that he is entitled to have the case tried by another Court.

The term 'Police report' in section 190 is not limited to the report mentioned in section 170, Criminal Procedure Code. A report made by the Police in a non-cognizable case under the order of a Magistrate is a Police report.

Criminal revision against an order of the Magistrate of Moradabad.

Mr. *C. C. Dillon* (with him Mr. *Ibn Ahmed*), for the Applicants.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application in revision alleging that the first Court did not act under section 200 of the Code of Criminal Procedure inasmuch as no complainant was examined under that section and if it acted under section 190, clause (*c*), then the trial of the petitioners was bad in law, in that the Court failed to observe the procedure laid down by section 191 of the Code.

It appears that in the present case, the Magistrate who tried the accused received a paper by post to the effect that an offence had been committed by certain *chowkidars*. The Magistrate then and there sent the paper to the Police for inquiry. The result of the inquiry appears to have first gone to the Superintendent of Police who suggested the prosecution of the accused and sent the report to the Magistrate. The Magistrate then took action presumably under section 204 of the Code of Criminal Procedure. The contention is, that the Magistrate when he sent the papers to the Police for inquiry took cognizance and acted upon section 190, clause (*c*). Had he done so, there is no doubt that, before taking evidence in the case, he should, under section 191, have informed the accused that he was entitled to have the case tried by another Court. It is quite conceivable that upon the Police report reaching him, the Magistrate might have refused to take action or in other words declined to take cognizance of the offence. I see no reason nor any authority for limiting the "Police report" to the report mentioned in section 170 and the preceding sections of the Code. Indeed section 155 shows that Police officers are empowered to investigate a non-cognizable case provided they act under the orders of a Magistrate having power to try such

a case, and as a natural consequence they can send in a report in such a case under section 173. The presumption is that in this case the action taken by the Magistrate was based upon the Police report. It is true, that in the judgment the Magistrate does speak of an investigation under section 202. But section 202 has reference only to cases of which cognizance is taken upon a complaint and after the examination of a complainant. The object of the Code appears to be, that before proceedings are taken against an accused person, such as would bring him to a Court of justice, a Magistrate must have before him knowledge, independent of his own knowledge, based either upon a complaint or upon a Police report. If he chooses to take action without such independent report he is bound to inform an accused that he is entitled to have the case tried by some Court other than the Court of such Magistrate. I reject this application.

Application rejected.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 583 OF 1912.
October 8, 1912.
Present:—Mr. Justice Chitty and Mr. Justice Richardson.
PROMOTHA NATH RAY—ACCUSED—APPELLANT
versus
EMPEROR—PROSECUTOR.

Charge—Criminal breach of trust—Penal Code (Act XLV of 1860), s. 406—Specification of dates between which offence committed—Offence committed after specified period—Illegality of charge—Acquittal of accused—Criminal Procedure Code (Act V of 1898), ss. 222, cl. (2) proviso, 537—Books of account—Locked up in boxes—One item of property.

The accused was charged with committing criminal breach of trust in respect of a large sum of money between August 17, 1909, and August 15, 1910. There is evidence to prove that in February and May 1911 he appropriated part of the sum to his own use; but there the evidence of the commission of such an offence before August 15, 1910, was insufficient:

Held, that it is not enough to show that there was embezzlement at some time, before, during or after that period; that the charge being framed under the special provision contained in clause (2) of section 222 of the Criminal Procedure Code and the proviso thereto, it is at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named, or some part of it, committed within the space of one year, that this error in the charge and the discrepancy between the dates specified and the actual dates on which the offence appears to have been committed was not a mere irregularity which might be cured by the provisions of section 537 of the Criminal Procedure Code.

Subramania Ayyar v. *King-Emperor*, 25 M. 61; 5 C. W. N. 866; 11 M. L. J. 233; 3 Bom. L. R. 540, 28 I. A. 257 (P. C.), relied upon.

As the evidence did not disclose any completed act of breach of trust between the dates specified in the charge, the accused was entitled to an acquittal.

The accused was charged with having committed the offence of criminal breach of trust in respect of certain account books between July 11, 1910, and August 15, 1910. He was called upon to produce them on August 15, 1910:

Held, that as those books, forming one set of account books, were found together in two locked boxes, the keys being with the accused, they may be fairly regarded as one item of property with which the accused was dealing in one particular way; and, therefore, the objection of the accused that the charge was bad inasmuch as there was a separate offence as regards each book, and the accused could not be tried for more than three of such offences, is untenable; that the accused could not be said to have committed an offence under section 406, Indian Penal Code, as regards the books until after August 15, 1910, when he was called upon to produce them; that as there was no evidence to show how he dealt with the books before that date there was no evidence of any dishonest dealing before that date, and that the accused ought to be acquitted on this charge also.

Appeal against the order of the Sessions Judge of Rungpur, dated July 17th, 1912, convicting the petitioner under section 406, Indian Penal Code, and sentencing him to two years' rigorous imprisonment and a fine of Rs. 1,000 on the first charge and to two years' rigorous imprisonment on the second charge.

Messrs. *Norton*, *Ashgar* and Babu *Manmatha Nath Mukherjee*, for the Appellant.

Messrs. *B. Chakravarti*, *K. N. Chaudhuri*, *B. K. Lahiri* and Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.—The appellant, Promotha Nath Ray, has been convicted by the Sessions Judge of Rungpur of criminal breach of trust under section 406, Indian Penal Code, and sentenced on the first charge to rigorous imprisonment for two years, and also to a fine of Rs. 1,000, or in default further rigorous imprisonment for six months and on the second charge to rigorous imprisonment for two years, the sentences to run concurrently. The facts, as to which there is no serious dispute, are as follows:—One Dukhina Mohan Ray, a wealthy *zemindar* of Rungpur, made a Will, dated 5th November 1895, of

which he appointed the appellant and one Nil Madhab Ray, executors. On 12th July 1897, Dukhina Mohan Ray adopted the present complainant, Duksbaja Mohan Ray, as his son, and on the same day he made a codicil to his Will. On 22nd March 1898, the testator died and five days later his executors applied for Probate of the Will and codicil. For some reason or other it was not immediately granted. On 18th November 1905, the widow of Dukhina Mohan Ray filed a suit for an increase of maintenance and also for the construction of her late husband's Will against the executors and the adopted son. That suit was carried up to this Court on appeal, judgment being delivered on 29th May 1908 [see *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (1)] Meanwhile, on 22nd February 1906, Probate was granted to both executors, who thereupon took charge of the whole estate. On 4th March 1907, Nil Madhab Ray died and since then the appellant has had sole charge. On 11th July 1910, (27th *Ashar* 1317 B. S.) Dukshaja Mohan Ray attained his majority, and called upon the appellant to make over the entire estate to him. It is in consequence of the appellant's failure to comply with this request that these proceedings have been taken. Some three or four days before the complainant attained his majority there was a conversation between Hari Das Ray, his natural father and guardian of his person, and the appellant. For the appellant it is now argued that he refused on that occasion to make over any of the property which had been made *debutter* by the Will, and that the sum which he is now charged with having embezzled formed part of such *debutter* property and was, therefore, retained by him as executor as of right. This contention is not supported by any evidence and is contrary to the fact, as appears from the appellant's own petition. He did not object at that time to make over any part of the property to the complainant but desired to make over so much, as had been made *debutter*, to him as *shebait*. It is conceded that the whole of the immoveable property was made over to the complainant including such portions as were set aside by the testator for the *debutter*. This was done by the appellant issuing 7 *purwanas* on 6th July 1910, to the various Tehsildars, in consequence of which the various tenants were brought in on the day appointed and attorned to the complainant. It was only in respect of the moveable property, more particularly the moneys that should have been in his hands on 11th July 1910, that the appellant made default. It should be stated, the complainant applied to the Collector for mutation of names. The appellant objected but in spite of his objections the complainant's name was registered in respect of all the immoveable property. Two notices were served on the appellant calling on him to deliver over to the complainant all money, valuables and papers belonging to the testator's estate. The first was given on 30th July 1910, (14th *Sravan* 1317), and second on the 15th August 1910, (30th *Sravan* 1317). On the latter day the complainant and others were present, and on that day the appellant endeavoured to remove five bags of rupees, each containing Rs. 1,000 but was prevented from doing so by the complainant and his servants. Much stress was laid by the appellant's Counsel on the fact that the complainant and his witnesses had in their earlier statements assigned this incident to the 14th of *Sravan* instead of the 30th. It appears to be a matter of little importance. There is no doubt whatever that it in fact took place. Except as indicating a dishonest intention on the part of the appellant it has no direct bearing on the present charges. In consequence of this and of the appellant's persistent refusal to make over any moveable property or to render any account, on 10th September 1910, four guards were placed over the *Malkhana*. On 23rd December 1910, the complainant brought two civil suits against the appellant for account, one in respect of his dealings as *dewan* in the lifetime of Dukhina Mohan Ray, and the other in respect of his executorship. We are concerned only with the latter suit. In that suit Commissioners were appointed and they worked until the 2nd May 1911, endeavouring to ascertain the precise state of the accounts. A decree was ultimately passed against the appellant as executor, against which he has preferred an appeal to this Court and that appeal is now pending. The appellant succeeded in keeping the complainant at bay and neglected or refused to produce the books of account. On 1st September 1911, criminal proceedings were commenced and a search

(1) 12 C. W. N. 808; 8 C. L. J. 489.

warrant was applied for and granted. The result of the search was to find the account books of the estate locked up in two boxes in the appellant's *zenana*. These form the subject of the second charge in this case. The books showed that the appellant should have had in his hands on 11th July 1910 a sum of Rs. 1,57,197-0-3, of this Rs. 30,670-0-$\frac{1}{2}$ was found by the Commissioner in the *Malkhana*. The appellant was, therefore, charged in the first charge with having committed criminal breach of trust in respect of, or having dishonestly misappropriated the balance, *viz.*, Rs. 1,26,526-12-2$\frac{1}{2}$. The dates between which the offences were alleged to have been committed were stated in the charges drawn by the Committing Magistrate as 7th July 1910 and 15th August 1910 in the first charge, and 11th July 1910 and 15th August 1910 in the second. In the Sessions Court at the request of Counsel for the prosecution the dates in the first charge were altered to 17th August 1909 and 15th August 1910.

Two main contentions have been pressed before us on behalf of the appellant. (1) It is argued that in refusing to account he was acting under a *bona fide* belief that he was entitled to so refuse, and that no dishonesty could be imputed to him for so doing; and (2) that the charges were so defective as to vitiate the conviction.

With regard to the first point, it was argued that on the true construction of the Will, or at any rate upon a construction which a reasonable man might take to be the true one, the executor was entitled to retain in his hands all the property dedicated by the testator to the idols or in any way constituted by him *debutter*. It was suggested that the whole sum of Rs. 1,26,526 was to be regarded as *debutter*. Counsel first argued that the sum or more than that sum would be required to establish the *thakurs*. On seeing that that view could not be supported by the Will itself he fell back on a suggestion that the Rs. 1,26,526 represented accumulations of income of the *debutter* property. Neither of these suggestions is at all borne out by the proved facts of the case. It is conceded that the appellant as executor never took any steps whatever to establish the *thakurs* at Benares. If he had done so, the only sum that the Will authorised him to expend was Rs. 7,000 out of income for building the temples. As a matter of fact he kept no separate account of the *debutter* properties, but one general account of the whole estate, so that it could not be said that the Rs. 1,26,526 represented accumulations of income of *debutter* properties. Further, his contention that he was entitled to retain possession of the *debutter* properties at all time is wholly untenable and no reasonable man could possibly put such a construction on the Will. Nor was this the appellant's original contention, for he was willing to and did in fact, make over the immoveable *debutter* properties to the complainant. At first all that he asked was that the complainant should receive them as *shebait*. It need hardly be said that the appellant as executor had no right to impose any such condition. The 5th and 13th clauses of the Will are perfectly clear. By the 5th clause, if the son, born or adopted, was a minor, the executor might establish the *thakur* at Benares. If he did not do so during such minority, it was incumbent on the son on attaining full age to carry out the testator's wishes in this respect. The executor would have nothing more to do with the matter. By clause 13, on the son, born or adopted, attaining majority, the executor was bound to render accounts and make over the *tahbil*, etc., and all property to him. Clause 7, on which Counsel for the appellant relies, does not militate against these clear conditions. It deals with a state of things, which has not in fact happened. The Will itself being thus clearly against the contentions of the appellant, as he takes his stand upon the Will, it is unnecessary to consider whether it was at all revoked or varied by the codicil of 12th July 1897. We are of opinion that there is no substance in the plea of a *bona fide* claim of right put forward by the appellant. There is abundant proof of his dishonesty in respect of portions of this sum of Rs. 1,26,526, but in the view that we take of the charges we refrain from entering upon a detailed discussion of the evidence on this point.

Turning to the second point, the first charge is of criminal breach of trust in respect of the gross sum of Rs. 1,26,526 between 17th August 1909 and 15th August 1910. The evidence shows that some amounts which go to make up this balance were received in December 1909 but for the most part they appear to have been received

before 17th August 1909. As to criminal breach of trust or dishonest misappropriation there is evidence to prove that between February and May 1911 the appellant appropriated considerable sums, part of this balance to his own use. There is, however, no sufficient evidence of such an offence having been committed before 15th August 1910. Up to 11th July 1910 the appellant was rightly in possession of the whole estate. On that day he should have made it over to the complainant. He failed to do so and a notice was served upon him on 30th July 1910. He failed to comply with that notice and a second notice was served upon him on 15th August 1910. Had he complied with that notice and rendered a true account to the complainant and handed over to him whatever remained in his hands nothing could have been said. He could hardly have been charged with dishonesty. No doubt, as we have indicated, the appellant was chargeable with the balance shown in the account books which were found in his possession. That is to say, it was his duty to account for the balance and, or within a reasonable time after the 11th July 1910, to pay over all that portion of it for which he could not satisfactorily account. But if there was criminal breach of trust or embezzlement, when was the offence committed? A large part of the balance was actually received before the period specified in the charge. It is not enough to show that there was embezzlement at some time before, during, or after that period, because the charge is framed under the special provision contained in clause (2) of section 222 of the Criminal Procedure Code and the proviso thereto, and upon a charge so framed it is at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named or some part of it, committed within the space of one year. It is true that between 11th July and 15th August 1910, the appellant refused or neglected to account for the balance or to pay it over. And we assume that the excuse which the appellant gave at the time, or now gives, for his failure to render an account of or to pay over the balance is entirely frivolous. On the other hand, this is not a simple case of moneys received and misapplied by a clerk or servant. It is the case of an executor of a large estate, with all the powers and responsibilities which an executor has, and there is no suggestion that the accounts themselves are incorrect or have been falsified. The correctness of the accounts is not an answer to the charge but it is one of the factors which we have to take into consideration upon the question whether there was any dishonesty on the appellant's part before 15th August 1910. In all the circumstances we hold that the evidence does not disclose any completed act of breach of trust between 17th August 1909 and 15th August 1910. It follows that, in our opinion, on this charge as framed the appellant is entitled to an acquittal.

We may add that it is not easy to see why, when the charge was amended in the Sessions Court, it was amended by putting the first date back to 17th August 1909. The evidence showing when the actual misappropriation took place had then been recorded before the Magistrate. Had the second date been put forward to the 10th July 1911, this difficulty would not have arisen. This error in the charge and the discrepancy between the dates specified and the actual dates on which the offence appears to have been committed is not a mere irregularity which might be cured by the provisions of section 537. It vitiates the whole trial. See *Subramania Ayyar* v. *King-Emperor* (1), where their Lordships of the Judicial Committee said :—"Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

The same objection arises as to the second charge. We may, however, state that the contention of the appellant's Counsel that the second charge is bad, inasmuch as there was a separate offence as regards each book, and the appellant could not be tried for more than three of such offences, is untenable. These books forming one set of account books of the estate were found together in two locked boxes, the keys being with the appellant. They may, we think, be fairly regarded as one item of property with which the appellant was dealing in one

(1) 5 C. W. N. 863; 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257 (P. C.).

particular way. It is doubtful, however, whether it was advisable to arraign the appellant on such a charge at all. The evidence of his conduct in respect of the books of account might well have been used to bring home to him the charge of misappropriation of the money. But taking the charge as it stands it is difficult to see how he can be said to have committed an offence under section 406 as regards the books until after 15th August 1910, when he was finally called upon to produce them and render an account, and neglected or refused to do so. There is no evidence to show how he dealt with the books before that date, and, therefore, no evidence of any dishonest dealing before that date.

For the reasons indicated we set aside, though with some reluctance, the conviction and the sentences passed upon him. The appellant is acquitted and must be discharged from his bail-bond.

We have considered whether we ought, in the interest of justice, to direct a re-trial. The result may seem in some sense unsatisfactory because the evidence has perforce been considered with reference only to the limits defined by the charges. On the other hand, it cannot be said that the result is due to a merely formal error in the charges. The charges fail not because they are deficient in point of form but because they are not supported by the evidence adduced. After giving the matter our most careful consideration, and having especial regard to the civil proceedings taken against the appellant, we have decided in acquitting him not to direct that he be re-tried.

Appeal allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 106 OF 1913.

March 5, 1913.

Present:—Mr. Justice Rafique.

SHEORAJ SINGH AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145 cl. (4)—Presumption—Jurisdiction—Actual possession.

The jurisdiction of a Magistrate, to initiate proceedings under section 145 of the Criminal Procedure Code is not determined by the date of dispossession of one of the parties claiming the land. It is determined by an apprehension, based on reliable information, that a dispute likely to cause a breach of the peace exists between two parties concerning some land situate within the local limits of the Magistrate's jurisdiction.

The proviso to clause 4 of section 145 of the Criminal Procedure Code merely recites a circumstance under which presumption of possession may be made in favour of one of the disputants.

A Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in clause 4 of section 145 of the Code.

Criminal revision against an order of the District Magistrate of Etah.

Mr. *C. Dillon* (with him Dr. *S. N. Sen*), for the Applicants.

Dr. *S. C. Banerji*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order of the District Magistrate of Etah passed under section 145 of the Criminal Procedure Code. It appears that one Sulaiman Shiko gardener was the original proprietor of *Mauza* Pachgain in the Etah District. He executed a deed of usufructuary mortgage in respect of that village on March 9th, 1867, in favour of the grandfather of Lalta Prasad in lieu of Rs. 25,000. One of the conditions of the mortgage was that the mortgagee was to pay Rs. 2,070 per annum to the mortgagor as *malikana* allowance. In 1833 gardener executed a deed of sale in respect of the equity of redemption of *Mauza* Pachgain in favour of Raja Shankar Singh of Kasganj. Beni Ram and Janki Prasad of Hathras had a simple money decree against Raja Shankar Singh for about a lac of rupees which was purchased by the Raja of Awa. The latter put the said decree into execution and the entire property of Raja Shankar Singh was sold and purchased by the Raja of Awa and Raja Khushal Pal Singh of Agra. The sale took place after the death of Raja Shankar Singh and the proceedings were held against his sons named Sheoraj Singh and Maharaj Singh. They contested the validity of the sale and the case came up in appeal to this Court. The sale was set aside on a compromise between the parties. On May 21st, 1912, in accordance with the decree of this Court, possession of the property sold was restored to Sheoraj Singh and Maharaj Singh through the Amin of the Subordinate Judge

of Aligarh. By mistake possession over *Mauza* Pachgain was also proclaimed by the Amin of the Court in favour of Sheoraj Singh and Maharaj Singh. Ten days after that proclamation, on May 31st 1912, Lalta Prasad presented an application to the District Magistrate of Etah complaining that the men of Sheoraj Singh and Maharaj Singh had taken possession of his "*zilla* house" in Pachgain and were attempting to collect rents. Another application was made by Lalta Prasad on June 7th, 1912, to the Magistrate complaining of the disobedience of Sheoraj Singh and Maharaj Singh to the oral orders given to the latter by Magistrate, on receiving the application of May 31st, 1912, to desist from interfering with the possession of Lalta Prasad and asking for Police guards.

Both the applications were dismissed by the Magistrate. On June 8th, 1912, Lalta Prasad presented an application under Order XXI, rule 100, of the Civil Procedure Code, to the Assistant Judge of Aligarh, who had the powers of a Subordinate Judge, asking for the restoration of possession against Sheoraj Singh and Maharaj Singh. The learned Judge dismissed the application on the ground that the possession of the applicant had not been disturbed by either the decree-holder or the purchaser. On July 8th, 1912, Lalta Prasad made a similar application to the Subordinate Judge of Aligarh who admitted that a mistake had been made in May 1912 in proclaiming the possession of Sheoraj Singh and Maharaj Singh without any qualification. He accordingly directed that a fresh proclamation should be made, and it was made by the Amin on the spot, that the possession of the two brothers, Sheoraj Singh and Maharaj Singh, was that of mortgagors only. On September 3rd, 1912, Pershadi Lal, *kaiinda* of Sheoraj Singh and Maharaj Singh, filed a complaint under section 107 of the Criminal Procedure Code against Lalta Prasad. On September 12th, 1912, Lalta Prasad filed a counter-complaint against his opponents and their servants. Towards the end of October and the beginning of November, while the collections of the *kharif* rents were in progress the situation became critical. Each side attempted to prevent the other from collecting rents and many tenants sent their rents by money orders to the Collector. Thereupon the latter started proceedings under section 145 of the Criminal Procedure Code. Both parties produced evidence as regards their possession, each claiming to be in possession. The learned District Magistrate found that Lalta Prasad was in actual possession and directed Sheoraj Singh and Maharaj Singh not to disturb or to interfere with his possession. Sheoraj Singh and Maharaj Singh have come up in revision to this Court and challenge the order of the learned District Magistrate. A preliminary objection is taken on behalf of Lalta Prasad to the effect that no revision lies from the order complained of, nor can this Court interfere with the order under section 15 of the Indian High Courts Act of 1861. In support of this contention the case of *Jhingai Singh* v. *Ram Partap* (1) is relied upon. The learned Counsel for the applicant meets the objection by contending that the learned District Magistrate had no jurisdiction to start proceedings under section 145 of the Criminal Procedure Code. The contention is based on the ground that Lalta Prasad himself had admitted in his applications to the District Magistrate, the Assistant Judge and the Subordinate Judge of Aligarh, that he (Lalta Prasad) had been dispossessed in May 1912. And as the proceedings under section 145 of the Criminal Procedure Code were not instituted till November 1912, more than two months after the admitted dispossession of Lalta Prasad, they were taken without jurisdiction. I do not think that the question of jurisdiction arises in the case. The jurisdiction of a Magistrate to initiate proceedings under section 145 of the Criminal Procedure Code is not determined by the date of dispossession of one of the parties claiming the land. It is determined by an apprehension, based on reliable information, that a dispute likely to cause a breach of the peace exists between two parties concerning some land situate within the local limits of the Magistrate's jurisdiction. What the learned Counsel really means is that as on the applications of Lalta Prasad himself he had been dispossessed, though wrongfully, more than two months prior to the institution of the proceedings under section 145 of the Criminal Procedure Code,

(1) 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382; 1 Ind. Cas. 762.

the Magistrate should not have found in Lalta Prasad's favour on the question of possession. The argument is based on the proviso to clause (4) of section 145 of the Criminal Procedure Code, which is to the effect that if a party has been forcibly and wrongfully dispossessed within two months of the order of the Magistrate calling upon the disputants to put in written statements of their respective claims as to the fact of actual possession of the land in dispute, the Magistrate may treat the party so dispossessed as if he had been in possession at the date of the order. The proviso merely recites a circumstance under which presumption of possession may be made in favour of one of the disputants. It does not debar the Magistrate from deciding the question of actual possession on other grounds also. In any case a Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in clause (4) of section 145 of the Criminal Procedure Code. I think the preliminary objection taken by the opposite party must prevail. I allow it and dismiss the application.

Application rejected.

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 430 OF 1910.
November 28, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
EMPEROR—APPELLANTS
versus
KUBERAPPA *bin* DHARMAPPA CHIWATI AND OTHERS—RESPONDENTS.

Approver—Accomplice—Evidence, value of—Corroboration—Quantity of corroboration—Practice—Law—Evidence Act (*I of* 1872), *ss.* 114, *ill.* (b), 133.

The law as such does not require any corroboration to validate the testimony of an accomplice. The rule of practice which does lay down this requirement must be applied with due regard to the varying circumstances of each particular case. The corroboration is necessary not only *quoad* the incidents and circumstances of the crime but also *quoad* the identity or personality of the offenders.

There is no rule, whether of law or practice, which seeks to furnish an inflexible canon as to the precise degree of corroboration which in all cases should be demanded for an accomplice's evidence.

The law does not require that every detail of the approver's story should be fortified by a similar story told by an independent witness, since the effect of any such principle would be to rule out the accomplice's evidence as altogether inadmissible. It is only necessary that accomplice's evidence should, in the circumstances of each particular case, receive that corroboration which it seems to require.

Criminal appeal by the Government of Bombay, from an order of acquittal passed by the Sessions Judge of Dharwar.

Mr. *L. A. Shah*, acting Government Pleader, for the Crown.

Mr. *Wadia*, with him Mr. *K. H. Kelkar*, for the Accused.

JUDGMENT.—In this case, two men, Kuberappa *bin* Dharmappa, accused No. 1, and Krishna *bin* Yellappa, accused No. 2, were charged before the Court of Session at Dharwar with murder by causing the death of one Parsappa. They were acquitted by the learned Sessions Judge with whom the two assessors agreed, and from that order of acquittal, this appeal is now brought by the Government of Bombay.

It may be convenient to set out *in limine* certain admitted facts in this case, and those admitted facts are these. The deceased Parsappa, a man of advanced years, was related to the first accused who expected to inherit property from him. The two accused are close friends. Next door to the first accused lived his mistress, a woman named Tara. Next door to Tara lived the deceased man Parsappa. Both the accused were in embarrassed circumstances. On the night of the 11th March, Parsappa was by some person or persons strangled to death under circumstances which constituted his killing the offence of murder punishable under section 302 of the Indian Penal Code. His dead body was found in his own house partly covered by a blanket on the following morning, the 12th of March. Search of the premises was made and ornaments worth Rs. 1,500 were found to have been stolen from his safe. The safe had to be forced open, as the keys of it could not be found. This crime baffled detection for some time, and not till after the lapse of about a month did the investigation, upon which the prosecution now rely, prove fruitful. The above, as we have said, are the admitted facts.

And the facts upon which the prosecution in this case rely are as follows:—According to the prosecution it was the two accused who plotted to kill the deceased in order to

rob him of his ornaments and so to relieve their own indebtedness. To that end they lured him into the house of Tara on the pretext of supplying him with medicine for his eyes which had been giving the deceased some trouble. When he had been thus enticed into the house, Tara, obeying the orders of the two accused, squeezed some chilly juice into his eyes, and thus temporarily blinded him. While thus disabled, he was set upon by both the accused who strangled him, the second accused also striking him on the jaws and chest with a large stone. The two accused then removed the deceased's keys, rifled his safe of the ornaments, threw the keys into the pit of Tara's privy, and then, carrying off the corpse out of Tara's house, took it through the courtyard over the party wall into the deceased's house, and there abandoned it leaving Tara's blanket lying partly over it and partly near it. The next morning the villagers' suspicions were aroused and the Police were communicated with. The house was entered and the dead body of Parsappa was found and sent off for *post mortem* examination. No clue to the perpetrators of the offence was obtained until the 10th April when the Sub-Inspector, following up certain information, which had been conveyed to him regarding the blanket, found on the corpse, went to Belgaum, the original residence of Tara, and there collected certain proof that the blanket was Tara's property. Armed with this proof, he returned to Dharwar and confronted Tara, with the knowledge which he had acquired. On the 13th April, the first accused was arrested. On the 15th April, the second accused and Tara were arrested, and the bulk of the ornaments stolen were found in the house of the first accused's grandfather Ningappa, on information supplied by the second accused. On the 16th April, Tara made her confession to a Magistrate, which confession is to all intents and purposes to the same effect as her deposition in the Court of Session. On the 17th of April, in consequence of information furnished by Tara, the pit of her privy was searched by *Bhangis*, and in it were found a lock and some keys which are fully identified as those of Parsappa's. On the 18th April, the first accused produced from where it lay hidden in a file of letters a pearl nose-ring also fully identified as the property of the deceased.

Such are the facts which the prosecution claim to have established in this case, and upon these facts it is urged that the guilt of the accused is placed beyond all doubt. From what we have already said it will be recognized that the evidence in the case falls substantially under two heads: *first*, the evidence of the accused No. 1's mistress, the accomplice Tara; and *secondly*, the evidence of the numerous witnesses who prove that on the accused's arrest they, whether directly or indirectly, produced ornaments which are identified as the property of Parsappa.

Mr. Wadia, who has said on behalf of the accused persons all that could be said, began by reminding us that the accused in this Court of Appeal stand in a stronger position than they occupied in the Court of trial, inasmuch as the learned trying Judge had the advantage of seeing and hearing the witnesses. It is true that that advantage is denied to us, but in this particular case the advantage is rather apparent than real, for we think that the appeal may safely be disposed of on the basis of that evidence which the learned Judge himself believed or, at any rate, did not disbelieve.

It is important, therefore, to see so far as possible what was the learned Judge's view as to the main classes of the evidence to which we have referred. It is clear that the case turns very largely upon the credibility of Tara; and the learned Judge writes that he considers that the evidence given by the approver Tara is "probably true in the main." He accepts, and so far as we can gather the assessors also accept, in its entirety the evidence which goes to show that the ornaments in suit were produced by the accused persons, and were ornaments belonging to the deceased man. The learned Judge indeed goes so far as to say towards the end of his judgment that in fact he thinks that "the accused probably are guilty of this murder." But he says that the evidence is not convincing. It must, we think, be conceded that the result, whether right or wrong, is not wholly satisfactory, seeing that the question of the guilt or innocence of these accused is solely a question of a degree of probability. As we understand the judgment, and it is so candid that there is little

risk of our misunderstanding it, the learned Judge believed that Tara was a witness of the murder. He believed also that her evidence was substantially true, and refrained from convicting the accused, only because he doubted whether the evidence of their production of the deceased's ornaments supplied as much corroboration, that is as much in quantity, as the law requires to validate the testimony of an accomplice. Now the law as such does not require any corroboration, and the rule of practice which does lay down this requirement, must, in our opinion, be applied with due regard to the varying circumstances of each particular case. There is no question of law before us now, but the question is solely one of fact whether certain evidence ought to be believed or not. If that evidence is believed, it is clear to us that there is ample corroboration of the accomplice Tara, not only *quoad* the incidents and circumstances of the crime, but also *quoad* the identity or the personality of the offenders. We may add that we know of no rule, whether of law or of practice, which seeks to furnish an inflexible canon as to the precise degree of corroboration which in all cases should be demanded for an accomplice's evidence, and we should deprecate any attempt to formulate any such rule. As to the case of *Queen-Empress* v *Ram Saran* (1), upon which the learned Judge relies as authority for some such principle, we are of opinion that that case, properly construed, is merely a decision on its own particular facts. If, however, it is to be read, as laying down a definite principle of law, we should with respect be unable to follow it.

Now the main question before us is whether the witness Tara should or should not be believed. It must be said that her story is in itself a natural and probable story, and gives a natural and probable account of the facts which have to be explained. Her statement bears every inherent sign of being true. For instance, we observe that she admits that the proposal to murder Parsappa was in secrecy disclosed to her beforehand. If she were anxious to misrepresent the truth, it would have been perfectly open to her to conceal this circumstance and to pretend, as is usual with such approvers in this country, that the actual commission of the crime came upon her as a surprise. As the learned Judge himself observes, Tara withstood cross-examination successfully. There is, therefore, nothing in the story itself or in the manner of its telling, which can weaken the authority of Tara as a witness. It remains to consider how far her disability as an accomplice is removed by the corroboration afforded *aliunde*. It seems to us that it is not possible in this case to draw a sharp line of distinction between the corroboration which goes to the mere incidents of the murder and that which goes to the identity of the murderers; and we think that on both these separate points, the corroboration which is forthcoming, and which the learned Judge himself believed, is ample and convincing.

In the first place it is proved, and has not been questioned before us, that the blanket found by the deceased's corpse was Tara's blanket. That circumstance alone tells to some extent against the first accused, for it establishes that the murderer, whosoever he was, had opportunity to use Tara's blanket. It is certain that if the murderer were accused No. 1, he would have had such opportunity, whereas, so far as we are aware, no other person would have had that opportunity. Furthermore, there is evidence to show that after this particular blanket had been used for the purposes of covering the corpse and had thus been withdrawn from the possession of Tara, she was recouped by the first accused who presented her with another blanket in substitution. It is not quite easy to satisfy oneself from the judgment what view the learned Judge took of this evidence. He expressed no disbelief of it, though he does not commit himself to any definite statement accepting it. We have examined it for ourselves, and, in the light of argument addressed to us on both sides, we are satisfied that the evidence is true. We have it, therefore, not only that the murderer, whoever he was, used Tara's blanket to cover the deceased, but that after Tara's deprivation of the blanket in this manner she was furnished with another blanket by the first accused.

Secondly, we find strong corroboration of Tara's story in the fact, which the learned Judge accepts, and which is incontestably proved, that the keys of the deceased man's safe were actually found in the pit of Tara's

(1) 8 A. 306.

privy, where Tara said that if search were made they would be found.

Next we have the fact that Tara was able to give, and did give, an accurate account of the ornaments which had been stolen from the deceased. Indeed the learned Counsel for the accused endeavoured to take advantage of this point and to urge that her account was too accurate to be genuine or spontaneous. We must, however, remember that in general a Hindu woman has a tenacious memory for ornaments, and there is nothing on the evidence to displace the natural assumption that after the murder had been committed and prior to the accused's arrest, the subject of the loot which had been acquired by the murder would be a common topic of conversation between the woman and her paramour. We see, therefore, no ground for surprise or for suspicion in the circumstance that Tara was able to give the Police a fairly accurate account of the ornaments which had been stolen. Her ability to do so, however, proves once more that she was a witness of the murder.

Next we think that all the probabilities in the case go to support her story that the murder was committed not in Parsappa's house but in her own house. It is quite true that her first story was that the murder took place in Parsappa's house, and that was the only material variation between her original story to the Police and her subsequent statements to judicial officers. This variation she frankly explains in these words:— "It was because I was afraid of the Sub-Inspector that I told the Police that the murder was committed in Parsappa's house. I was confused and afraid then. I was afraid that I too would be arrested." But it must be observed that as early as the 12th of April, or one day before the first accused was arrested, and three days before the second accused was arrested, Tara had come forward with her story describing these two accused men as the murderers. We are not prepared to throw discredit on her whole evidence merely because at first she was anxious, so far as possible, to conceal her own part in this crime, and to that end substituted one house for another.

Next, and perhaps most important, we have the evidence which the learned Judge has believed and which we too believe, that on the 15th April on the information of the second accused the bulk of the deceased's ornaments were found in the house of the first accused's grandfather, the blind old man Ningappa, and that Ningappa told the Panchas that he had received them from the first accused. There is no doubt whatever as to this fact, and the importance of it may be realized by the desperate straits to which the defence was driven in order to avoid it. Ningappa indeed went so far as positively to deny in the teeth of all the evidence that he ever produced those ornaments.

Lastly, and to much the same effect, is the evidence which shows that the pearl nose-ring belonging to the deceased was produced by the first accused. It was hidden in an envelope which lay among many other letters on a file in the first accused's house. Surprise may perhaps be felt at first sight, and has been expressed by the learned Judge, that the two accused, who had taken such pains to conceal the actual commission of the crime, should have been so ready with confessional disclosures as soon as they were arrested. Here, however, we think that the Police, whose conduct throughout has been such as to merit nothing but commendation, furnish us with a perfectly satisfactory and intelligible explanation. That explanation is that when, on the night of the 11th April, the Sub-Inspector returned from Belgaum with the certain proof that this incriminating blanket was the property of Tara, Tara herself and the two accused inferred and very naturally inferred, that their guilt was fully discovered and that there was no further purpose in secrecy.

It appears to us that all these items of corroboration of Tara's evidence leave us no choice but to act on our belief that that evidence is true. There is no reason why Tara should suppress the names of the real murderers, whom admittedly she must know, and substitute for them the names of her lover and his best friend. It is not suggested that she and accused No. 1 had ever quarrelled. On the contrary the evidence is that she lived contentedly with him as his regularly kept mistress The production of the ornaments by the two accused seems to us to be in itself conclusive. It must be remembered that all that Tara can possibly know as to the disposal of those ornaments would be the

names of the murderers who took them from the deceased's safe. If those murderers had in turn transferred the ornaments to third parties, of those parties Tara would presumably know nothing. The learned Judge was oppressed by the possibility that the accused might have received those ornaments from some third person, intermediary between the murderers and themselves. That, however, as we think, was to extend the scope of the Sessions Court's inquiry into unnecessarily speculative regions, for it was nobody's case that the accused had received those ornaments from third parties. On the contrary their considered defence was, and always had been, a simple denial of the proved fact that the ornaments were in their possession.

Then again the learned Judge hesitated to convict the accused because he said that it was not clearly proved that Parsappa had retained possession of those ornaments up till the day of his death. *Non constat*, said the learned Judge, that although they were Parsappa's property, he might not have sold them or transferred them some time before the murder. This again appears to us to be an unnecessarily speculative branch of inquiry, for if we except the evidence that Parsappa had been thinking of selling those ornaments, there is nothing whatever on the record to suggest that they ever left Parsappa's possession. On the contrary the evidence is that up till a fortnight before Parsappa's death witnesses had seen him in possession of this jewellery. Moreover, when the safe was forced open by the Police in the presence of a Panch, some members of the Panch, including a close friend of the deceased, immediately exclaimed that Parsappa was then in possession of far more ornaments than were discoverable in the safe. Furthermore, it is clear upon the evidence that some of those ornaments, and for our present purposes it matters not whether they were some or all, belonged to the deceased's four year old daughter, and it is nobody's case that he ever intended to sell or get rid of those ornaments. Lastly, this theory again makes for the accused a case which neither they nor their Pleader had ever made. It was not the accused's case that Parsappa had sold those ornaments and that by some subsequent transactions they had found their way into the possession of Ningappa and the first accused. On the contrary the case of the accused was that the ornaments were never in the possession of Ningappa or the first accused; in other words, they are unable to give any explanation of the ascertained fact that this jewellery was discovered in their custody and control.

It appears to us, therefore, upon a general review of all the evidence tendered in this case that Tara's story, probable and credible in itself, is amply corroborated by other evidence which has been believed by the Sessions Judge, and which it is impossible to challenge. We know not in what way better corroboration of an accomplice's evidence could be supplied than has been supplied here. It is clear that the law does not require that every detail of the approver's story should be fortified by a similar story told by an independent witness, since the effect of any such principle would be to rule out the accomplice's evidence as altogether inadmissible. It is, in our opinion, only necessary that accomplice's evidence should, in the circumstances of each particular case, receive that corroboration which it seems to require. In this case, we do not doubt that it has received that corroboration. We believe it and we must, therefore, act upon it.

The result, therefore, is that we set aside the order of acquittal, and convict the two accused of murder under section 302 of the Indian Penal Code. The crime was in itself a brutal one and was brutally carried out. It was particularly detestable on the part of the first accused with whom the dead man was always on friendly terms, and to whom he was related, yet it would appear from the evidence that it was the first accused who plotted and designed this crime. We sentence the first accused, Kuberappa *bin* Dharmappa Chiwate, to death, and we sentence the second accused, Krishna *bin* Yellapa Pishe, to transportation for life.

Order of acquittal set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 6 OF 1913.

January 29, 1913.

Present:—Sir Henry Drake-Brockman, KT., J. C.

MANNA—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (1), 4 (k), 242, 256 (1), 423—Appellate Court setting aside conviction and sentence ordering re-trial after framing fresh charge on recorded evidence—Trial when begins (a) in warrant-cases, (b) in summons cases—Competency of Court to order.

An Appellate Court, when setting aside the conviction and sentence in a warrant-case on the ground that the accused has been illegally tried along with another person, is competent to direct that the accused be re-tried on a fresh charge framed on the evidence already recorded for the prosecution.

In a warrant-case, the trial does not begin till a charge has been framed and the accused claims to be tried. In summons-cases, the intimation prescribed by section 242 of the Code of Criminal Procedure takes the place of a formal charge.

Petition for revision against the order of re-trial passed by the Sessions Judge, Nagpur Division, dated the 3rd December 1912, of the case decided by the Sub-Divisional Magistrate, Nagpur, on the 7th November 1912.

Mr. *S. R. Pandit*, for the Applicant.
Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The applicant, Manna, was chalaned by the Police along with one Nathudas for an offence of house-breaking with intent to commit theft. The Magistrate charged Manna only with that offence and framed a separate charge against Nathudas for receiving one of the stolen articles, but proceeded to try both men jointly and eventually convicted each man of the single offence with which he had been charged. Both appealed to the Sessions Judge who held the joint trial illegal, inasmuch as the house-breaking and receiving were not committed in the same transaction, acquitted Nathudas on the ground that no guilty knowledge had been established against him and ordered Manna to be re-tried on a fresh charge framed on the evidence already recorded for the prosecution.

This Court has been moved to set aside the order for a re-trial on two grounds. The first is that in accordance with the decision in *Emperor* v. *Balwantsingh* (1) the proper course when a trial is declared invalid is to set aside the conviction and sentence and release the accused, leaving the prosecution to take any further proceedings which may be considered desirable. That case came before this Court in appeal and in it no fewer than four persons had been jointly tried for offences committed in several distinct transactions to all of which all were not parties. The learned Additional Judicial Commissioner who decided the appeal found himself in doubt as to how the new proceedings, if taken, should be framed. Should he order a joint trial of all four on a charge relating to the one transaction in which all took part or a separate trial of each on the charge or charges individual to him? In *Kamudini Kanta* v. *Queen-Empress* (2) Prinsep and Handley, JJ., declined to interfere in revision with an order for re-trial passed by a Sessions Judge on appeal, holding that he had power in discharging an accused person on the ground of misjoinder of parties to add a direction for his re-trial. And in *Emperor* v. *Balwantsingh* (1) it was recognised that in exceptional cases a superior Court may be justified in giving orders for repeating the prosecution. In the present case the Sessions Judge passed an order which has already been fully complied with, the applicant having again been convicted and sentenced on the very day he moved this Court to upset the order in question. So far as he is concerned, the prosecution relates to a single act of house-breaking and according to the evidence he himself gave the information leading to recovery of part of the stolen property from his co-accused, Nathudas. It is not and could not be suggested in these circumstances that any doubt could arise as to the course which the Executive Authorities would desire to take on the first trial being pronounced invalid, and the learned District Magistrate in showing cause against this application has impliedly accepted the Sessions Judge's order as expedient. In these circumstances I decline to interfere with that order.

The second ground on which the order for re-trial is attacked relates to the scope of the new proceedings, which according

(1) 4 N. L. R. 71; 8 Cr. L. J. 11.
(2) 28 C. 104.

to the applicant's learned Counsel should commence with a re-hearing of the evidence for the prosecution. This contention is rested on the definition of the term "trial" in *Gomer Sirda* v. *Queen-Empress* (3) as "the proceeding which commences when the case is called on, with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution, and for the defence, if the accused be defended, are present in Court for the hearing of the case." That definition, however, was given in connection with a case in which a re-trial had been ordered to commence from the stage at which the proceedings had been left immediately before delivery of judgment. The decisions of Maclean, C. J., and Banerjee, J., contain no suggestion that such an order is necessarily illegal. The re-trial was necessary because the Magistrate had improperly refused to call certain witnesses whom the accused desired to call. The Judges who ordered the re-trial were under the impression that the same Magistrate would continue the hearing, but he had been succeeded by another when the time for further action came. The definition above quoted was given solely in connection with the question whether the accused were too late with an application under proviso (*a*) to section 350, Criminal Procedure Code, because prior to the re-attendance of the accused in Court a *Mukhtar* had on their behalf applied for and obtained warrants against the additional witnesses required for the defence. Clearly then the definition is no wise in point here. Nor is any definition of the term "trial" given in the Criminal Procedure Code. It seems clear, however, from section 256 (1) of the Code that in a warrant-case the trial does not begin till a charge has been framed and the accused claims to be tried. This appears to be the reason why in section 253 (2) the word "trial" is not used, the Code directing that a Magistrate may discharge the accused at any previous stage of the "case." No doubt, the word "trial" figures in section 251 at the very commencement of Chapter XXI just as it does in section 241 at the beginning of Chapter XX. In the former Chapter, on the other hand, it does not occur again till section 257 (2), while in the latter it is used in connection with a complainant's application to summon witnesses, whether preferred at the outset or later. It may, therefore, be concluded that in a warrant-case there is, till a charge has been framed, no trial but only an inquiry as defined in section 4 (*k*), Criminal Procedure Code. This view finds support in the following observations of Wallis, J., in *Narayanasawmy Naidu* v. *Emperor* (4):—

"Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. These, as observed by Wilson, J., in *Hari Dass Sanyal* v. *Saritulla* (5), are questions which arise at the stage of inquiry."

I would also refer to section 233, Criminal Procedure Code, which contains the only provision of law requiring the applicant to be tried separately from Nathudas: it runs thus:—

"For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239."

In summons-cases the intimation prescribed by section 242 of the Code takes the place of a formal charge, but it is only a charge, formal or informal, which has to be separately tried. That the word "charge" must be similarly interpreted in sections 233, 242 and 254 appears from section 4 (1). I hold, therefore, that when an Appellate Court orders under section 423 (1) (*b*) that a convicted person be re-tried it may, in a suitable case, direct at the same time that the new proceedings should commence with the framing of a proper charge. In any other view it would have to be held that, even where a Magistrate is necessarily unable to discover that two persons accused before him in a single case require separate trials—until all the available evidence for the prosecution has been recorded, none of that evidence can be utilised against either accused, the entire proceedings being *ab initio* invalid.

I decline to interfere. The application is dismissed.

Application dismissed.

(3) 25 C. 863 at p. 865; 2 C. W. N. 465.

(4) 32 M. 220 at p. 234; 5 M. L. T. 233 (F. B.); 9 Cr. L. J. 192; 19 M. L. J. 157; 1 Ind. Cas. 228.

(5) 15 C. 608 at p. 620.

BOMBAY HIGH COURT.
CRIMINAL APPEALS NOS. 327 AND 340 OF 1912.
December 4, 1912.
Present:—Mr. Justice Batchelor and
Mr. Justice Rao.
EBRAHIMJI MULLA JEEVANJI
AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 420—Cheating by false representation as to future event—Proof—Evidence—Statement as to what witness said regarding particular period of time.

Where a person is charged of cheating by false representation, and that representation is in respect of a certain future event and not as to an existing fact, the prosecution must prove that the representation was false to the knowledge of the accused at the time it was made.

It is but little to the purpose that in fact that representation has turned out to be true.

In India, where references to time are almost always the merest approximations, there is always a large margin of honest error when a witness makes a statement as to what he himself said, some time ago, with regard to a particular period of time.

Criminal appeals from convictions and sentences recorded by the Third Presidency Magistrate of Bombay.

Mr. *Weldon*, instructed by Messrs. *Ardeshir, Hormasji, Dinshaw and Company*, for Accused No. 1.

Mr. *Raikes*, with him Mr. *Velinkar*, instructed by Messrs. *Payne and Company*, for Accused No. 2.

Mr. *Strangman*, Advocate-General, instructed by the *Public Prosecutor*, for the Crown.

JUDGMENT.—The appellants before us have been convicted by the learned Third Presidency Magistrate of the offence of cheating and have been sentenced to one day's simple imprisonment and a fine of Rs. 750. The appellants are the agents and directors of a Steamship Company, called the Bombay Hajaz Steam Navigation Company, which is occupied in the conveyance of pilgrims between Bombay and Jeddah. Another Company which engages in similar business is known as the Persian Steam Navigation Company and is the trade rival of the appellants' Company. The appellants have a steamer, named the "Shah Jahan," which on the 24th of August 1911 left Bombay for the outward voyage to Jeddah. On the 5th of September it appears that she arrived at Aden and was there boarded by the witness Green, the Master of a steamship belonging to the Persian Company. Green inspected the "Shah Jahan" and saw that she had suffered some damage owing to high seas on her voyage from Bombay. The repairs, however, which, in his opinion, would be required were repairs capable of being executed within a period of about five days.

It seems that on the 15th September Green arrived in Bombay and communicated his knowledge of the disrepair of the "Shah Jahan" to various interested persons. It is the case for the prosecution that some knowledge of such communications must have filtered through to the present appellants.

On the 21st September, by Exhibit D., the appellants gave notice to the Commissioner of Police under section 11 of the Pillgrims Protection Act II of 1887 that the latest date of sailing of the "Shah Jahan" would be the 20th of October, "or about" that date. It is material to observe that no objection was taken by the Commissioner to the insertion of the words "or about" in this letter, and the same words, we notice, occur in the printed portion of the tickets issued by the Company to their customers. It is a fair inference, therefore, that an approximate date for the sailing of these vessels had hitherto been accepted by the authorities concerned as sufficient; and such inference would be in accordance with the practice of similar steamers sailing out of this Port.

On the 28th September, the "Shah Jahan" reached Aden from Jeddah, and telegraphed to her Bombay agents that she would be leaving Aden on the following day. On this same date, the 28th September, the Persian Company advertised two of their steamers as due to sail for Jeddah on the 16th and 18th October respectively. Whether in consequences of this advertisement by the Persian Company or merely because they were anxious to shorten the time of their vessel's lying idle in port, the appellants on the 30th of September announced a change in the sailing date of the "Shah Jahan." That date was altered from the 20th of October formerly fixed to the 12th of October.

On the 6th October the "Shah Jahan" arrives in Bombay in a damaged condition. The appellants go on board the steamer and see for themselves and are also told the particular repairs which would be required. On the 11th of October, by the letter, Exhibit G,

the Commissioner of Police makes inquiry of the appellants as to why they have changed the sailing date of the "Shah Jahan" saying that it had been brought to his notice that they had been issuing passage tickets for the 12th, which was other than the date advertised by them in their previous letter. On the following day, the 12th October, by Exhibit B, the appellants reply to the Commissioner explaining that in the events which have then happened, the steamer will not sail until the 20th of October. In fact she did not sail till the 24th October, the repairs which were found necessary upon her not being completed until the 23rd.

Now the appellants have been convicted of cheating upon the footing of a mis-representation wilfully made by them to their Haji customers, and the mis-representation charged was that this steamer, the "Shah Jahan," would sail from Bombay on the 12th of October. It is the case for the prosecution that when that representation was made, it was false to the knowledge of the appellants, and that by such false representation they deceived the Hajis, and fraudulently or dishonestly induced them to part with the money which they paid for their tickets.

Mr. Raikes, on behalf of the appellants, began his address to us by taking an objection in the nature of demurrer, contending that, even assuming that all the facts are as they were found by the learned Magistrate below, yet in law those facts would not suffice to constitute the offence of cheating. It is not necessary for us to express, and we, therefore, refrain from expressing, any opinion as to the validity of this contention, because in our view the judgment below is unsustainable on the facts.

It is clear that the representation impugned as false was a representation not as to an existing fact but as to a certain future event; and, it is necessary for the prosecution to show that when on the 30th September, and thereafter to the 12th October, the appellants held out the representation that their steamer would sail on the 12th October, that representation was false to their knowledge. It is but little to the purpose that in fact that representation has turned out to be untrue. The essential point to be considered is what was the knowledge of the appellants at the time when those representations were being made by them. Are they shown upon the evidence to have known at that time that the steamer "Shah Jahan" would not leave Bombay on or about the 12th October? We think it is clear that the conviction cannot be rested upon any knowledge acquired by the appellants prior to the 6th of October, for the only knowledge alleged to have been obtained by them prior to that date was some hazy and undefined acquaintance with an equally undefined rumour which Captain Green may be taken to have put about as to the damage which the "Shah Jahan" had sustained in her voyage to Bombay. We do not doubt the learned Magistrate's estimate of the credibility of the witness Asper, but even upon this witness's evidence there is no clear or certain knowledge which could safely be attributed to the appellants. Moreover, even supposing that the rumours circulated by Captain Green had reached the ears of the appellants in some definite form, it is not suggested that the appellants had been apprised of their vessel's misfortune by those agents of theirs whose duty it was to keep them informed of such matters; and in these circumstances the appellants, it seems to us, were clearly under no obligation to accept as Gospel and to act upon rumours which reached them in this indirect and unverified manner. Indeed as we understood the learned Advocate-General's argument, he himself was not prepared to ground the case for the prosecution upon any knowledge which the appellants had derived prior to the 6th of October.

It remains, therefore, to see what exactly was the knowledge which upon this evidence must be attributed to the appellants on the 6th of October. Here again we have to rely upon the witness Asper, and upon him alone. That gentleman's account of the material matter is this. He says that when the appellants came aboard the "Shah Jahan" on the evening of the 6th October he met them there and in his own words: "I told them to employ some good hands, and I told them that the repairs would take from about fifteen to twenty days." Now the whole of this conviction on the charge of cheating must depend upon this one isolated passage in the evidence of this particular witness. As we have said, we throw no doubt upon the learned Magistrate's estimate

of the witness's claim to credit, but giving him all possible claim to credit, we must yet think that such a statement as this cannot be read as a statement of absolute mathematical precision or cannot be read, as Mr. Raikes put it, as if it were a section in an Act of Parliament. In the first place when a witness, however honest, is throwing his mind back to events which occurred some time ago, and is endeavouring to re-count those events, his memory is very apt to betray him on a matter of such subordinate importance as to what he himself said with regard to a particular period of time. That is so universally, and we think it is especially so in this country where references to time are almost always the merest approximations. Indeed on the witness's own showing his estimate was a mere approximation, and it may well be that the fifteen or twenty days, which his memory now represents as his statement, may really have been a somewhat different period. If, however, it was a different period, if instead of fifteen or twenty days it was ten or twelve days, then it appears to us that the appellants' defence would be made out. In other words, in such a statement as this, which we are now considering, there is always a large margin of honest error, and in the particular case before us even a small error would suffice to render this conviction unmaintainable. We have it on the evidence of Captain Green who saw the damaged steamer at Aden that, in his opinion, the repairs would ordinarily not occupy more than five or six days. That evidence is corroborated by the artisan whom the appellants with great expedition employed to repair the "Shah Jahan," for this witness deposes that the repairs were such as would ordinarily have been completed within a period of seven or eight days. According to this witness, he so informed the appellants, as he naturally would inform them; and if he did so, the appellants were not compelled to believe Asper's estimate rather than this witness's. Reckoning the seven or eight days from the 7th of October, when this witness was called in we have it that the ship would be ready to put to sea by the 14th or 15th October; and we feel sure that if she had sailed by that date, nothing would ever have been heard of this case, although the actual limit, the 12th of October, would have been exceeded. This artisan witness, whose evidence we see no reason for distrusting, deposes that the extra delay was caused by the "Shah Jahan's" engineer's action in constantly pointing out to the Government surveyor fresh defects which seemed to him to need repair. There is evidence, however, to show that the engineer's demands in this matter were a little extravagant, and that the ship as a pilgrim ship would have been fit for the ordinary discharge of her duties without all the repairs which in fact she received.

On the whole, therefore, we think that in a case of this kind it is not possible in a criminal prosecution to press a matter of one day or two days on this or that side of the line, particularly when the representation upon which the conviction rests was itself a mere approximation so far as regards time. We are of opinion, therefore, that the prosecution have not succeeded in showing that the representation that this ship would sail on the 12th of October or thereabouts was to the appellants' knowledge a false representation. It may be that the appellants were unreasonably sanguine, or underrated the difficulties ahead of them, or even realised that their promise as to the 12th October was not unlikely to be broken. But all that is not enough. If the prosecution is to succeed, it must be affirmatively shown that the representation as to time was false to the appellants' then knowledge: and, having regard to the state of the evidence as to the knowledge then in their possession, we cannot think that this has been established. The conviction must, therefore, be reversed and we must direct that the accused be acquitted and discharged and that the fines, if they have been paid by them, should be refunded to them.

Conviction and sentence reversed.

SUBBAPPA CHANNAPPA *v.* EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 398 AND 399 OF 1912.

December 13, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

SUBBAPPA CHANNAPPA AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 37, 299, 300, 302 *--Culpable homicide—Murder—Issue—Proof—Practice—Trial by Sessions Court—Murder committed in concert—Liability of each person co-operating.*

Where culpable homicide has been committed, *prima facie* the principal issue is:—Whether that culpable homicide does not amount to murder. In ordinary cases, that issue ought to be tried, and ought to be prejudged, by an authority less than the authority of a Court of Session.

A. and *B.* attacked *C.*, acting in concert in the sense that their attack was a single indivisible thing.

A. struck *C.* savagely on the head with a heavy stick and *B.* smashed *C.* in his skull by a blow dealt with a heavy stone held firmly in the hand. *C.* died in consequence of the injuries. There was no general fight of any gravity before the attack:

Held, (1) that *A.* and *B.* were both guilty of murder;

(2) that section 37 of the Penal Code made them both liable for the murder which was the result of their attack.

Criminal appeals from convictions and sentences passed by the Sessions Judge of Bijapur.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *L. A. Shah*, Government Pleader, for the Crown.

JUDGMENT.—In this case we have had a careful and thorough argument from Mr. Kelkar, but he has not succeeded in satisfying us that there is any good ground for supposing that the learned Sessions Judge's judgment is in any particular wrong with regard to the conviction of these two appellants. The conviction of them, which now concerns us, was of the offence of murder under section 302 of the Indian Penal Code, each appellant being sentenced to transportation for life. We desire at the outset to express our entire concurrence with the learned Judge's action in altering the charge, as originally framed, to a charge of murder, and with the reasons which the learned Judge has given for that action. We think he is quite right in saying that where culpable homicide has been committed, *prima facie* the principal issue is: whether that culpable homicide does not amount to murder, and in all ordinary cases that issue ought to be tried, and ought not to be prejudged, by any authority less than the authority of a Court of Session.

With regard to this offence itself, the evidence is overwhelming that the deceased Subapgauda's death was caused by these two appellants. It is urged that some of the witnesses who depose to this fact should be regarded as partisans of one of the two village factions. The evidence, however, does not establish that, nor do we believe it to be the case; but even if it were the case, the same fact is put beyond doubt by the two Police Constables who are clearly independent of these disastrous village factions. These witnesses prove that the manner of Subapgauda's death was this, that as he stood unarmed and bareheaded, protesting against the use of violence, the two appellants rushed at him, No. 1 striking him savagely on the head with a heavy stick held in both hands, and No. 2 smashing in his skull by a blow dealt with a heavy stone, not thrown as a missile, but held firmly in the second appellant's hands.

On the evidence, it is further established that the two appellants were acting in concert in the sense that their attack was a single indivisible thing, so that both of them would be liable for the result which ensued. That is the consequence of the provisions of section 37 of the Penal Code which enacts that when an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. On the evidence we are satisfied, as the learned Judge was satisfied, that the first appellant, who used the stick intentionally co-operated in the commission of the murder with the second appellant, who used the still more cruel weapon, the stone.

Then it was urged by Mr. Kelkar that Subapgauda's death was caused without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel, and that, therefore, the killing was reduced from murder by reason of Exception 4 to section 300 of the Code. Here again, however, we agree with the learned Judge that it is not shown upon evidence that any sudden or general fight was in progress when Subapgauda was attacked. On the contrary we think that the

general fight, such as it was, did not originate till after Subapgauda had fallen. Moreover, even if there was some kind of fight in progress it was one of very little gravity from the point of view of the appellants and their associates, for none of them received any injury which required medical treatment. That being the character of the fight, if there was a fight impending, it is clearly not open to the appellants to take advantage of the 4th Exception to section 300, seeing that upon the evidence they are obviously shown to have taken undue advantage and acted in a cruel or unusual manner. We see, therefore, no reason to interfere with this conviction which appears to us to be based upon perfectly adequate evidence. It is essential that murderous attacks, such as these, should be rigorously suppressed, and there is no ground for the exercise of any leniency. We affirm the conviction and sentence and dismiss these appeals. The argument has been restricted to the conviction and sentence on the charge of murder, and that being so, we need only say that we affirm also the convictions and sentences passed upon the other counts in the charge.

Appeals dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 123 OF 1913.
March 19, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
EMPEROR—APPELLANT
versus
ALLAHDAD KHAN—RESPONDENT.

U. P. Excise Act (IV of 1910), s. 63—Search warrant should be obtained before search of house—Conviction of offence—Search illegal.

In a case under section 63 of the Excise Act of 1910, where it is necessary to search a house, a search warrant should be obtained beforehand.

Even if the search is illegal, the occupier of the house searched can be convicted under section 63 for unlawful possession of an excisable article.

Appeal against an order of acquittal passed by the Sessions Judge of Meerut.

The *Government Advocate*, for the Crown.

Mr. *Hameed Ali Khan*, for the Respondent.

JUDGMENT.—One Allahdad Khan was convicted of an offence punishable under section 63 of the United Provinces Excise Act IV of 1910 which provides as follows:—"Whoever, without lawful authority, has in his possession any quantity of any excisable article knowing the same to have been unlawfully imported, transported or manufactured or knowing the prescribed duty not to have been paid thereon, shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees, or with both." The Superintendent of Police and the Sub-Inspector in charge of the City Police Station on information received, searched the house of Allahdad Khan and discovered there a mixture of cocaine and another drug. The accused was convicted by a Magistrate and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 50. On appeal, the Additional Sessions Judge held that the search of the accused's house was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He, therefore, acquitted the accused. The Local Government has appealed against the order of acquittal. It is doubtful whether the case is one which comes under the provisions of section 50 of the Excise Act, and we would have some hesitation in holding that the search was legal. Whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine which is an excisable article under the provisions of the Excise Act for possession of which the accused had no license. On the facts found, we are satisfied that the accused must have known that the cocaine had been unlawfully imported and that no duty had been paid on it. We allow the appeal, set aside the order of acquittal passed by the Additional Sessions Judge and restore the order of conviction. We reduce the sentence passed on the accused to the term of imprisonment already undergone by him and we set aside the order of fine. We may add that we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand. The fine, if paid, will be refunded.

Appeal allowed.

In re NILKANTH RAMCHANDRA KULKARNI.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 341 OF 1912.
December 13, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
In re NILKANTH RAMCHANDRA KULKARNI— APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 88, 89—Accused absconding—Proclamation—Attachment of property—Application for restoration—Period of limitation—Nature of proof.

The adverbial phrase "within two years from the date of the attachment" in section 89, Criminal Procedure Code, qualifies not only the word "appears" but also the word "proves" which is connected with the word "appears" by the conjunction "and".

Under section 89, it is necessary that the proof that the accused person had not absconded should be offered or given within two years from the date of attachment.

It is not enough to show that the accused appeared voluntarily or was apprehended or brought before the Court within that period.

The section contemplates and requires proof that the offender did not abscond or conceal himself for the purpose of avoiding arrest, and that he had not such notice of the proclamation as to enable him to attend within the time prescribed.

Semble.—It is not necessary that the absconding accused should himself personally apply for the restoration of his property. The application can be made by any one on his behalf if it satisfies the other requirements of section 89.

Criminal application for revision from an order passed by the Magistrate, first class, Belgaum, confirmed on appeal by the Sessions Judge of Belgaum.

Mr. *A. G. Deasi*, for the Applicant.

JUDGMENT.—A complaint was, on the 23rd February 1908, filed against the present petitioner under section 409, Indian Penal Code. On the following day, a warrant was issued for his arrest but was returned unserved. On the 6th June 1908, a proclamation was issued under section 87 of the Criminal Procedure Code requiring the petitioner to appear within forty days. On the 6th July 1908, an order was passed by the Magistrate for the attachment of the petitioner's property. On the 24th September of the same year, the attachment was actually effected. On the 10th March 1910, the petitioner was arrested. He was convicted in July 1910 and sentenced to one year's imprisonment. In June 1911, he came out of Jail and made an application for the restoration of his property which had been attached. The application has been refused on the ground that it was not made within two years of the date of attachment as required by section 89 of the Code.

From the Magistrate's order refusing the restoration, an appeal was presented to the learned Sessions Judge who, however, has held that, although certain irregularities have crept into the proceedings, he could not interfere in the petitioner's favour.

From this decision the present application is made to us in revision, and three points only have been taken by Mr. Desai on the petitioner's behalf. In the first place, it was contended that under section 89 of the Criminal Procedure Code it was not necessary that the proof that the accused person had not absconded should be offered or given within two years from the date of the attachment, but all that was required to be done within that period was that the accused person should appear voluntarily or be apprehended or brought before the Court. To this contention, however, we think that the plain grammatical meaning of the section is fatal. We agree with the learned Judge below that the adverbial phrase "within two years from the date of the attachment" must qualify not only the word 'appears' but also the word 'proves' which is connected with the word 'appears' by the conjunction 'and.'

Secondly, it was argued that it was not necessary for the purposes of the section that the absconding accused should himself personally apply for the restoration of his property, but that the section was satisfied if an application was made within time by anyone on his behalf. In this respect the petitioner relies upon an application made on the 20th February 1910, by his wife and another application of the 7th June 1910, made by his uncle. It is, however, clear, we think, that neither of these applications can be read as satisfying the conditions of section 89. The wife's petition was made before the accused's arrest, and in it she merely prays that the attachment may be removed because she is seeking to discover the whereabouts of her husband. The uncle's application, as we read it, was not an application made in the petitioner's behalf, but on the uncle's own account in order to safeguard a certain share of the property to which the uncle was laying claim. It is plain that neither of these applications falls within section 89 which contemplates and requires proof that the

offender did not abscond or conceal himself for the purpose of avoiding arrest, and that he had not such notice of the proclamation as to enable him to attend within the time specified. Those clearly are matters particularly within the knowledge of the absconding accused himself, and no attempt was made in either the wife's or the uncle's application to furnish such proof as the section demands. Mr. Desai suggested that the section did not require that any separate application should be made by the absconding accused; but if that is so, it is nonetheless essential that the absconding accused should appear and prove the facts referred to. In the present case, not only has he not proved them, but he has made no attempt or effort to prove them within the time allowed to him by law.

Lastly, Mr. Desai appealed to us to excuse the delay by which the petitioner's application had exceeded the legal period. We cannot, however, find any valid reason for so doing, since it is clear that the petitioner had ample opportunity after his arrest to urge and to prove his present claim if he had been minded to do so.

No other point being taken, we must reject this petition. The Rule is discharged.

Rule discharged.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 182 OF 1913.
February 28, 1913.
Present:—Mr. Justice Banerji.
BEHARI AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898*), s.* 107—*Security to keep peace—Boycotting servants of* zemindar *—No sufficient ground.*

Where the tenants were boycotting the servants of the *zemindar* but beyond that they were doing nothing from which it might be apprehended that they were likely to commit a breach of the peace or disturb the public tranquility:

Held, that the tenants were not liable to be bound down under section 107, Criminal Procedure Code, to keep peace.

Reference made by the District Magistrate of Bulandshahar, dated 3rd February 1913.

Mr. *C. C. Dillon*, for the Applicants.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—Behari, Ji Sukh and Ghanshiam have been ordered by a Magistrate of the first class to furnish security to keep the peace for a term of one year. The case has been referred to this Court by the District Magistrate under section 438 of the Code of Criminal Procedure with the recommendation that the order of the Magistrate referred to above be set aside. It appears that the three persons named above are tenants of Abdul Shakur Khan, *zemindar*. It was alleged on behalf of the *zemindar* that these persons were tenants holding under a lease, the term of which had expired and that they were not entitled to continue in possession of the holding. The tenants, on the other hand, claimed that they have a right of occupancy and they refused to execute a fresh *kabuliat* in favour of the *zemindar*. The *zemindar* instituted proceedings in the Revenue Court for their ejectment. While these proceedings were pending, the three persons named above were called upon to furnish security to keep the peace. The Court would not have been justified in calling upon them to furnish security unless it was shown that they were likely to commit a breach of the peace or disturb the public tranquility or do any wrongful act that might probably occasion a breach of the peace or disturb the public tranquility. The reasons given by the trying Magistrate for making his order are summarized in the order of the learned District Magistrate. Those reasons only show that the relations between the *zemindar* and the tenants are strained and that the tenants by lawful means are opposing the *zemindar's* efforts to obtain ejectment or to get a fresh lease. That is not a sufficient reason for ordering these persons to furnish security to keep the peace. The highest that is proved against them is that they are boycotting the servants of the *zemindar*, but it has not been stated in the evidence, part of which has been read to me, nor was it found by the trying Magistrate that they have done any act from which it might be apprehended that they were likely to commit a breach of the peace or disturb the public tranquility. Under such circumstances, the Magistrate was not justified under section 107 of the Code of Criminal Procedure to order these men to furnish security to keep the peace. I, therefore, accept the recommendation of the learn-

ed District Magistrate and set aside the order of the Magistrate of the first class, dated November 6, 1912, ordering Behary, Ji Sukh and Ghanshiam to furnish security for keeping the peace.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 6 OF 1912.

CRIMINAL REVISION PETITION No. 6 OF 1912.

August 2, 1912.

Present:—Mr. Justice Ayling.

KUNHAMBU—PETITIONER—ACCUSED

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 423—Altering the conviction—Penal Code (Act XLV of 1860), ss. 183, 353.

An Appellate Court has power under section 423, Criminal Procedure Code, to alter a conviction from one under section 353 of the Penal Code to one under section 183, Indian Penal Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Puttur in Criminal Appeal No. 43 of 1911, presented against the judgment of the Stationary 2nd class Magistrate of Kasargod, in C. C. No. 293 of 1911.

FACTS —The accused in this case was charged under section 353, Indian Penal Code, under the following circumstances. The accused was a defaulter, in arrear of *kist* due from him. The complainant, under orders from the Tahsildar, went with a demand notice to the defaulter's house. He was absent and his goods were attached amongst which was a bullock. The bullock was tied with a rope and was being led when the accused and a few others came that way. The accused cut the rope that tied the bullock and beat one of the men. He further said that the bullock had already been attached by an *ameen* in pursuance of the District Munsif's order and was made over to him for safe custody and hence he would not allow it to be distrained. The 2nd class Magistrate found the accused guilty under section 353, Indian Penal Code, and sentenced the accused to pay a fine of Rs. 100. On appeal, the Sub-Divisional

Magistrate found that the accused resisted but disbelieved the story about the blow. He said:—'The facts, in my opinion, constitute an offence under section 183, Indian Penal Code, and I, therefore, alter the finding to one of guilty under that section, and reduce the fine to Rs. 50.' The accused filed a revision in the High Court on the ground that the finding under section 183 was unsustainable in law.

Mr. *K. P. Lakshmana Row*, for the Petitioner.

ORDER.—The facts proved justify a conviction under section 183, Indian Penal Code, and it cannot, in my opinion, be said that the Deputy Magistrate exceeded his powers under section 423 of the Code of Criminal Procedure in altering the conviction from one under section 353, Indian Penal Code, to one under section 183. But the circumstances of the case are such as to call for no more than a nominal punishment. Petitioner was in possession of the bullock in pursuance of an attachment of a competent Civil Court, and had given a *muchilika* for its production when required. He was not justified in resisting the *vograni* who was acting in obedience to a legal order of the Tahsildar; but his resistance appears to have been unaccompanied by violence and to have been much exaggerated by the prosecution.

The conviction will be confirmed but the fine reduced to Rs. 3 (three); the excess paid will be refunded to petitioner.

Fine reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 72 OF 1913.

February 15, 1913.

Present:—Mr. Justice Tudball.

HIRA LAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Jurisdiction—Magistrate's power to try case after having made over charge of his duties to his successor.

A Magistrate has no jurisdiction to try a case after having made over charge of his duties to his successor.

Criminal revision from an order of the District Magistrate of Muttra.

Mr. *S. K. Dar*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

MAKBUL HUSAIN *v.* EMPEROR.

JUDGMENT.—The applicant in this case and in the connected Case No. 73 of 1913, is a person who was a complainant in one case and an accused person in the other cross-case in the Court of a Magistrate of the second class of Tahsil Chhata in the Muttra District. The cases were instituted in September 1912 and on October 21st, 1912, the Magistrate in this case examined certain witnesses for the defence and convicted the applicant. The cross-complaint made by the applicant was also dismissed by the Magistrate. Hira Lal appealed to the District Magistrate and in the grounds of appeal distinctly raised the plea that the trying Magistrate, having made over charge of his duties on October 19th, 1912, had no jurisdiction to try the case on October 21st, 1912. The appeal was dismissed without one word in relation to this ground of appeal. Hira Lal has come to this Court in revision and the plea taken is that the Magistrate had no jurisdiction on October 21st to hear and decide the case. There are records before me which show clearly that the Tahsildar was relieved on October 19th by his successor, Pandit Shiam Narain, who had returned from privilege leave and had been directed by the Collector to take over charge on October 19th. In these circumstances, it is quite clear that Muhammad Yawar Husain, the Tahsildar, who decided the case, had no jurisdiction and his order is absolutely *ultra vires* in both cases. I allow the application, set aside the conviction and sentence and direct that the case be tried *de novo* by some Magistrate competent to try it, whom the District Magistrate may appoint for the purpose. The fine, if paid, will be refunded.

Petition allowed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 31 OF 1913.

February 5, 1913.

Present:—Mr. Justice Tudball.

MAKBUL HUSAIN AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 35—Concurrent sentences—Conviction at two separate trials by different Courts.

A Sessions Judge has no power to order a sentence passed by him to run concurrently with the sentence passed by another Court in some another trial.

Criminal appeal from an order of the Sessions Judge of Meerut.

JUDGMENT.—The appellants, Makbul Husain and Ikramullah, have been convicted under section 232 of the Indian Penal Code of having made counterfeit coins, to wit, one anna pieces, and have been sentenced to seven years' rigorous imprisonment each including three months' solitary confinement. The Judge and the assessors were unanimous in their verdict. I have been carefully through the evidence and can find no reason to arrive at any other conclusion than that the accused were caught red handed in the commission of the offence. In view of the prevalence of this class of offence the sentence imposed is not excessive. After signing his judgment the learned Sessions Judge wrote the following order:—

"In Makbul Husain's case the sentence will be concurrent with the sentence he is already undergoing." It appears that Makbul Husain had been convicted before the trial of the present case of an offence under the Arms Act by some other Court. Section 35 of the Code of Criminal Procedure does not apply, as he had not been convicted at one trial of two or more distinct offences, and it was not in the Judge's power, therefore, to order that the second sentence should run concurrently with the sentence passed by another Court in another case. If the learned Judge had wished to take the other sentence into consideration, he could have done so by imposing a lesser sentence in the case before him; but as the two offences were very distinct and separate, I see no reason why Makbul Husain should not serve the full sentence imposed on him in the present case. So much of the lower Court's order, therefore, as directs that the sentence in the present case should be concurrent with the sentence in the case under the Arms Act, is set aside. In other respects, the appeal is dismissed.

Appeal dismissed.

MOHAN LALJI *v.* TIKAIT SRI GORDHAN LALJI.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

APPEAL No. 114 OF 1911.

March 17, 1913.

Present:—Lord Atkinson, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

MOHAN LALJI AND ANOTHER—APPELLANTS

versus

TIKAIT SRI GORDHAN LALJI MAHARAJ AND OTHERS—RESPONDENTS.

Hindu Law—Shebaitship—*Ballavacharya Gossain temple—Whether* debutter *property—Performance of worship as evidence*—Shebaitship *vested in heirs of the founder—Daughter of Ballavacharya Gossains married to* Bhats *and* Bhat *girls married to Ballavacharya Gossains of the Gossain* kul—*Daughter's sons not of the* kul.

In determining whether certain property in suit is *debutter*, and not the private property of an individual, the performance of worship in accordance with the rites of the sect for whose benefit it is held, may be treated as good evidence of dedication.

According to Hindu Law when the worship of a *thakoor* has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution, provided, of course, that the devolution in the ordinary line of descent is not inconsistent with, or opposed to, the purpose the founder had in view in establishing the worship.

Whilst the daughters of the Ballavacharya Gossains married to Bhat husbands continued to live in their father's houses and remain within their father's *kul*, their sons do not acquire that status, thus the sons of daughters being Bhat, not belonging to the Gossain *kul*, are debarred from taking part in the ministrations at the Gossain temples for the benefit of the worshippers.

Bhat girls, however, married into the Gossain *kul* receive the *mantras* for the purposes of initiation and become thenceforth members of that *kul*.

Gossami Sree Greedhariji v. *Ramanlolji Gossami*, 16 I. A. 137; 17 C. 3, referred to and explained.

Appeal from a judgment and decree of the High Court, dated February 28th, 1910*, affirming those of the Judge of Small Cause Court of Agra, dated August 5, 1907.

FACTS.—The facts of the case are mentioned in their Lordships' judgment.

Messrs. *De Gruyther*, *K. C.*, and *Ross*, *K. C.*, on behalf of the Appellants, contended that the temple was founded by Muttinji and the appellants who were heirs-at-law of the founders were entitled to hold the office of *shebait*. The appellants were wrongly required to prove that sons of daughters succeeded. No custom excluding sons of daughters was in fact proved. On the contrary it was proved that they succeeded. The custom of succession applicable to the Tikait temples of the Ballav Kul Goswami had no relevancy to the question at issue.

[LORD MOULTON: You claimed it was his property, but it was the property of the idol].

[LORD MOULTON: Variation from custom cannot prove what custom applies. It may only shift the burden of proof].

[LORD ATKINSON: Custom settles it which may be in accordance with Hindu Law].

Reference was made to *Raja Muttu Ramalinga Setupati* v. *Perianayagam Pillai*, (1) and *Srimati Janokee Dabi* v. *Sri Gopal Acharyia* (2).

Sir *R. Richard* and *Dube*, appeared for the Respondent, but were not called upon to reply.

JUDGMENT.

MR. AMEER ALI.—The dispute in this case relates to the *shebaitship* of a Hindu temple belonging to the Bullavacharya Gossains situated at a place called Jatipura in the Muttra District of the United Provinces of India.

The Bullavacharya cult, in reality an off-shoot of Vaishnavism, was founded in the 16th century of the Christian Era by one Ballavacharya who is usually designated among his followers and disciples as Maha Pirbhuji. He and his descendants, who constitute the Bullavacharya Gossain *kul*, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity, Krishna, whom in common with other Vaishnaus (Vishnuvites) they worship. The cult established by Bullavacharya differed in several particulars from the practices in vogue among other votaries of Krishna the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other Gossains.

The Bullavacharya Gossains, in other words the descendants of Bullav, possess several principal temples, each of which is presided over by a member of his *kul* or family, who is styled a Tikait.

The defendant Gordhan Lalji is in possession of one of the most important of these

*See *Mohan Lalaji* v. *Madhsudan Lala*, 6 Ind. Cas. 77; 7 A. L. J. 430; 32 A. 461—*Ed.*

(1) 1 I. A. 209 at p. 228.

(2) 10 I. A. 32 at p. 37; 13 C. L. R. 30; 9 C. 766

temples, if not the most important, which is situated at Nathdwara in Odeypore State.

In order to make the contentions of the parties intelligible, it is necessary to state in this connection certain admitted facts relating to the customs and usages in vogue among the Bellavacharya *kul*.

In the first place the Bullavacharyas do not intermarry in their own *kul*, as the members belong to the same *gotra*. They take wives from among the Bhats, a well-known Brahmanical caste, and marry their daughters to Bhats.

In the Bullavacharya Gossain temples besides the principal image, which is directly or indirectly a presentment of Krishna, there are subsidiary images not enjoying the same worship or veneration but nevertheless regarded as representations of Krishna. They are almost invariably images of one or other of the descendants of Maha Pirbhuji.

Another fact necessary to bear in mind is that the ministrations in the Bullavacharya temples are entirely in the hands of the direct descendants of the founder, and the Gossains of his *kul* are the preceptors of the cult taught by him.

The temple which forms the subject-matter of dispute in the present case is stated to have been built about the time of the Indian Mutiny, by one Muttuji, a descendant of Bullav and thus a member of his *kul*. The worship he set up in this new temple was of the image of Sri Madan Mohunji, which is proved to have been brought from the Tikait defendant's temple at Nathdwara. This was one of the subsidiary images that were worshipped there along with the principal deity.

Muttuji remained in possession of the temple built by him and of the worship performed there until his death in 1883. He left a widow, Satbinda Bahuji, and two daughters, *Musammat* Ganga Beti and Gordhana Beti. After the death of Muttuji, his widow, Satbinda, carried on the worship until 1838 when she died, and the charge of the temple devolved on Ganga and Gordhana. Ganga died in 1896 and Gordhana in 1902. Both Ganga and Gordhana were married, according to the custom of the sect, to Bhat husbands—and their sons are accordingly called Bhats. The plaintiffs, Mohan Lalji and Gordhan Lalji, are the sons of Ganga, whilst the defendant, Madhusudan Lala, is the surviving son of Gordhana, and Damodar Lala is her husband.

On the death of Gordhana, these two, together with Anrudh Lala, another of her sons, who was alive at the time, appear to have taken possession of the temple. In 1904 a suit was instituted by the defendant, Tikait Gordhan Lalji, against Damodar and his two sons to establish his title to the *Shebaitship*, and for possession of the temple. This suit was referred to arbitration, and an award was made in his favour under which he obtained possession.

During the pendency of that suit, the plaintiffs, the sons of Ganga, brought the present action against Damodar and his two sons for joint possession of the temple and its appurtenances. On the 25th of August 1905, Tikait Gordhan Lalji was added as a defendant to the suit of *Musammat* Ganga's sons.

The plaintiffs' claim against Gordhan Lalji is for ejectment; whilst against the other defendants it is for joint possession. They allege that Muttuji, their maternal grandfather, was the owner of the temple with all its appurtenances; that on his death his widow came into possession of the same by right of inheritance; and that upon her death their mother and their aunt "became the owners of the temple." And they claim to be entitled on the death of Gordhana to joint possession with her husband and sons to an equal share as "owners." It will be noted that they base their right on the ordinary right of inheritance under the Hindu law.

The Tikait, the real contesting defendant, denied the title put forward by the plaintiffs. He urged that the temple was not the personal property of Muttuji and that the right of inheritance did not attach to it. He further alleged that according to the custom in force among the Bullavacharyas daughters' sons did not belong to their *kul* and were debarred from taking part in the ministrations at the temple for the benefit of the worshippers, and he claimed that as a collateral relative of Muttuji in the male line he was entitled to succeed him as *Shebait*.

He also alleged that the temple was built by Muttuji on land belonging to his (the defendant's) father with his permission and that on Muttuji's death without leaving any

lawful heir the right to the possession devolved on him by virtue of an agreement executed by Muttuji.

On these respective allegations of the parties the trial Judge framed a number of issues, only four of which need attention. The second and third put in issue the incapacity alleged by the defendant of daughters' sons succeeding to their maternal grandfathers or taking part in the worship at a Bullav temple. The fourth raised the question whether the property was *debuttur*. The fifth dealt with the claim of the defendant to succeed to the *shebaitship* by right of heirship to Muttuji.

The Subordinate Judge, on an exhaustive review of the evidence, held on all the issues against the plaintiffs and accordingly dismissed the suit. His decision has been affirmed on appeal by the High Court of Allahabad.

From the decree of the High Court the plaintiffs have appealed to His Majesty in Council. They, or rather their advisers, abandoned, if not in the first Court certainly in the High Court, their contention that the temple in suit with the appurtenances formed the private property of Muttuji subject to the ordinary law of inheritance. In the High Court the case was discussed and decided on the admission of the plaintiff's Counsel that the property in suit was *debuttur*. In fact, in their Lordships' judgment, the evidence left no room for the opposite contention, for, apart from positive testimony directly bearing on the point, the performance of the worship in accordance with the rites of the sect for whose benefit it was held may be treated as good evidence of dedication. That being so, the ordinary rule of Hindu Law relating to the descent of private property is not applicable to the particular right in controversy in this case.

Stress, however, is laid on the principle enunciated in *Gossami Sri Girdharji* v. *Romanlalljee Gossami* (3), where Lord Hobhouse, delivering the judgment of this Board, said as follows:—

"According to Hindu law, when the worship of a *Thakoor* has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

Starting from this point, the first question to determine is whether the plaintiffs suing for the joint exercise of the right of *shebaitship* to the temple in suit, have established their competency for the office. The duties which are imposed on the person in charge of the temple and of its worship are to be found very comprehensively set forth in Professor Hayman Wilson's "Religious Sects of the Hindus." Both the Courts in India have found that the plaintiffs, being Bhats, and not belonging to the Gossain *kul*, cannot perform the diurnal rites for the deity worshipped by the sect; they cannot wash, dress or adorn the image or perform the *arti* (one of the most important rites) which seems to consist in waving the light before the image of the deity. They cannot touch the food offerings placed before the idols, which are afterwards distributed among the Vaishnav votaries. Nor can they communicate the *Mantras* to the disciples for purposes of initiation. It is to be noted in this connection, that whilst the daughters of the Bullav Gossains married to Bhat husbands continue to live in their fathers' houses and remain within their fathers' *kul*, their sons do not acquire that status; as sons of Bhats they are Bhats, and not Bullavacharya Gossains who are by virtue of their descent entitled to act as minister of the cult established by Bullav Maha Pirbhuji.

Another fact is equally clear on the evidence that Bhat girls married into the Gossain *kul* receive the *Mantras* and become thenceforth members of the *kul*. It is not surprising, therefore, that after Muttuji's death his widow and daughters remained in charge of the temple and its worship. But to allow the plaintiffs' claim to an admittedly Bullav temple, where the rites are performed according to Bullav ritual which, it is clearly

(3) 16 I. A. 137; 17 C. 3.

established they cannot perform, would, in their Lordships' jndgment, defeat the purpose for which the worship was established.

In an action of ejectment the conclusion at which their Lordships have arrived would be sufficient for the affirmance of the decree appealed against dismissing the plaintiffs' suit.

But their Lordships are of opinion that the Tikait defendant has succeeded in establishing an independent title of his own to the temple in suit. He appears to be the nearest male relative of Muttuji, both being descendants of two full brothers; there can be little doubt, also, that the image installed at Jatipura was brought from his temple at Nathdwara, and that the worship founded by Muttuji was an offshoot of the worship in Nathdwara. The temple, again, was built on land belonging to the Tikait defendant, with the permission of his ancestor, who held the office of Tikait at the time.

It seems to their Lordships that apart from the statements contained in Muttuji's letter, on which the defendant relied in his written statement, he has a clear title, according to the customs and usages of the Bullav *kul*, to the *shebaitship* of the temple in suit.

On the whole their Lordships are of opinion that the judgment and decree of the High Court are right, and that this appeal must be dismissed. And they will humbly advise His Majesty accordingly.

The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent: Messrs. *Watkins & Hunter.*

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT OF OUDH, LUCKNOW.

APPEALS NOS. 68, 69 AND 70 OF 1912.

March 14, 1913.

Present:—Lord Atkinson, Lord Moulton, Sir Jhon Edge and Mr. Ameer Ali.

Thakur BASANT SINGH—APPELLANT

versus

MAHABIR PERSHAD—RESPONDENT.

Practice—Point appearing on the face of documents and raised—Privy Council bound to decide—Plaintiff in ejectment suit must recover on the strength of his own title—Agreement forming foundation of plaintiff's title—Declaring him merely partner and entitled to possession only in case of success of contemplated litigation—No present right to possession—Suit for ejectment must fail.

Their Lordships of the Privy Council are bound to decide a vital point appearing on the very face of the written proofs of the parties, and plainly raised in the pleadings, notwithstanding the fact that it was not much discussed or not at all discussed on the hearing of the appeal before the Court from which the appeal to His Majesty was made.

A plaintiff in an action of ejectment must recover on the strength of his own title, not by the weakness of his adversary's.

Where an agreement forming the basis of the plaintiff's title provides that he should merely be a partner, or co-owner with the other party to the agreement in a certain undivided fraction of the property in dispute, and that in case of success in the contemplated litigation in respect of the said property he should become entitled to the proprietary possession of the said fraction, a present right to the possession of a share in the property is not conferred and hence a suit for ejectment would be incompetent before the successful issue of the contemplated litigation.

Lala Achal Ram v. *Kazim Husain Khan*, 32 I. A. 113, 9 C. W. N. 477; 15 M. L. J. 197; 27 A. 271; 8 O. C. 155 (P. C.), distinguished.

Consolidated appeals from the judgments and decrees of the Court of Judicial Commissioner of Oudh, dated the 19th of March 1909 and the 29th of March 1911,* partly affirming and partly reversing the judgments and decrees of the Court of Subordinate Judge of Partabgarh, dated the 22nd of July 1903, and a judgment and decree of the District Judge of Rai Bareli who had partly affirmed and partly reversed a judgment and a decree of the Subordinate Judge of Partabgarh, dated the 22nd of July 1908.

FACTS.—A certain estate in the village of Lohangpur in Partabgarh was owned by two joint Hindu families, the respective heads of which were two brothers, Binda Sewak and Ram Persad. By two deeds of January 2, 1900, and October 3, 1901, Binda Sewak purported to sell the share appertaining to his branch of the family to Basant Singh, the appellant. Ram Persad, thereupon, as a co-sharer brought suits for pre-emption and obtained decrees thereon. Then, Ram Persad dealt or purported to deal with the whole estate as follows: By a deed dated June 4, 1903, and by two other deeds of August 3, 1903, and November 8, 1905, he sold a certain proportion of the whole estate to Basant Singh and by a deed of February 4, 1907, he mortgaged the remainder of the said estate for

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* See *Mahabir Prasad* v. *Basant Singh*, 12 Ind. Cas. 347; 14 O. C. 299.—*Ed.*

25 years for Rs. 12,000. Sheopal and Chandra Bhukan, sons of Binda Sewak, questioned the alienation by Binda Sewak as being without necessity and not binding upon them. Bhopal, a grandson of Ram Persad, claimed his ancestral property questioning the alienation by his grandfather. Being without funds they entered into an arrangement with Mahabir Prosad who was to finance them in the legal steps they intended to take in return for a certain proportion of the ancestral property in the event of their success. Later on they retired from the case under section 375 of the Code of Civil Procedure. Mahabir Prosad, who was joined as a plaintiff, was left to prosecute the suit single handed. The Courts in India had allowed the claims of Mahabir Prosad against which the present appeal was preferred to the Board.

Mr. *De Gruyther*, *K. C.* (with him Mr. *Dube*), on behalf of the Appellant, contended that the respondent was not competent to carry on the litigation after the withdrawal of principal plaintiff, who had further to prove that alienation was not binding upon them and that it was for immoral purposes. The alienations made by the manager of a Hindu family for an adequate consideration were binding upon the plaintiffs.

Mr. *Lowndes*, for the Respondent, contended that the mortgages of the different parts of the property in suit, which are relied upon by the appellant, were not within the competence of the persons by whom they were made and were not binding upon the respondent. The sales were not made for family necessity or for discharging antecedent debts. The respondent is further entitled to recover the property on payment of the sums alleged to have been advanced by the appellant.

Reference was made to *Chandra Deo Singh* v. *Mata Prasad* (1), *Lala Achal Ram* v. *Raja Kazim Hussain Khan* (2).

JUDGMENT.

LORD ATKINSON.—These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th of March 1909 and the other two the 29th of March 1911.

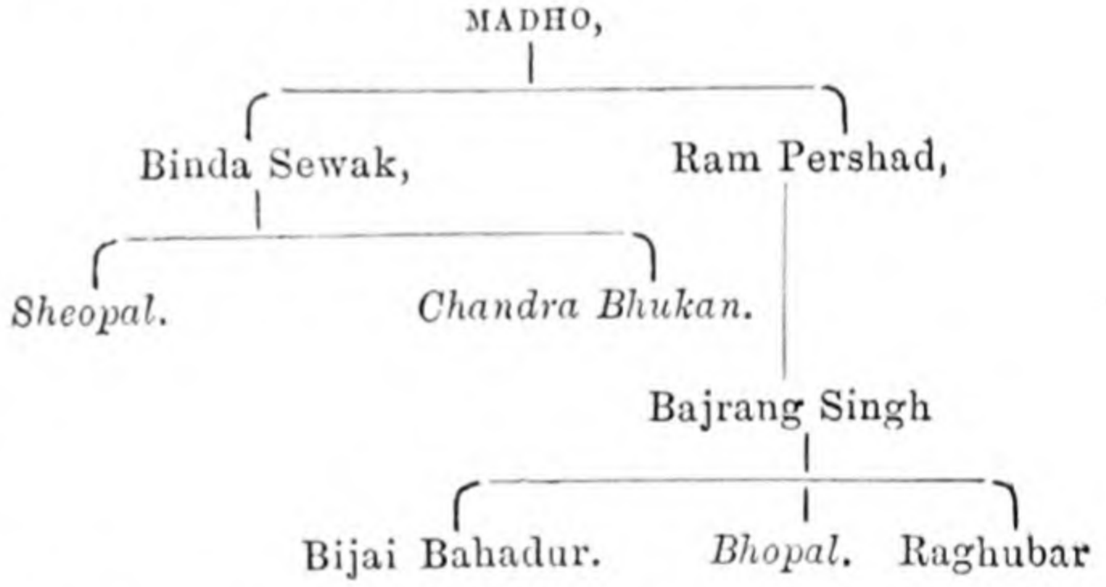
By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated the 22nd of July 1908, were in part affirmed and in part reversed, and by the two latter a judgment and decree of the District Judge of Rae Bareli, dated the 5th of February 1910, was also in part affirmed and in part reversed.

By this decree of the 5th of February 1910 a previous decree of the same Subordinate Judge, dated the 3rd of August 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows:—

A certain estate in five villages in the Partabgarh District was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Pershad, the share of the said Binda Sewak's branch being 7 annas 2 pies and that of Ram Pershad's branch 8 annas 10 pies.

A geneological table set out in the respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed:—



The persons whose names are printed in italics are plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukhan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Pershad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a plaintiff.

By two deeds, dated respectively the 2nd of January 1900 and 3rd of October 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property.

Thereupon Ram Pershad, as co-sharer in the family estate, instituted two pre-emption

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.
(2) 32 A. I. A. 113; 9 C. W. N. 477; 15 M. L. J. 197; 27 A. 271; 8 O. C. 155.

suits in respect of these two sales, and obtained decrees therein. He, subsequently, by deeds dated the 4th of June 1903 and 3rd of August 1903 respectively, purported to sell and convey to the same Basant Singh (the appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6-annas share of his own share of the family property. In addition he, by deed dated the 4th February 1907, mortgaged this latter 6-annas share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of 25 years. Sheopal Singh, Chandra Bhukhan Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as being, on several grounds, void according to Hindu Law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April 1907, were accordingly entered into between them and Mahabir Pershad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Pershad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the Court of the Subordinate Judge of Partabgarh, the first on the 10th of August 1907, in which Sheopal Singh, Bhukhan Singh, and Mahabir Pershad were plaintiffs, and Basant Singh, Binda Sewak Singh, and Ram Pershad defendants, praying for "a decree for proprietary and actual possession of 4 annas 9 pies 6 2/3 *karants* under proprietary share" in five villages therein named and for Rs. 1,704-14 9-33/36 mesne profits, In other words, it was an action of ejectment and for recovery of mesne rates.

In the second suit Bhopal Singh and Mahabir Pershad were plaintiffs, and Ram Pershad and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Pershad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Pershad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed dated the 22nd of April 1908, compromised with the two principal plaintiffs in that suit, namely, Sheopal Singh and Chandra Bukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed was filed in Court, and on an application made under section 375 of the Code of Civil Procedure, the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly dismissed as against him. Mahabir Pershad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiffs. Even if all the impeached deeds were absolutely valid he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgment delivered upon the 22nd of July 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said: "The suit, however, cannot fail altogether, as was contended by defendant No. 1. Plaintiff No. 3 has acquired an interest as to half the property." This seventh issue ran thus: "To what relief, if any, are the plaintiffs entitled?" Owing to the compromise, that issue came to mean to what relief is the third plaintiff, Mahabir Pershad, entitled? And the last of the reasons stated in the appellant's case lodged in these appeals is that the respondent, Mahabir Pershad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though raised, was not much discussed, or not at

all discussed on the hearing of the appeals before the Court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained from discussing in the Court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised as this point, has been in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them.

It is elementary law that a plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's.

What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore, is, did the agreement in the first action confer upon Mahabir Pershad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows:—

"1. That in the share of each declarant amounting to 2 annas 4 pies and $13\frac{1}{3}$ *karant* Mahabir Pershad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the declarants, as follows:—

Sheopal Singh 2 annas 4 pies $13\frac{1}{3}$ *karant* share.

Chandra Bhukhan Singh 2 annas 4 pies $13\frac{1}{3}$ *karant*.

"2. We, the declarants, and Mahabir Pershad will be bound by the following conditions:—

"(*a*) That Mahabir Pershad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal then Mahabir Pershad will have to defend the appeal also with his own costs.

"(*b*) That in case *of success Mahabir Pershad will be entitled to proprietary possession of the share entered in* paragraph 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Pershad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the *zemindari* share decreed.

"(*c*) That Mahabir Pershad will remain a co-sharer and proprietor like ourselves in all the *sir* and *khudkasht* lands and all *zemindari* rights relating to the *zemindari* share like ourselves, and we will have no right to keep separate possession over any *sir* and *khudkasht* land, nor will we raise any plea as to ex-proprietary right."

In the view of their Lordships these provisions did not confer upon Mahabir Pershad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated litigation had been achieved. Success has not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Pershad, should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lala Achal Ram* v. *Raja Kazim*

Hussain Khan (2) is wholly different from the present. There the sole owner of certain lands, who had already sold one-half of them, executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lakh and a half of rupees." He acknowledged the receipt of one lakh, the balance has to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was, no doubt, exaggerated. But the vendor, never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgment of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned says at page 121 of the report: "Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate, giving a good title to the Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Pershad any present right to recover the possession of the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed, that the three judgments and decrees of the Court of the Judicial Commissioner, dated the 19th of March 1909 and the 23th of March 1911 respectively should be set aside, that the two judgments and decrees of the lower Court, namely, that dated the 3rd of August 1909 of the Subordinate Judge and that of the District Judge of Rae Bareli dated the 5th February 1910, should be set aside, and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent: Messrs. *Watkins & Hunter.*

COURT OF THE FINANCIAL COMMISSIONER PUNJAB.

REVISION APPLICATION No. 147 OF 1912-13.

April 14, 1913.

Present:—Mr. Fenton, F. C.

RUHELA AND OTHERS—PLAINTIFFS—APPLICANTS

versus

DULA—DEFENDANT—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), *ss.* 53, 59—*Occupancy tenant—Transfer of holding by gift to adopted son—Landlord not suing to set aside within limitation period—Gift ceasing to be voidable—Limitation to run from date of gift—Effect of heirs on nature of occupancy tenancy—Transfer of occupancy tenancy not avoided, effect of.*

Where the adopted son of an occupancy tenant derives his title from a gift-transfer under section 53 of the Tenancy Act, and not from inheritance under section 59 and the landlord does not bring a suit within the period of limitation to set the transfer aside, the gift transaction will cease to be voidable.

The landlord of an occupancy tenant can during the donor's life-time sue to oust the donee, and limitation, therefore, runs against him from the date of the gift transaction and not from the date of the donor's death.

The nature and status of the property held by an occupancy tenant is not affected by his having or not having statutory heirs.

When an occupancy tenant has, within his power of alienation, once made a transfer, which is not voidable at the suit of any reversioner, and has by reason of limitation ceased to be voidable at the suit of his landlord, the alienee will step into his shoes with all the rights and liabilities of the tenancy.

Case reported by the Commissioner of Jullundur, on revision from the order of the Collector of Ludhiana, dated the 16th August 1912, confirming that of the Assistant Collector, 1st Grade, so registered by the order of the Chief Court, dated the 18th March 1912.

ORDER.—I am unable to concur with the learned Commissioner that the decree of the Collector should be set aside. Briefly the

case is one in which landlords sue for possession of the land included in an occupancy-holding on the death of the adoptive father of the tenant in possession. Had the tenant in possession no other title to the occupancy-rights than such as arose from the circumstance that he was the adopted son of the previous occupancy-tenant, I agree that, following *Fatteh Mahomed* v. *Musammat Jiwan* (1), the landlords would be entitled to treat the occupancy rights as having lapsed on the death of the defendant's adoptive father. But the defendant derives his title from a gift-transfer under section 53 and not from inheritance under section 59 of the Tenancy Act. This gift to defendant by his adoptive father during the latter's life-time was voidable at the instance of the landlords: but within the period of limitation, the landlords did not bring any suit to set it aside, so that the gift transaction has ceased to be a voidable one.

What, however, the learned Commissioner contends is that what the occupancy-tenant gifted to his adoptive son was not his occupancy rights but his life-interest in his occupancy-holding, an interest which terminated on his death. Mr. Fagan writes:—"Had he (defendant) been a mortgagee his interest, as I understand the rulings *Sher Khan* v. *Pir Baksh* (2), and *Shib Sahai* v. *His Highness Maharaja Balbir Singh* (3)*, would certainly have determined on the death of Basan. It appears to me that the same principle must apply *a fortiori* in the case of a donee. Basan would only transfer, whether by mortgage or gift, the maximum quantity of interest which he enjoyed and that was an interest which under the terms of section 59, Punjab Tenancy Act, terminated on his death without male issue or entitled collaterals. No transfer made by him could so far as I can see operate to prolong the occupancy tenure in favour of a stranger which is what Dula is in spite of his adoption."

Now it seems to me that there are several fallacies in the above contention. A gift is not analogous to a mortgage. A donor parts with all his right, title and interest to the donee. A mortgagor does not similarly part with all his right, title and interest to the mortgagee. A mortgagor has a right to redeem. A gift followed by possession may not be revoked, [section 25, explanation 1 of Contract Act, section 126 of Transfer of Property Act, *Musammat Murad Khatun* v. *Ahmad Ali* (4)]. Gifts may, no doubt, under customary law, be rendered voidable so far as the interests of reversioners are concerned and having regard to their claims there is certainly an analogy between the position of a donee and of a mortgagee during the life-time of the donor. A reversioner cannot during the donor's life-time sue to oust the donee, but the landlord of an occupancy-tenant can bring such a suit during the donor's life-time and limitation, therefore, runs against him from the date of the gift transaction and not from the date of the donor's death.

But the learned Commissioner's main contention is that what passed from the donor to the donee was nothing more than a life-interest in the occupancy-holding. It is not contended that the language of the deed of gift so limits its scope. Mr. Fagan's position seems to be that a childless and heirless occupancy tenant possesses property different in nature and status from that which is possessed by an occupancy tenant with visible statutory heirs; that in the one case the property is a life interest and in the other a permanent interest. I am unable to find any authority for such a proposition. An heirless occupancy tenant may marry and beget an heir. Can it be contended that with the birth of a son the nature of his title in his occupancy holding is altered? However that may be, even if it be admitted that an heirless occupancy tenant possesses only a life-interest, that fact, while it may restrict his powers of alienation by imposing conditions as to necessity and consent of others, cannot affect the title of a transferee when once the transfer, being within such powers has been made; and if the alienation, as in this case, is not voidable at the suit of any reversioner, and has by reason of limitation, ceased to be voidable at the suit of the landlords, then the alienee shall, as provided expressly in section 57 and generally in section 4 (7) of the Tenancy Act, step into the shoes of the occupancy tenant and "have the same rights and be subject to the same liabilities as the tenant to whom

(1) 43 P. R. 1895.
(2) 79 P. R. 1878.
(3) 8 P. R. 1905 Rev.
* See also *Narindar Singh* v. *Lehna Singh*, 6 P. R. 1901, Rev.—*Ed.*

(4) 91 P. R. 1894.

before the transfer the right belonged had and was subject to."

For these reasons I am unable to regard the decree of the Collector dismissing the landlords' (plaintiffs') suit for possession of the occupancy holding as one which should be revised under section 84 of the Tenancy Act.

PUNJAB CHIEF COURT.
CIVIL REFERENCE No. 96 OF 1912
April 4, 1913.
Present:—Mr. Justice Shah Din and
Mr. Justice Scott-Smith.
KESAR SINGH—PLAINTIFF
versus
MANGAL SINGH—DEFENDANT.

Punjab Tenancy Act (XVI of 1887), ss. 50, 51—Suit for possession by tenant-at-will against the landlord of his land—No relationship of tenancy between the parties.

Defendant was the owner of land held under him by *N.* as an occupancy tenant. Plaintiff held the land under *N.* as a tenant-at-will. Plaintiff sued defendant for recovery of possession of the land on the allegation that within six months before the institution of the suit he was dispossessed by the defendant:

Held, that the suit was not one between landlord and tenant, and, therefore, sections 50 and 51 of the Tenancy Act did not apply.

Case referred by the Munsif, 1st class, Tarn Taran, under date the 28th October 1912, under Order XLVI, rule (1), of the Civil Procedure Code, and submitted by the Divisional Judge of the Amritsar Division, under cover of his letter No. 1267G dated 9th November 1912, for the orders of the Chief Court.

ORDER.—This is a reference by Chaudhri Muhammad Shafi, Munsif, 1st class, Tarn Taran, under Order XLVI, rule 1, of the Civil Procedure Code. The facts of the case out of which this reference has arisen are fully stated by the Munsif. Briefly put, the land in dispute is the property of the defendant and certain other persons, under whom it is held by an occupancy tenant, named Nathu. The plaintiff held the land under Nathu as a tenant-at-will. The plaintiff alleges that within six months before the institution of the suit he was dispossessed by the defendant, and he has brought this suit under section 9 of the Specific Relief Act for recovery of possession.

The question which has been referred to this Court by the Munsif is whether, in view of the provisions of sections 50 and 51 of the Punjab Tenancy Act, this suit is maintainable under section 9 of the Specific Relief Act. The answer to this question depends upon the determination of the questions (1) whether at the date of the suit the relation of landlord and tenant existed between the defendant and the plaintiff, and (2) whether, if such relation did not exist between them, the provisions of sections 50 and 51 of the Punjab Tenancy Act are applicable to the present suit.

The plaintiff is a tenant-at-will under Nathu and holds the land under him. Nathu holds the land under the defendant as an occupancy tenant and not as a tenant-at-will, and it is clear that the plaintiff, who has entered into possession under Nathu, has no direct relation, so far as the occupancy of the land is concerned, to the defendant. Section 4, clauses (3), (5) and (6) of he Tenancy Act make it clear that the defendant in the present case is the landlord of Nathu who holds the land under him and is liable to pay rent to him for that land; and that, so far as the plaintiff is concerned, his landlord is Nathu and not the defendant, because it is under Nathu that he holds the land and it is to him that he is liable to pay rent for it. The present suit is not, therefore, one between landlord and tenant and, as held in *Mian Singh* v *Fatha* (1), sections 50 and 51 of the Tenancy Act do not, therefore, apply to this suit. The observations of Sir Meredyth Plowden in *Joti* v. *Maya* (2), at page 235 (paragraph 3), to which the Munsif has referred, are mere *obiter dicta* and they were not intended to lay down definitely a rule of law contrary to the decision of the Division Bench, of which the learned Judge was himself a member, in the reported case in 1889. The remarks of Sir Meredyth Plowden in his referring order in *Resar Singh* v. *Nihal Singh* (3), at page 243, tend to show that sections 50 and 51 of the Tenancy Act refer only to suits

(1) 3 P. R. 1889.
(2) 44 P. R. 1891.
(3) 45 P. R. 1891.

between landlord and tenant and not to suits between a tenant and a stranger who dispossesses him of his tenancy.

For the above reasons, our answer to the reference is that the present suit is not one governed by sections 50 and 51 of the Punjab Tenancy Act and that it is maintainable under section 9 of the Specific Relief Act.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 115 OF 1912.

August 29, 1912.

Present:—Mr. Kanhaiya Lal, A. J. C.

BACHCHU LAL—DEFENDANT—APPLICANT

versus

RAJA RAM—PLAINTIFF—OPPOSITE PARTY.

Pre-emption decree—Extension of time fixed in the decree—Civil Procedure Code (Act V of 1908), s. 152, O. XX, rr. 3, 14—Interpretation of statutes—Conflict.

A Court cannot extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired.

A right, extinguished by virtue of a decree of a competent Court binding on the parties, cannot be revived by any subsequent act of the Court or the party at fault.

Laws have to be interpreted in such a way as to avoid a conflict.

Appeal against an order of the Subordinate Judge, Tahsil Biswan, dated 4th November 1911.

Babu *Basudev Lal*, for the Appellant.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—The question for consideration in this case is whether a Court can extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired.

On the 18th May 1911, Raja Ram obtained a decree for pre-emption against Bachchu Lal subject to the payment of Rs. 1,561-0-3 within three months to Bachchu Lal. The decree provided that, in default of payment within the said time, the plaintiff's right of pre-emption shall be extinguished. The decree-holder deposited Rs. 1,500 on the 17th August 1911. On the 6th September 1911, he tendered the remainder of the purchase-money with an application asking for an extension of time till the 18th September 1911.

The learned Subordinate Judge extended the time by 20 days and accepted the balance of the purchase-money paid by the decree-holder and held that the decretal amount was paid within time. The defendant appealed to the District Judge, who held that no appeal was maintainable.

In revision it is contended on behalf of the defendant that the Subordinate Judge had no jurisdiction to extend the time under section 148 of the Code of Civil Procedure or to declare that the payment made after the date specified in the decree was a good payment.

Order XX, rule 14, of the Code declares that a decree for pre-emption shall specify a day on or before which the purchase-money shall be paid and shall direct that if the purchase-money and the costs, if any decreed to the plaintiff, are not so paid, the suit shall be dismissed with costs. The decree accordingly directed that, if the purchase-money was not paid within three months, the right of pre-emption shall be extinguished. The amount paid by the decree-holder on the 17th August 1911, was inadequate and the decree for pre-emption, therefore, became inoperative by the expiry of time allowed by it and the right of pre-emption was extinguished. The decree accorded with the judgment.

Under Order XX, rule 3, of the Code, a Court, passing a decree, has no power to alter or add to a judgment save as provided by section 152 of the Code or on review. Section 152 of the Code applies only to clerical or arithmetical errors arising from any accidental slip or omission and it is evident that, unless section 148 of the Code could be applied, the Court had no power to add or to alter the judgment in accordance with which the decree was framed or to extend the time fixed by the decree for the payment of the purchase-money. Section 148 of the Code is a new provision intended to enable the Court to enlarge the time in its discretion even though the original period of time may have expired. But there is nothing in that section to justify an interference with or alteration of the directions contained in a decree or judgment of a Court of competent jurisdiction.

Laws have to be interpreted in such a way as to avoid a conflict. "An author",

says Maxwell, "must be supposed to be consistent with himself; and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author; and the language of every enactment must be so construed, as far as possible as to be consistent with every other which it does not in express terms modify or repeal." (Maxwell on the Interpretation of Statutes, 4th Edition, page 233).

In *Narendra Bahadur Singh* v. *Ajodhya Prasad* (1), it was laid down that the general provisions of section 143 of Act V of 1908 related to proceedings antecedent to the passing of a final decree and that, when such a decree was passed, the power of the Court was limited by the general principle that once a judgment was pronounced and the decree signed, such final decree could not be altered except under the provisions of section 152 or Order XX, rule 3, or those relating to a review of judgment, unless the power to grant further extension of time was expressly reserved to the Court by the decree or otherwise.

The learned Counsel for the decree-holder has referred to the case of *Ganga Dhar* v. *Anurudh Singh* (2), but in that case the last day of the period fixed for payment into Court of the pre-emptive price expired on a Gazetted holiday, in consequence of which the payment was made on the next working day; and this Court, therefore, exercised its discretion, as a Court of revision, in fixing a fresh date for the deposit of the purchase-money. In the present case the payment was not made till about 19 days later. The time fixed for the payment did not expire on a holiday and, though it is possible that there may have been some misapprehension, which led the decree-holder to deposit a slightly insufficient amount, there is no reason for going against the explicit terms of the decree, which directed that, if the payment was not made within the time specified therein, the right of pre-emption shall be extinguished.

A right, which was extinguished by virtue of a decree of the competent Court binding upon the parties, cannot be revived by any subsequent act of the Court or of the party at fault. The decision in *Sitaram* v. *Bharath Prasad* (3) does not apply because in that case the decree was passed subject to the plaintiff's taking out Letters of Administration within a certain period. The decree was virtually a conditional decree, which could not have been executed until the Letters of Administration were obtained. The suit was at any rate a pending suit till such Letters of Administration were filed to make the decree operative and capable of execution.

In the present case, the order extending the period specified in the decree, after the right of pre-emption was extinguished, was without jurisdiction.

I, therefore, allow the application and set aside the order of the Court below with costs in all the Courts.

Application allowed.

(1) 5 Ind. Cas. 443; 13 O. C. 28.
(2) 11 O. C. 144.
(3) 8 O. C. 241.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 23 OF 1910.
May 23, 1912.
Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

ALIM SON OF DADU AND OTHERS—APPELLANTS
versus
MOLEDINO SON OF AKAHDINO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 154, Sch. II, para. 16—Invalid award—Decree in accordance with award—Finality—Appeal—Right of appeal—Not a mere matter of procedure—Alteration does not affect right—Interpretation of statutes—Express provision regarding right of appeal under old law.

Under the Code of Civil Procedure, 1908, in a case falling under paragraph 16 of Schedule II of the Code, the Court giving judgment in accordance with an invalid award must be taken to have decided that the invalid award is valid, the Court having jurisdiction to decide whether or not it has jurisdiction, and that decision is final.

Ghulam Khan (Ghulam Jilani) v. *Muhammad Hassan*, 29 C. 167; 29 I. A. 51; 4 Bom. L. R. 161; 12 M. L. J. 77; 6 C. W. N. 226; 25 P. R. 1902; *Hansraj* v. *Sunder Lal*, 10 Bom. L. R. 581; 35 C. 648; 35 I. A. 88; 12 C. W. N. 585; 14 Bur. L. R. 146; 4 M. L. T. 25; 18 M. L. J. 266; 99 P. W. R. 1908; 7 C. L. J. 520; 80 P. R. 1908; 138 P. L. R. 1908; *Chairman of the Purnea Municipality* v. *Siva Sankar*, 33 C. 899; *Kanakhu* v. *Nagalinga*, 4 Ind. Cas. 871, 19 M. L. J. 480; 32 M. 510; 6 M. L. T. 176; *Shib Lal* v. *Chaturbhuj*, 2 Ind. Cas. 363; 31 A. 450; 6 A. L. J. 496, referred to.

ALIM *v.* MOLEDINO.

Under the general law a right of appeal is more than a matter of procedure, and an alteration in the law of procedure would not retro-act upon it.

Section 154 of the Code of Civil Procedure, however, supersedes the general law by expressly providing that 'nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.'

A reference to arbitration was made under section 506 of Act XIV of 1882. An award was made and a decree passed in accordance therewith after Act V of 1908 had come in force:

Held, that the question of the right of appeal must be determined by Act V of 1908 and not by Act XIV of 1882.

Per *Pratt, J. C.*—A decree passed in terms of an award under the old Civil Procedure Code would be appealable, if the award is void *ab initio*.

Appeal against the decision of the District Judge, Hyderabad.

Mr. *Wadhumal Oodharam*, for the Appellants.

Mr. *Hirdaram Mewaram*, for Respondent No. 3.

JUDGMENT.

PRATT, J. C.—Plaintiff filed an ejectment suit in 1906 against the four defendants the heirs of one Saindino.

On the 10th September 1903, the parties, it is said, agreed under section 506 of the Code of 1882 to refer the matter to arbitration. A reference was ordered by the Court and the arbitration delivered his award. This was objected to by the first defendant alone on the ground that the arbitrator had been guilty of misconduct. The objection was overruled by the Sub-Judge who gave judgment in accordance with the award; and a decree followed thereon.

The defendants appealed to the District Judge on the ground that the award was void *ab initio* as the reference or rather the application to refer had been signed on behalf of two of the defendants by a Pleader who had not been authorised to do so.

The District Judge dismissed the appeal as incompetent and the defendants come to this Court in second appeal on the same ground. The point is purely a point of law. Will an appeal lie from a decree made on an award on arbitration in a suit on the ground that the award is a nullity or has no legal effect *ab initio* as an award? The argument before us has proceeded on the Code of 1882, and it is said that this point is concluded by the decision of the Privy Council in *Ghulam Khan (Ghulam Jilani)* v. *Muhammad Hassan* (1).

It is desirable, therefore, to see what was decided in that case.

The plaintiff filed a suit against the defendants in the Court of the Sub-Judge claiming possession of certain land said to have been cultivated by the defendants under an agreement of partnership with the plaintiff and also for a settlement of account and for a share of profits of the cultivation. The suit was referred to arbitration and the Sub-Judge subsequently made a decree in terms of the award of the arbitrator. The defendants appealed to the Chief Court. The main ground of appeal was that the portion of the claim which related to a settlement of accounts and a share of the profits had been excluded from the cognizance of Civil Courts by clause (*k*) of section 77 (3) of the Punjab Tenancy Act of 1887. The Civil Court had, therefore, no jurisdiction to entertain the suit or to refer it to arbitration; and it was urged that the reference being invalid the award was also of no legal effect as an award. The Punjab Chief Court, however, decided that no appeal could lie except on the narrow ground referred to in section 522 and that it was not competent to the appellant to object that what purported to be an award was no award. While dismissing the appeal, however, they expressed an opinion that the question of jurisdiction could be raised in an application for revision. The defendants accordingly applied in revision. On this the Chief Court decided that that part of the claim which referred to the accounts and share of profits being without the cognizance of the Civil Court, that Court had no jurisdiction to refer this part of the claim to arbitration. It held, however, not without hesitation that the portion of the award which dealt with the accounts was separable from the rest. It, therefore, held that that portion only of the award was void and amended the decree accordingly.

Appeals were made to the Privy Council from both orders of the Chief Court. It is important to notice what was said by their Lordships as to the revisional ap-

(1) 29 C. 167; 29 I. A. 51; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902; 12 M. L. J. 77.

plication. Apart from the question of limitation their Lordships said that the case could not be brought under section 622 and the reasons were stated as follows :—

"The question whether the suit was competent was one of the issues in the suit and as such referred to the arbitrators. They were not indeed bound to give an award on each point. They had to give their award on the whole case. In point of fact, however, they did decide the question. They may have erred in law, but arbitrators may be judges of law as well as judges of fact and an error in law certainly does not vitiate an award."

It is certain, therefore, that their Lordships found that there was a valid reference and a valid award. It is important not to lose sight of this fact when considering the judgment on the appeal.

In that judgment the then forms of arbitration under the then Code of Civil Procedure were contrasted. These were (1) references in suits, (2) references on agreements to refer and (3) awards without the intervention of the Court. As to (2) and (3) it was pointed out that the order of reference and the order of filing were obtained as a result of a litigious proceeding and had the effect of preliminary decrees. But that there was no such proceeding as to (1). In fact the order of filing or rather the order refusing to set aside the award was in case (1) treated as an interlocutory order in the suit. Their Lordships' object seems to have been to point out that *while* in cases (2) and (3) there was a right of appeal independent of section 522—yet in case (1) there was no such right of appeal.

The right of appeal being then limited to section 522, their Lordships at page 185 said that they entirely concurred with the decision of the Punjab Chief Court and again at page 183 that it would be doing violence to the plain language and obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under section 522 except in so far as the decree may be in excess of or not in accordance with the award. But this judgment does not decide that no appeal lies when the award on which the decree purports to be founded is not an award. No doubt, that is what the Punjab Chief Court decided and the Privy Council concurred in the decision but the point was not before the Privy Council because the Privy Council held that the award was a valid award and that the decree was in form and *substance* a decree under section 522.

So far, therefore, as this judgment implies that no appeal would lie even when there is no award the judgment must be construed according to the rule enunciated by Lord Halsbury in *Quinn* v. *Leathem* (2): "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of expressions which may be found there are not intended to the expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides." I do not, therefore, think that *Ghulam Khan's* case (1) can be regarded as an authority for the proposition that no appeal lies from a decree passed in accordance with an invalid award.

With great deference I think this point has been overlooked in the judgments of the Calcutta and Madras High Courts in *Chairman of the Purnea Municipality* v. *Siva Sankar Ram* (3), *Kanakku* v. *Nagalinga Naik* (4).

The Privy Council in *Ghulam Khan's case* (1) lay emphasis on the principle of finality of awards, but I do not think they intended to apply that principle to awards which are only awards in name, but which have no legal effect as awards. There is an express decision of the Privy Council on this point in the case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (5). There a decree was pronounced under section 522 on an award which had been made after the period allowed by the Court and which was, therefore, invalid. The Privy Council reversed the decree approving of the law as laid down by the Justice Oldfield in *Chuha Mal* v. *Hari Ram* (6). In that case Oldfiled, J., had said that there was no award on which the

(2) (1901) A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.
(3) 33 C. 899.
(4) 4 Ind. Cas. 871; 19 M. L. J. 480; 32 M. 510; 6 M. L. T. 176.
(5) 13 A. 300; 18 I. A. 355.
(6) 8 A. 548; A. W. N. (1886) 179.

Court could make a decree and that the decree was not one in accordance with an award from which no appeal lies.

This is an express decision which I think should be followed in preference to the observation in *Ghulam Khan's* case (1). I am fortified in this conclusion by a more recent judgment of the Privy Council in *Hansraj* v. *Sunderlal* (7). Here also the Punjab Chief Court dismissed an appeal from a decree under section 522 as incompetent. But the Privy Council while dismissing the appeal observed that there was nothing that could justify the Court in setting aside or remitting the award.

Under the new Code of Civil Procedure the Legislature has given effect to the dictum in *Ghulam Khan's* case (1) and has carried the principle of finality perhaps further than their Lordships intended. By the addition of the words "or being otherwise invalid" in paragraph 15 (1) of the Arbitration Schedule all questions as to the validity of the award are to be decided by the Court in which the award is being filed. Then the further amendment proposed by the Select Committee in paragraph 8 of their report was to modify the law as to appeals as laid down in *Ghulam Khan's* case (1). According to that decision orders of filing awards under section 525 and of filing agreements to refer under section 523 were decrees and subject to appeal as such while orders under section 521 were merely interlocutory orders not subject to appeal.

The Select Committee proposed to put all these on an equal footing and treat them as orders subject to first appeal only. This proposal is carried out in the Code for section 525 is represented by paragraph 21 (1) appealable as an order under section 104 (*f*); and section 523 is represented by paragraph 17 appealable as an order under section104 (*d*). But it has not been carried out as to section 521 for there is no appeal from an order setting aside an award or refusing to set aside an award under paragraphs 15 and 16 which stand in the place of sections 521 and 522. The effect, therefore, is that under the present Code in a case falling under paragraph 16 the Court giving judgment in accordance with an invalid award must be taken to have decided that the invalid award is valid—for a Court has jurisdiction to decide whether or not it has jurisdiction and that decision is final.

This may not be a satisfactory result, but we have to enforce the law as it stands.

My conclusion, therefore, is that the defendants had a right of appeal under the Code of 1882, but that that right of appeal is denied them under the present Code.

The only question left for decision is which Code applies. No doubt, under the general law a right of appeal is more than a matter of procedure and the alteration of the law of procedure would not retro-act upon it. For authorities it is only necessary to refer to the *Colonial Sugar Refining Co., Ltd.* v. *Irving* (8), *Nana* v. *Sheku* (9), and section 6 of the General Clauses Act. But in the case of the Code of Civil Procedure the general law is superseded by the express provisions of that Code. By section 154 "Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement." When did the right of appeal accrue as a present right to the defendants? Clearly only on the day the order was passed refusing to set aside the award and that was on the 20th March 1909. This was after the commencement of the new Code and, therefore, the defendants have lost the right of appeal which they might have had under the old Code. I would, therefore, confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

CROUCH, A. J. C.—I concur with the opinion expressed by the learned Judicial Commissioner that the present Civil Procedure Code allows no appeal in this case, and that the question whether or not a right of appeal existed must be determined by a reference to the present Code, and I agree that the appeal must be dismissed.

I am unable, however, to concur in the opinion that had the old Civil Procedure Code had application, an appeal would have been competent.

Prior to the case of *Ghulam Khan* v.

(7) 10 Bom. L. R. 581; 35 C. 648; 35 I. A. 88; 99 P. W. R. 1908; 12 C. W. N. 585; 14 Bur. L. R. 146; 4 M. L. T. 25; 18 M. L. J. 266; 7 C. L. J. 520; 80 P. R. 1908; 138 P. L. R. 1908.

(8) (1905) A. C. 369; 92 L. T. 738; 74 L. J. P. C. 77; 21 T. L. R. 513.

(9) 32 B. 337; 10 Bom. L. R. 330.

Muhammed Hassan (1), the right of appeal against a decree passed under section 522, Civil Procedure Code, on the ground that the award was illegal or invalid had been admitted by all the High Courts in India. See *Ibrahim Ali* v. *Mohsin Ali*(10), *Nandram Daluram* v. *Nemchand Jadavchand* (11), *Saturjit Pertap Bahadoor Sahi* v. *Dulhim Gulab Koer* (12), *Husanamma* v. *Linganna* (13), and, in the Privy Council case *Raja Harnarain Singh* v. *Chandnarain Bhagwant Kuar* (5). Such right of appeal was assumed to exist, at any rate the right was not disputed or even discussed. But, as pointed out by Maclean, Chief Justice, in *Chairman of the Purnea Municipality* v. *Siva Sankar* (3), all these cases were practically overruled by the decision of the Judicial Committee in *Ghulam Khan's* case (1). In that case, the Full Bench of the Chief Court of the Punjab had held that no appeal lay against a decree passed on an award under section 522 except on the grounds therein mentioned. The only issue before the Privy Council was—Did an appeal lie? The notes of the arguments of Sir W. Rattigan, who appeared for the appellant, show that he based his claim to appeal on the express ground that the award had been illegally made and was, therefore, invalid; he urged that all High Courts in India had recognised a right of appeal on such grounds and cited all the cases above referred to. Their Lordships concurred with the Full Bench of the Chief Court that no appeal lay and it seems to me impossible to avoid the conclusion that the Judicial Committee intended to affirm that no appeal lay even though it were contended that the award was invalid.

It is true that in discussing the question whether or not the application for revision was properly entertained, their Lordships indicated that they did not consider the award to be invalid, but this did not form the *ratio decidendi* on the main issue.

In the case of *Hansraj* v. *Sunderlal* (7) the Chief Court Punjab, relying on the decision of *Ghulam Khan's* case (1), had dismissed an appeal against a decree passed under section 522 on the ground that the appeal was incompetent, "inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award." Before the Judicial Committee it was again argued by appellant's Counsel that an appeal lay when the award was not a valid and legal one; this was met by Counsel for the respondent by a reference to *Ghulam Khan's* case (1). Their Lordships found that "the decision of the Chief Court was perfectly right." Had the Judicial Committee been of opinion that the view expressed by the Calcutta High Court, two years before, in the *Purnea Municipality's* case (3),—*viz.*, that all the cases which held that an appeal lay against a decree passed under section 522, when the award was attacked as being invalid or illegal, had been overruled by the decision in *Ghulam Khan's* case (1)—was erroneous, surely the opportunity would have been taken to say so.

The *Purnea Municipality's* case (3) has been recently followed by the Madras High Court in *Kanakku* v. *Nagalinga Naik* (4).

It is true that the Allahabad High Court has in *Shib Lal* v. *Chaturbhuj* (14) boldly held that when there is no valid award an appeal lies against a decree passed in accordance therewith, but no reference is made in the judgment to the Privy Council cases and no attempt made to distinguish them.

I am of opinion, therefore, that the Privy Council has declared, in unmistakeable terms, that no appeal lies against a decree passed in accordance with an award, on the ground that such award is invalid.

Appeal dismissed.

(14) 2 Ind. Cas. 363; 31 A. 450; 6 A. L. J. 496.

(10) 18 A. 422; A. W. N. (1896) 137.
(11) 17 B. 357.
(12) 24 C. 469.
(13) 18 M. 423.

A. M. ROSS *v.* SECRETARY OF STATE.

MADRAS HIGH COURT.

CIVIL SUIT No. 51 OF 1911.

February 6, 1913.

Present:—Mr. Justice Wallis.

A. M. ROSS—PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT.

Assam Labour and Emigration Act (VI of 1901), s. 91—Notification thereunder, condition No. 10—Validity—Order of suspension and closing the depôt ultra vires *—Statutory power of dismissal does not include suspension—Liability of the Secretary of State—East India Company—Liability for breach of contract—Liability for tort in transactions of the nature carried on by private persons—Master and servant—Acts done by servants in exercise of sovereign powers—Liability of the officer doing the act—Effect of Indian Enactments on the liability of the Secretary of State in Council—Government of Madras had no authority to ratify Collector's orders—Exercise of statutory power—Suit for damages for libel published by Madras Government incompetent against both the members of the Government and the Secretary of State for India in Council—Absolute privilege—Qualified privilege—Claim for damages too remote—Government of India Act* (21-22 *Vic. C.* 108), *s.* 3.

A., an agent of the Assam Labour Supply Association, brought a suit for damages against the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam, by one of which a local agent serving under *A.* and working under the Assam Labour and Emigration Act, 1901, was suspended and the depôt maintained by him closed to recruiting, while by the other the local agent was dismissed, and also for alleged defamation of the plaintiff by the Governor of Madras in Council in a Government order passed on the appeal of the plaintiff and other interested parties against the Collector's orders above referred to:

Held, (1) that the condition No. 10, specified in the Government of Madras Notification of 6th October 1909, giving the District Magistrate power to cancel the local agent's license for failure to exercise due supervision was valid, and a necessary and a proper one to be made under section 91 of the Act as amended;

(2) that the District Magistrate's order closing the depôt to recruiting and directing the suspension was *ultra vires*;

(3) that the order of the Madras Government complained of was not expressed in sufficiently clear and unambiguous terms to amount to a ratification, but, moreover, the Government of Madras had no authority from the Company, and no authority from the Secretary of State now, whether to commit tortious acts themselves, or to ratify them when committed by others;

(4) that the orders of the District Magistrate, suspending the local agent and closing the depôt to recruiting would appear to have been passed by him as incidental to the statutory power, conferred upon him by the Act of 1901 and the Notification made thereunder, to dismiss the local agent, and if this be so, it is well settled that in exercising such authority or in exceeding it he cannot be considered to have been the agent of the authority appointing him so as to render the latter liable;

(5) that no suit lay against the defendant for a libel published by the Madras Government, at all events, unless it was shown that publication was made under the orders of the Secretary of State, or on his behalf and afterwards ratified by him;

(6) that even if the suit had been brought against the members of the Madras Government at the date of the order and the Court had jurisdiction to entertain such a suit, it must have failed on the ground that the publication having been made by such Government in the execution of its duty and without exceeding it, was absolutely privileged;

(7) that even if the occasion was not one of absolute privilege it was certainly one of qualified privilege;

(8) that the Secretary of State in Council was not liable either in respect of the orders of the Collector or the Madras Government;

(9) that the plaintiff's claim for damages in respect of the Collector's orders was too remote.

A statutory power of dismissal does not include a power of suspension;

As regards liability to be sued, the Secretary of State is to be in no position different from that of the old East India Company before the passing of the Government of India Act, 1858.

The liabilities of the East India Company cannot have been any less than those of the Crown in England on a Petition of Right which extend not only to detention of the land, chattels, or money of the subject, but also to breach of contract.

The East India Company did not enjoy the same immunity as the Crown with regard to torts in transactions which might have been carried on by a private individual.

The Company could not have been made liable for the tortious acts done by servants in India in the exercise of sovereign powers, which it had not ordered or ratified, merely on the ground that they were done in the course of employment.

The officer who does the act is himself liable.

An enactment adding to, or taking away from, the liability of the Secretary of State in Council to be sued, as settled by the Government of India Act, 1858, is *ultra vires* of the Indian Legislature, as opposed to the provisions of the Indian Council's Act, 1861.

As regards the liability of the East India Company there was a distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on without having such powers delegated to them. In the latter case, the Company were liable for the negligence of their servants in the course of their employment in the same way as any private employer in a similar case.

Messrs. *C. P. Ramaswami Aiyar*, *A. Krishnaswami Aiyar* and *M. Subbaraya Aiyar*, for the Plaintiff.

A. M. ROSS *v.* SECRETARY OF STATE.

The Hon'ble Mr. *F. H. M. Corbett*, Advocate-General, with him Mr. *C. E. Odgers*, for the Defendant.

JUDGMENT.—This is a suit brought by the plaintiff, Mr. A. M. Ross, to recover damages from the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam, by one of which a local agent working under the Assam Labour and Emigration Act, 1901, was suspended and the depôt maintained by him closed to recruiting, while by the other the local agent was dismissed; and also for alleged defamation of the plaintiff by the Governor of Madras in Council in a Government order passed on the appeal of the plaintiff and other interested parties against the Collector's order above referred to. Under Part IV of the aforesaid Act of 1901, as amended in 1908, recruiters known as Garden Sirdars are sent by employers in Assam to recruit labourers in Ganjam and other places under a license issued by the authorities in Assam and countersigned by the authorities of the District in which the recruiting is to be carried on. They are under a statutory duty to provide a proper place of accommodation or depôt for the recruited coolies and to get each cooly's labour contract executed before an appointed officer. Employers may also appoint local agents to supervise them.

In the exercise of the powers conferred by section 91 of the Act, as amended, the Government of Madras issued the Notification of 6th October 1909 relaxing or dispensing with the requirements of certain sections of the Act in the case of Garden Sirdars working under the control of the Assam Labour Supply Association and other bodies on certain specified conditions. One of the conditions required the Association to employ a local agent in each District where recruiting was carried on for the purpose of representing the Association in all matters connected with the supervision of the Sirdars. Under condition 8 the local agent was to provide suitable accommodation (a depôt) for the labourers engaged. Under condition 9 he was responsible for preventing to the best of his ability all acts of misconduct on the part of the Sirdars; and under condition 10 the license of any local agent, who might be found not to have exercised due care in preventing misconduct on the part of the Sirdars, was liable to be cancelled by the District Magistrate.

On the 19th February 1910, the District Magistrate of Ganjam issued notice to T. S. Rama Sastri, local agent of the Association in the District, calling on him to show cause why his license should not be suspended for habitually allowing illegal recruitment in the agency tracts where recruitment was prohibited; and on the 21st February he passed the first of the orders complained of, suspending the agent's license pending the passing of orders as to its cancellation. A copy was sent to the Sub-Collector and Police-Inspector, Berhampore, who were requested to see that the depôt was closed to recruiting until further orders issued. By a subsequent order of the 25th July 1910, made upon the report of the Special Assistant Agent, as the result of an inquiry held by him, the District Magistrate cancelled the local agent's license.

It was admitted before me that, if condition 10, giving the District Magistrate power to cancel the local agent's license for failure to exercise due supervision was valid, the legality of the dismissal could not be questioned in the present case; but it was contended that the condition was *ultra vires* as section 67 specified the cases in which the District Magistrate could dismiss local agents, and was exhaustive. I had no hesitation in overruling this contention, as it seemed to me that the condition was a necessary and a proper one to be made under section 91 of the Act as amended. So much is left to the local agent under the notification, that it would not, in my opinion, be safe to make these relaxations without reserving to the District Magistrate power to dismiss a local agent who proves untrustworthy. I hold the order of dismissal was not open to objection.

It is otherwise with the order of the 21st February, closing the depôt to recruiting That depôt was available not only to the local agent, as the place he was bound to provide under condition 8, but also to Garden Sirdars as the place they were bound to provide, under section 62 of the Act, when recruiting under the provisions of the Act without the benefit of the concessions. As correctly pointed out in the Government

order containing the alleged defamation of the plaintiff, the concessions had not the effect of limiting the right of working under the Act or preventing employers for so doing, if they preferred to conform to the more arduous and exacting requirements of the regular procedure. It is, I think, clear that the District Magistrate's order of the 21st February, closing the Berhampore depôt to recruiting by Garden Sirdars, working under the Act, was *ultra vires*.

The legality of the other part of the order, suspending the local agent pending the inquiry, was also questioned at a late stage of the case on the ground that the power to dismiss under condition 10 did not include a power to suspend. The decision in *Barton* v. *Taylor* (1), that a Colonial Legislative Assembly has no power to suspend members as well as to expel, proceeded on the ground that suspension would deprive the constituency of its representation and does not appear to cover the present case. The plaintiff has also referred to an American decision in *Gregory* v. *Mayor of New York* (2) which supports him and to *Seshadri Aiyangar* v. *Nataraja* (3). I am inclined to think that a statutory power of dismissal does not include a power of suspension; but the plaintiff has failed to show that he incurred any additional damages by reason of the suspension and in the view I take of the case it is unnecessary to decide the point.

Assuming the Collector's orders, closing the depôt to recruiting and suspending the local agent, to be *ultra vires*, the next question is has the plaintiff any cause of action against any one? The local agent and the Garden Sirdars were in the service of the Assam employers, constituting the Assam Labour Supply Association, and it was their business which was interrupted by the closing of the depôt. The plaintiff, who is the agent of the Association in the Districts of Ganjam, Godavari and Vizagapatam, held agreements and powers-of-attorney from several persons and companies working in the Association; and, though not filling any statutory capacity under the Act, represented the Association in these Districts, exercised a general supervision over their local agents and Garden Sirdars, and corresponded on behalf of the Association with the local authorities in all matters relating to recruiting. For his services he was entitled, under his agreements, to be paid Rs. 7 a head for each labourer recruited and the plaint alleges that the closing of the depôt, which put a stop to all work of emigration, interfered seriously with the plaintiff's business, prevented him earning his commission during the period of the closure of the depôt and caused heavy loss to him personally.

The question then at once arises whether the plaintiff's claim for damages is not too remote. The general rule is stated in Mayne on Damages: "If *A.* breaks his contract with *B.* or inflicts some harm on *B.*, the result may be most hurtful to *C.* But *C.* cannot in general sue *A.*", citing as to that the judgment of Lord Penzance in *Simpson* v. *Thomson* (4); and the same rule is laid down in Dicey's Parties to an Action. Rule 83 page 382. For the plaintiff reliance has been placed on *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co.* (5), in which it was held that, if by fraud, *A.* induces *B.* to break his contract with *C.* and *C.* sustains damage thereby he may sue *A.* In the present case it is not alleged that there has been any breach of contract with the plaintiff, and it does not appear to me that the present point arose or was considered in that case. That case, therefore, is no authority for the plaintiff but it is unnecessary to consider the point further as, in my opinion, the suit fails on another ground.

Assuming that the action of the Collector was tortious, the next question is, is the plaintiff entitled to recover unliquidated damages for such tort from the Secretary of State in Council under the provisions of the Government of India Act, 1858? For the plaintiff reliance was placed on *Secretary of State for India* v. *Hari Bhanji* (6), *Vijaya Ragava* v. *Secretary of State for India* (7) and *Jehangir* v. *Secretary of State* (8) and on appeal

(1) (1886) 11 A. C. 197 at p. 205; 55 L. J. P. C. 1; 55 L. T. 158.
(2) 3 L. R. A. 854.
(3) 21 M. 179.
(4) (1877) 3 A. C. 279 at p. 289; 38 L. T. 1; 3 Asp. M. C. 567.
(5) (1908) 1 Ch. 335; 98 L. T. 291; 24 T. L. R. 201; 77 L. J. Ch. 218.
(6) 5 M. 273.
(7) 7 M. 466.
(8) 27 B. 189; 5 Bom. L. R. 30.

Jehangir v. *Secretary of State for India* (9), was also referred to. The Advocate-General for the defendant relied mainly on the decision in *Shivabhajan* v. *Secretary of State* (10), following *Rogers* v. *Rajendro Dutt* (11) and *Tobin* v. *Reg.* (12) and also referred to *Mc Inerny* v. *Secretary of State for India* (13) and *Secretary of State for India* v. *Kasturi Reddi* (14). The important decision of the Privy Council in *Secretary of State for India in Council* v. *Moment* (15), which has only just been reported, was also referred to by the plaintiff at the close of the argument. The fundamental position, as stated by their Lordships in that case, following the judgment of Sir Barnes Peacock in *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India in Council* (16), is that, as regards liability to be sued, the Secretary of State is to be in no position different from that of the old East India Co. before the passing of the Government of India Act, 1858. The plaintiff has, therefore, to prove that he would have had a cause of action against the East India Co. if the case had arisen before 1858. In the *P. & O. Co.'s* case (16) the plaintiff had been injured by the negligence, in the course of the employment of workmen employed by Government at the Government Dock Yard at Kidderpore. Stress was laid on the fact that the Government in India was obliged to engage in transactions partaking more of the character of private business than of affairs of State, such as this dockyard, the Bengal Marine Bullock Train River Steamers etc. "There is a great and clear distinction," it was said, "between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on without having such powers delegated to them"; and at the close of the judgment at page 16 it was held that the workmen having been employed by Government and the act being of a private nature and not in the exercise of powers usually called sovereign powers or in the performance of an act of State, Government was liable for their negligence in the course of their employment in the same way as any private employer in a similar case. That was all that was decided, but certain dicta in the judgment were subsequently interpreted by the Calcutta High Court in the case of *Nobin Chander Dey* v. *Secretary of State* (17), as asserting the immunity of the Company from suit in respect of all acts done in the exercise of sovereign powers, whether the suit was based on contract or on tort, thus conferring on the Company a larger immunity than is enjoyed by the Crown in England. In *Hari Bhanji* v. *The Secretary of State* (18), a suit to recover money, alleged to have been illegally levied, Innes, J., refused to follow the Calcutta case but dismissed the suit on the merits, leaving each party to bear his own costs. Even so an appeal was preferred by the successful defendant on the ground that the Court ought to have declined jurisdiction as the act complained of was done, in the exercise of sovereign powers. This contention was overruled in a learned judgment distinguishing between the acts of State over which the Court has no jurisdiction as regards which the agent is protected as well as the principal and acts such as those in that case and in this done under colour of Municipal Law—as to which the agent at any rate is always responsible. *Secretary of State in Council* v. *Hari Bhanji* (6). The only question before the Appellate Court was one of jurisdiction and they decided nothing as to the grounds on which liability could be brought home to the Company with success for acts done by public servants in India in cases within jurisdiction of the Courts. This question was, however, discussed by Innes, J., at the trial. *Hari Bhanji* v. *Secretary of State in Council* (18). In the first place the learned Judge drew the inference from the preamble to Bengal Regulation III of 1793 (which he set out) that the Company had submitted questions such as arose in that case (the alleged illegal levy of salt duty) to the arbitrament of the Court In the 2nd place, he came to the conclusion

(9) 6 Bom. L. R. 131.
(10) 28 B. 314; 6 Bom. L. R. 65.
(11) 8 M I.A. 103, 2 W.R.(P.C.)51; 19 Eng.Rep. 469.
(12) (1869) 33 L. J. C. P. 199 at p. 204; 16 C. B. (N. S.) 310; 10 Jur. (N. S.) 1029; 10 L. T. 762; 12 W. R. 838.
(13) 13 Ind. Cas. 370; 38 C. 797 at p. 800.
(14) 26 M. 268; 12 M. L. J. 453.
(15) 18 Ind. Cas. 22; 17 C. W. N. 169; 13 M. L. T. 53; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C.L.J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459.
(16) 5 B. H. C. R. App. 1.
(17) 1 C. 11; 24 W. R. 309.
(18) 4 M. 344.

that a Petition of Rights would lie against the Crown in England in a similar case and decided that the liability of the company for an act of this kind done in the alleged exercise of sovereign powers could not be less. The judgment, therefore, did not cover the present case, in which no money of the plaintiff has come into the hands of the Government and in which there could be no remedy against the Crown or a petition of Right. Indeed at pages 355, 356, referring to the case of *Rogers* v. *Rajendro Dutt* (11), the learned Judge remarked that it might be authority for the position that the East India Company or the Secretary of State would not be liable to be sued for the recovery of unliquidated damages for a wrong, which is the present case.

It certainly seems a reasonable position that (as held by the learned Judge) the liabilities of the East India Company cannot have been any less than those of the Crown in England on a Petition of Right, which extend not only to detention of the land, chattels or money of the subject, but also, as now settled, to breach of contract. *Thomas* v *Reg.* (19). Whether the Company enjoyed the same immunity as the Crown with regard to torts is, of course, a very different matter. The *P. and O. Company* v. *The Secretary of State* (16) is authority for the position that it did not do so with regard to transactions which might have been carried on by a private individual. Whether it did so with regard to acts done in the exercise of the sovereign powers but under colour of Municipal law cannot perhaps be considered settled conclusively until their Lordships have had an opportunity of considering the case of *Rogers* v. *Rajendro Dutt* (11) in which "the irresponsibility of the supreme power" for a tortious act committed under the orders of the Government of India by an officer in its service was assumed, and justified on the ground that the officer who does the act is himself liable; and it is unnecessary to recognise an immunity so extensive for the purposes of the present case. Two decisions of Irish Courts as to the Lord Lieutenant of Ireland may be cited on one side and numerous English decisions as to Colonial Governors on the other.

While the immunity of the Crown in respect of tortious acts committed by its servants has always been based on the legal maxim, the King can do no wrong, yet the Courts in particular cases, where the act had neither been ordered nor ratified by the Crown, have been careful to point out that there were less technical grounds on which such immunity could be justified, grounds which appear to be equally applicable to the East India Company. Thus in *Canterbury* v. *Reg.* (20), where an ex-speaker of the House of Commons sought to recover damages for the loss of his furniture in the fire, which destroyed the Houses of Parliament, and was occasioned by the negligence of the servants of the Commissioners of Woods and Forests, who were in charge of the building, Lord Lyndhurst, L. C., pointed out that the Commissioners were public officers appointed to perform certain duties entrusted to them by the Legislature and that though they were appointed by the Crown they would not make the Crown responsible for their neglect or misconduct any more than High Officers of State, such as, the Lord Chancellor or Postmaster General were responsible for the neglect or misconduct of subordinate officials appointed by them; and that, if the Crown would not be responsible for the neglect or misconduct of the Commissioners themselves, it must be equally irresponsible in the case of their subordinates. And in *Tobin* v. *Reg.* (12), in which it was sought to recover damages from the Crown for the action of the Captain of a ship of war in destroying a vessel supposed to be engaged in the slave trade, the second ground on which the immunity of the Crown was based was that the rule which makes masters or principals responsible for torts committed by their servants or agents in the course of their employment was inapplicable between the Crown and the Captain of a ship of war. In Story on Agency, which has quite recently been treated as the highest authority and followed by the House of Lords in settling the vexed question whether the principal is responsible for wrongs committed by the agent in the course of his employment for his own benefit as well as for wrongs committed by him for the benefit of his

(19) 4 St. Tr. (N. S.) 767; 44 L. J. Q. B. 9; 10 Q. B. 31; 31 L. T. 439.

(20) 1 Ph. 306; 12 L. J. Ch. 281; 7 Jur. 224; 55 R. R. 393; 41 Eng. Rep. 648.

principal [*Lloyd* v. *Grace Smith & Co.* (21)], it is broadly laid down that Government do not come within the rule.

Section 319: "It is plain that Government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents engaged in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations in endless embarrassments and difficulties and losses which would be subversive of the public interest." This passage is cited with approval in *Vijaya Ragava* v. *Secretary of State for India* (7). Similarly, in a very recent case, *McKenzie* v. *The Corporation of Chilliwack* (22), their Lordships of the Judicial Committee appear to have been of opinion that a local authority could be made responsible for the misconduct of a constable appointed by it, if at all, only on the ground that the appointment was not fitly or properly made.

In *Dhackjee Dadaji* v. *The East India Co.* (23), decided by the Supreme Court of Bombay, the Court held that an action of trespass for alleged trespass in breaking and entering the plaintiff's house and taking away a book under a warrant from the Governor of Bombay in Council would not lie against the East India Company, unless it was shown to have ordered or ratified the act complained of, thus negativing the position that the Company could be made responsible like an ordinary principal merely on the ground that the act was done by the agent in the course of employment. The decision in the *P. & O. Company* v. *The Secretary of State for India* (16), which has already been examined, only makes an exception in the case of undertakings of a private nature carried on by the Company and in no way affects the application of the principle to acts done by the servants of the Company in the exercise of the sovereign powers delegated to it.

The plaintiff, however, relies on the decision of Kernan, Muthuswamy Aiyar and Hutchins, JJ., in *Vijaya Raghava* v. *The Secretary of State* (7) that the Secretary of State in Council was liable in damages for the illegal action of the Governor of Madras in removing the plaintiff from the Office of Municipal Councillor under the Towns Improvement Act III of 1876. That decision does not proceed expressly on the ground that the Company would have been liable like an ordinary employer for acts done by its servants in the course of its employment; and indeed this part of the case appears to have received very little consideration. Kernan, J., merely refers to the case of *Forester* v. *The Secretary of State for India* (24) in which the defendant was held liable to pay the plaintiff the value of certain arms illegally seized by Government in India with interest at the rate of 12 per cent. The point argued in that case was whether a seizure was an act of State. If not, it was a seizure in respect of which a Petition of Right would lie against the Crown in England, and the liability of the Secretary of State in Council does not seem to have been disputed. That case does not seem to be any authority for holding the defendant liable in damages for the act of the Government of Madras in wrongly dismissing a Municipal Councillor from his office. The other learned Judges, forming the majority, appear from their statements at pages 478 and 486 to have proceeded on an admission made by the Advocate-General, who appeared for the defendant, that "if the Government would have been answerable otherwise, section 416 (now 79) of the Code of Civil Procedure would make the Secretary of State liable. Section 416 is as follows:—"Suits by or against the Government shall be instituted by or against (as the case may be) the Secretary of State for India in Council." It has since been decided in *Raleigh* v. *Goschen* (25) that if a body, such as the Governor in Council, committed a tort, assuming, of course, that they were amenable to the jurisdiction of the Court, a suit would not lie against them in their official capacity but only as individuals. Such a

(21) (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547.
(22) (1912) A. C. 888, 107 L. T. 570; 29 T.L. R. 40.
(23) (1843) 2 Morley's Dig. 307.
(24) (1872) I. A. Sup. Vol. 10; 12 B. L. R. 120; 18 W. R. 349.
(25) (1898) 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90; 14 T. L. R. 36.

suit could not be said to be a suit against Government. Further it could scarcely have been intended in an enactment as to procedure to effect a change in the substantive law and make the Secretary of State in Council liable where he was not liable before. However, if the Legislature had such an intention, it is now settled by the decision of their Lordships of the Judicial Committee in *The Secretary of State* v. *Moment* (15) that an enactment adding to or taking away from the liability of the Secretary of State in Council to be sued, as settled by the Government of India Act, 1858, is *ultra vires* of the Indian Legislature, as opposed to the provisions of the Indian Council's Act, 1861. It appears to me that the decision in *Vijaya Ragava* v. *Secretary of State* (7) is no longer of authority and in any case does not preclude me from holding on the authorities already cited that the Company could not have been made liable for the tortious acts done by servants in India in the exercise of sovereign powers, which it had not ordered or ratified merely on the ground that they were done in the course of employment.

If the Company could not have been held liable for acts such as these on the ground that they were done by its servants in the course of their employment, the only other ground of liability I can think of is that the acts were ordered or ratified by it. In the present case the plaintiff relies on an alleged ratification of the orders, complained of, by the Governor in Council of Madras in G. O. No. 948 of 12th October 1910. Only part of the order was communicated, and to ascertain whether Government ratified the orders or not, as this question in no way turns on whether the ratification was communicated or not, *Buron* v. *Denman* (26), it may, I think, be surmised that Government had been advised that the closing of the depôt to recruiting under the Act, as distinct from recruiting under the notification, was illegal, and they point out this mistake, though in an earlier part of the order they "consider the present necessities of the case have been met by the District Magistrate's action." On the whole, I think, the order is not expressed in sufficiently clear and unambiguous terms to amount to a ratification; but the point is immaterial, as it seems to me the Government of Madras had no authority from the Company, and have no authority from the Secretary of State now, whether to commit tortious acts themselves or to ratify them when committed by others. The authority of the Government of Madras is derived from the East India Company Act, 1793, and the Government of India Act, 1833, under which the whole Civil Government of the Presidency was vested and continues vested in the Governor and Councillors. In *Dhackjee Dadajee* v. *The East India Company* (23), Sir Erskine Perry held that the only ratification which would bind the Company in such a matter was a ratification by the Court of Proprietors itself.

For the foregoing reasons it seems to me that, as this is not a case in which a Petition of Right would lie against the Crown, and as the Company would not have been liable for the acts of its servants merely on the ground that they were done in the course of employment, and as the acts complained of in this case have not been shown to have been ratified by the Secretary of State, who has succeeded under section 3 of the Government of India Act, 1850, to the powers of the Directors and the Court of Proprietors, this part of the plaintiff's case must fail.

The decision may, however, be rested on narrower grounds. The orders of the District Magistrate, suspending the local agent and closing the depôt to recruiting, would appear to have been passed by him as incidental to the statutory power, conferred upon him by the Act of 1901, as amended, and the Notification made thereunder, to dismiss the local agent; and if this be so, it is well-settled that in exercising such authority or in exceeding it he cannot be considered to have been the agent of the authority appointing him so as to render the latter liable. This was the first ground of decision in *Tobin* v. *Reg.* (12), already referred to, in which it was held that, independently of the doctrine that the King can do no wrong, the Crown could not be made liable for the action of a Naval Captain purporting to act under the Slave Trade Act in seizing and destroying the plaintiff's vessel, as he was not acting in obedience to the command of Her Majesty but in the supposed performance of a duty imposed upon

(26) (1848) 6 St. Tr. (N.S.) 525; 76 R. R. 554; 2 Ex. 167.

him by the Act of Parliament. In that case Erle, C. J., observes:—"Then as Captain Douglas would not have been an agent of the Crown, if he had lawfully seized and kept the vessel under the Statute, still less ought he to be held such agent in seizing and destroying it illegally." Applying this principle it has been held in *Shivabhajan* v. *Secretary of State* (10) that the Secretary of State in Council could not be made liable for the negligence of a chief constable in regard to the custody of hay seized by him under statutory authority conferred by the Code of Criminal Procedure. In such cases even ratification would make no difference, because there can be no ratification unless the act is done on behalf of the principal in the first instance, *Buron* v. *Denman*(26), and notes to *Armory* v. *Delamirie* (27). Lord Coke, says:—By the common law he that receiveth a trespass and agreeth to a trespass after it is done is no trespasser, unless the trespass was done for his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *Omnis ratihabitio retro-trahitur et mandato priori æquiparatur.*

The plaintiff also seeks to recover damages in this suit for an alleged libel in the opening sentence of G. O. No. 948 Public, dated 12th October 1910, which was passed by Government on complaints made by the plaintiff himself and by two of the firms from whom he held powers-of-attorney, namely Messrs. Williamson Major and Company Calcutta, and Messrs. Balmer Lawrie and Company, British India Tea Company Calcutta, of the orders of the District Magistrate which are the subject of this suit. The alleged libel is contained in the first sentence of the order: "Government see no reason to doubt that there had been illegal recruitment in the agency tracts of the Ganjam District by Sirdars working under the Assam Labour Supply Association and are of opinion that the conduct of Mr. Ross (the plaintiff) in that matter has not been wholly above suspicion." The order directs copies to be sent to the District Magistrate of Ganjam and the District Magistrate of Vizagapatam, and Godavari in whose district Mr. Ross was working on the same lines, to Mr. Ross himself, and to the two firms already mentioned.

(27) (1721) 1 Stra. 505; 1 Sm. L. C. (1903 Ed.) 356; 93 Eng. Rep. 664.

This is the only publication relied on. The defendant has not thought proper to plead justification but has elected to rely on his other defences.

As to this, I am in the first place of opinion, for reasons already stated, that no suit lies against the defendant for a libel published by the Madras Government, at all events, unless it has been shown that publication was made under the orders of the Secretary of State, or on his behalf and afterwards ratified by him. A similar conclusion was arrived at by Chandavarkar, J., in *Jehangir* v. *Secretary of State* (9), to whom the case was referred on a difference of opinion between Batty and Jacob, JJ., sitting on appeal from the judgment of Tyabji, J., which is reported in *Jehangir* v *Secretary of State*(8).

Even if the suit had been brought against the members of the Madras Government at the date of the order and this Court had jurisdiction to entertain such a suit it must still, in my opinion, have failed on the ground that the publication having been made by such Government in the execution of its duty and without exceeding it is absolutely privileged. In *Oliver* v. *Lord William Bentinck* (28) the plaintiff sued the defendant in the Court of Common Pleas at Westminister for publishing in the Gazette at Madras whilst Governor and the Commander-in-Chief in the Presidency, a notification that the Court of Directors had resolved to dismiss the plaintiff, who was military officer, for gross violation of the trust reposed in him as Commander-in-Chief, of the Molucca Islands; and on demurrer all the Courts were of opinion that it would be a good defence to the suit that the publication was made by the defendant in the execution of his duty and considering that this had not been sufficiently pleaded they gave the defendant leave to amend.

In *Grant* v. *The Secretary of State for India in Council* (29) Grove, J., held that the defendant was not liable for the publication of a similar notification in the Gazette, apparently the Fort St. George Gazette, at all events when the libel was not alleged to have been published maliciously and without reasonable and probable cause. This qualification was inserted with re-

(28) (1811) 3 Taun. 456; 128 Eng. Rep. 187.

(29) (1877) 2 C. P. D. 452; 46 L. J. C. P. 681; 37 L. T. 188; 25 W. R. 848.

ference to the dissenting judgment of Cockburn, L. C. J. in *Dawkins* v. *Lord Rokeby* (30) but is not in accordance with the decision of the majority of the Court in that case or with the subsequent decision of the Court of Appeal in *Chatterton* v. *The Secretary of State for India in Council* (31), explained in the case last mentioned; the defence of absolute privilege, in this as in other cases, is allowed in the public interest, because it would be contrary to such interest to allow public officers to be sued for libel in respect of publications made in the course of their official duty on the mere allegation that the publication was malicious. Otherwise they would be obliged to defend all such actions for the purpose of rebutting the allegation of malice, however unfounded, and would be hampered and embarrassed in the due discharge of their duties.

Even if the occasion was not one of absolute privilege, it was certainly one of qualified privilege; and that being so and there being no evidence of malice of any kind on the part of Government in passing the order, a suit against them would fail on this ground also, and must also fail against the present defendant. In the result the suit is dismissed with costs.

Suit dismissed.

(30) 4 Fost & F. 803.
(31) (1895) 2 Q. B. 189; 64 L. J. Q. B. 676; 14 R. 504; 72 L. T. 858; 59 J. P. 596.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT OF 1912.

February 19, 1912.

Present:—Mr. Hayward, A. J. C.

SABRO *walad* ADINA—PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 80—Suit for injunction against Secretary of State for India in Council—Notice necessary.

In default of notice under section 80, Civil Procedure Code, 1908, a suit for injunction will not lie against the Secretary of State, and the plaint must be rejected

Mr. *T. G. Elphinston*, for the Plaintiff.

JUDGMENT.—This is a suit for an injunction against the Secretary of State and it has been argued by Mr. Dipchand on behalf of Mr. Elphinston that no notice is necessary under section 80, Civil Procedure Code.

This question was in doubt under the wording of the corresponding section 424 of the old Civil Procedure Code. The Calcutta High Court held in the case of *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1) that the words "in respect of any act purporting to be done by him" excluded cases in which an act was only contemplated and had not yet been done and applied both to a Public Officer and to the Secretary of State. This view was followed by a Bench of this Court in *Fundumal* v. *Mahomed Sharif* (2). The Bombay High Court, however, in the more recent case of *Secretary of State* v. *Gajanan Krishna Mavlankar* (3), took the opposite view and held that the words applied only to a Public Officer and not to the Secretary of State. Attention has been called to certain remarks in that case indicating that those learned Judges might in certain circumstances be induced to take action, notwithstanding their interpretation of the section, but those remarks were merely *obiter dicta* and did not pretend to lay down that notice was not required by that section to be given in all suits against the Secretary of State. That Bombay view has since been clearly endorsed by the Legislature by substituting for the word "him" the words "such Public Officer" in section 80 of the present Civil Procedure Code.

This suit, therefore, will not lie against the Secretary of State, and the plaint must be rejected in default of notice under section 80, Civil Procedure Code.

The application for temporary injunction fails also in consequence of the rejection of the plaint for want of notice under section 80, Civil Procedure Code.

Suit dismissed.

(1) 1 Ind. Cas. 514; 36 C. 28; 12 C. W. N. 1065.
(2) 4 Ind. Cas. 1156; 3 S. L. R. 175.
(3) 10 Ind. Cas. 630; 35 B. 362; 13 Bom. L. R. 273.

TIRAPAYYA *v.* MALLIDI RAMASWAMI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 528 OF 1911.

February 28, 1913.

Present:—Mr. Justice Bakewell.

B. TIRAPAYYA MINOR BY GUARDIAN T. GANJAYYA—DEFENDANT—PETITIONER

versus

MALLIDI RAMASWAMI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 21—Lawful guardian—Person lawfully acting as guardian—Though not legally appointed

A person who is lawfully acting as guardian, though not legally appointed for the purpose, is 'lawful guardian' within the meaning of section 21 of the Limitation Act, 1908, when acting for the benefit of the minor.

Therefore, a payment made for the benefit of a minor by his natural mother. saves the bar of limitation, when the guardians appointed by the Will of the minor's adoptive father and all his relations have been unwilling to act as minors.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Principal District Munsif of Tanuku, in S. C. S. No. 1144 of 1910.

Mr. *B. Somayya* (for Mr. *P. Narayanamurti*), for the Petitioner.

Mr. *T. Ramachandra Row*, for the Respondent.

JUDGMENT.—The District Munsif has found that the action of the natural mother of the minor, in making the payment in question, was for the benefit of the minor and that she was in charge of his person and property at the time.

The guardians appointed by the Will of the minor's adoptive father, and all his relations appear to have been unwilling to act as guardians, and in their default, the natural mother of the minor was, I think, the proper person, to be entrusted with his interests. The cases cited show that a person who is lawfully acting as guardian, though not legally appointed for the purpose, can bind his estate for necessary purposes, and, I think, that such a person is a "lawful guardian" within the meaning of section 21 of the Limitation Act, 1908, when acting for the benefit of the minor. The payments made by Suramma, therefore, save the bar of limitation. The petition is dismissed with costs.

Petition dismissed.

TIRBHUVAN *v.* SHAM SUNDAR.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 13 OF 1913.

March 27, 1913.

Present:—Mr. Justice Tudball.

TIRBHUVAN AND OTHERS—APPELLANTS

versus

SHIAM SUNDAR AND OTHERS—RESPONDENTS.

Revision—Jurisdiction of Small Cause Court—Suit instituted during the absence of a Munsif who had Small Cause Court jurisdiction and tried by his successor who had no such power—Appeal.

A Munsif, having Small Cause Court powers, obtained privilege leave and left his District on 10th of April 1912. His successor, who had no such power, joined the District on 18th April. On the 15th of April a suit to recover Rs. 50 was instituted which was subsequently tried by the Munsif who had no Small Cause Court jurisdiction:

Held, that the suit was not tried as a Small Cause Court suit and hence an appeal lay to the District Judge.

Petition for revision against the decision of the Additional District Judge of Gorakhpur, dated the 5th of October 1912.

Mr. *Mohan Lal Sandal*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This revision arises out of the following circumstances:—Munshi Lachhmi Narain was the Munsif of Basti and was invested with the powers of a Small Cause Court Judge up to Rs. 50. He obtained three months' privilege leave and on the 10th of April 1912 left the District making over charge, as far as he could, to his *Munsarim*. On the 15th of April 1912, the plaintiff in the present case filed his plaint before the *Munsarim*. On the 18th of April, Mr. Ali Muhammad, the new Munsif, took over charge. He was not invested with any powers under the Provincial Small Cause Courts Act. The present suit was registered on the regular side from the very beginning and was heard and tried by him as a regular suit. An appeal was preferred, which was decided against the appellant. He has come here on revision and urges that no appeal lay to the Court below, because the suit was of a Small Cause Court nature and was filed in a Small Cause Court and the decision of the Munsif, who had succeeded Munshi Lachmi Narain, must, under the Act, be treated as the decision of a Small Cause Court. If the suit had been filed while Munshi Lachmi Narain was the Munsif of Basti, there would be considerable force in the present application. It is urged that though

POKARDAS JASHIOMAL *v.* FORBES, FORBES, CAMPBELL, AND CO. LD.

Munshi Lachhmi Narain left the District on the 10th of April, still the Small Cause Court of Basti was in existence, in spirit at least if not in body, and on the 15th of April the suit was, as a matter of fact, filed in the Court of Small Causes. The Munsifi of Basti is a Court in which the powers under the Act can be exercised by a Judicial Officer, who has been invested with those powers. It is quite clear that if such an officer dies or is removed from the District, there is no Small Cause Court left, specially when he is succeeded by an officer, who has not those powers. Provision has been made in the Act to cover those suits, which are filed in the Court of Small Causes, but are left undecided at the time when the Court ceases to exist, and a new officer is appointed who has no powers under the Act. It is quite clear that as long as there is no Judicial Officer in charge of the Munsifi at Basti, who has powers under the Act, there is no Small Cause Court in existence. If any suit is filed, it will have to be tried as a regular suit. I have been taken over the sections of the Act at considerable length, but there is nothing to support the contention put forward by the applicant that on the 15th of April 1912, there was a Small Cause Court at Basti capable of taking cognizance of the suit. There is, therefore, no force in the application. The suit was tried by the Munsif as a regular suit and the appeal lay to the District Judge. The application is dismissed with costs.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

REVIEW APPLICATION No. 52 OF 1911.

April 22, 1912.

Present:—Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

POKARDAS JASHIOMAL—APPLICANT

versus

MESSRS. FORBES, FORBES, CAMPBELL & CO., LTD.,—OPPONENTS.

Arbitration Act (IX of 1899), ss. 13, 14, 15—Firm party to dispute—Reference by firm or individual members—Jurisdiction of arbitrator to decide the question of partnership of individual members—Finality of the order or otherwise—Award against firm—Remedy of individual alleged to be partner—Separate suit—Decision of question in execution—Whether execution allowed against more than partnership property—Revision—Review—Grounds—Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 50, O. XLVII.

In an application to file an award under section 11 of the Arbitration Act, the only questions that can be properly considered are questions within the scope of sections 13, 14 and 15 of the Act.

The authority of the arbitrators is directly created, and strictly limited, by the contract containing the submission, and they have no jurisdiction over any person who is not a party to the contract.

Where one of the parties to the dispute to be referred to arbitration is a firm, it is not open to the other party to proceed to arbitration against either the firm, or its members individually.

In the latter case, it is competent for the arbitrators to decide whether a particular individual is or is not a member of the firm and to pass an award in regard to him accordingly. But the decision of the question would not be final, and is open to correction by the Court.

In the former case, however, the arbitrators have no jurisdiction to determine the question of partnership and liability of the individual members of the firm. Any person alleged to be a partner may appear and deny his partnership, and if there are any persons who admit their liability as members of the firm, the arbitrators can note the protest of the objector and proceed with the reference as against the firm, leaving the question of the objector's personal liability to be determined by a competent Court in execution proceedings or by separate suit.

When an award has been given against a firm, and an application is made to file the award in Court, an objection by a person that he is not a partner to the firm and not bound by the award, raises questions altogether outside the award. The question whether execution can issue under such award against a particular person is one that must be determined in execution proceedings, or in an appropriate suit.

Per *Hayward, A. J. C.*—*Quære*—Whether execution can issue on such award against anything more than the property of the partnership under Order XXI, rule 50, of the Civil Procedure Code.

A review of an order, summarily rejecting an application for revision of the judgment of the lower Court, may be granted on the ground that the judgment, as it stands, is open to misconstruction, and that the points raised involve questions of great importance, and of frequent occurrence, and that it is desirable to have the views of the Appellate Court declared.

Application for review against the order of Messrs. H. N. Crouch and M. H. W. Hayward, Additional Judicial Commissioners of Sind.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *Hirdaram Mewaram*, for the Respondent.

JUDGMENT.

CROUCH, A. J. C.—This is an application for review of an order of this Court summari-

ly rejecting an application to revise the order of Mr. Fawcett, Additional Judicial Commissioner, ordering the award to be filed.

A preliminary objection has been taken that no grounds have been shown for granting the review; but I consider that we are justified in granting the review on the ground that Mr. Fawcett's order, as it stands, is open to misconstruction, and that the points raised involve questions of great importance, and of frequent occurrence, and that it is desirable to have the views of the appellate side of this Court declared.

The contracts containing the submission to arbitration purport to be made by "Verhomal-Pokardas." Verhomal-Pokardas is the name of an individual; Messrs. Forbes, Forbes & Co, assert, and Pokardas denies, that it is also the firm name under which Verhomal and his father Pokardas traded.

The reference was signed by Forbes, Forbes & Co, only. Therein it was recited that certain agreements had been entered into by Verhomal son of Pokardas, and Pokardas son of Jashiomal, trading under the firm or style of "Verhomal-Pokardas," but the operative part was as follows:—

"And, whereas, the said firm of Verhomal Pokardas having failed, after notice of seven days having been given to them, to appoint their arbitrator, and whereas Messrs. Forbes, Forbes, Campbell & Co., Ltd., have appointed their arbitrator Mr. J. B. Stevenson; now, we, the said Forbes, Forbes, Campbell & Co., Ltd., do hereby, under the provisions of the said agreements, appoint Mr. E. Miller to act on behalf of the said firm of Verhomal-Pokardas and refer matters under difference to the award of

Mr. J. B. Stevenson.
Mr. E. Miller.

both of Karachi."

Thus, though there was an assertion that Pokardas was a partner in the firm of Verhomal Pokardas, there was no attempt made to confer on the arbitrators jurisdiction over Pokardas individually.

It has been held by the lower Court that Pokardas was served, personally, with notice of the arbitration proceedings. The effect of this notice was merely to warn him that such proceedings were pending against the firm of "Verhomal Pokardas," and that he was alleged to be a partner in that firm. The delivery of such notice could not by itself operate to confer jurisdiction on the arbitrators over Pokardas.

Pokardas put in no appearance before the arbitrators. It has not been made clear if the question, whether or not he was a partner in the firm, was raised; the award is, in terms, against the firm only, and no reference is made to any individual partner, nor is there anything in the award from which it could be inferred that the constitution of the firm was considered.

The application by the arbitrators under section 11 of the Arbitration Act to file the award in Court is headed thus—

"Suit No. 158 of 1910.

MESSRS. FORBES, FORBES, CAMPBELL & Co.—Plaintiffs

versus

1. VERHOMAL SON OF POKARDAS.
2. POKARDAS SON OF JASHIOMAL TRADING UNDER THE FIRM AND STYLE OF VERHOMAL POKARDAS, AMRITSAR—Defendants.

In the matter of an application by Messrs. Earnest Miller and J. B. Stevenson to file an award under the Indian Arbitration Act IX of 1899."

Then follows an application, in four short paragraphs, setting forth that there had been a reference, that an award had been made, and that notice had been given to the parties, and praying that the Court would order the award to be filed. The application is signed and verified by the two arbitrators only. The form of the heading is clearly bad and misleading. The arbitrators were the petitioners, and the respondents should have been Forbes, Forbes, Campbell & Co., Ltd., and the firm of Verhomal-Pokardas. It should have been stated in the body of the application that Verhomal son of Pokardas, and Pokardas Jashiomal were alleged to be partners in the firm of Verhomal-Pokardas (see Rules, Chapter XII, of this Court). There was no suit instituted between Forbes, Forbes & Co. and (1) Verhomal and (2) Pokardas, nor was there any allegation by the former on record on which it was possible to draw an issue. The only questions that could be properly considered in such application were the questions within the scope of sections 13, 14 and 15 of the Act; *viz.*, whether it was necessary to remit

the award for re-consideration, whether the arbitrators had misconducted themselves, and whether the award had been improperly procured.

Pokardas was served with notice of the petition, and put in written objections. He contended, *inter alia*, that he was not a partner in the firm of Verhomal-Pokardas, and that the award as against him should be set aside. In argument, the Pleader for Pokardas appears to have merely contended that the award was void, as against his client, because it did not show on its face that the arbitrators had inquired into the question who were partners (see page 105 of the record). The portion of the order of the lower Court dealing with this part of the case is as follows:—

"Nor is the objection that the award does not show that the arbitrators inquired as to who are the partners of the firm in any way substantial. There was no obligation on them to make any such inquiry in the absence of any issue before them on the point, and if defendant No. 2 wanted to contest the jurisdiction of the arbitrators over him on the ground that he was not a party to the contracts, nor a partner with his son, he should have put in an appearance and contested the matter as he did in the first arbitration proceedings. Not having done so, he cannot now raise the question as an objection to the filing of the award. The principle of *res judicata* (section 11, explanation IV, Civil Procedure Code) applies in such a case. *Biraj Mohini Dasi* v. *Srimati Chinta Moni Dasi* (1), *Smith* v. *Johnson* (2). For these reasons objections 7, 8 and 9 cannot be gone into in this Court, and, as pointed out in the Appellate Court's judgment in *Kewalram Ghanshamdas* v. *Donald Graham & Co.* (3), the defendant No. 2 has only himself to blame in the matter on account of his conduct in absenting himself and allowing an *ex parte* award to be passed.

I, therefore, order the award to be filed as against defendant No. 2."

The learned Judge appears, therefore, to have ruled that.

(1) Arbitrators had jurisdiction to decide whether or not Pokardas was a member of the firm.

(2) Their decision on this point was final.

(3) Even though the point was not expressly raised or decided, Pokardas had no right to raise the point before the Court, as it was *res judicata* inasmuch as it should have been raised in the arbitration proceedings.

I am of opinion that the learned Judge was in error in so ruling on these three points.

The authority of the arbitrators was conferred by the submission and reference; their powers were directly created, and strictly limited, by the contracts containing the submission. It follows that they had no jurisdiction over any person who was not a party to those contracts. If, as a matter of fact, Pokardas was not a partner in the firm of "Verhomal-Pokardas," the arbitrators had no authority to make an award against him. Had the arbitrators the powers conferred by the Civil Procedure Code on duly constituted Courts, then the service of the notice of the proceedings on Pokardas personally might have operated to give Messrs. Forbes, Forbes & Co., the right to treat him as individually liable to satisfy the award against the firm, (See Order XXI, rule 50 and Order XXX). But the arbitrators had no such powers.

Where a firm is the defendant party to arbitration proceedings and a person alleged by the plaintiffs to be a partner in that firm, appears and denies his partnership, he thereby challenges the jurisdiction of the arbitrators as regards himself. In such case, if there be any person who admits his liability as a member of the firm, the arbitrators can note the protest of the objector and proceed with the reference as against the firm, leaving the question of the objector's personal liability to be determined by a competent Court. If the objector be subsequently held to be a member of the contracting firm, then he will be bound by the award against the firm—unless it be set aside by the Court. It is, therefore, advisable for him to appear in the proceedings and see that no improper award is passed against the firm. If, however, the reference made by Messrs. Forbes, Forbes & Co., had purported to be on behalf of (1) Verhomal Pokardas and (2) Pokardas-Jashiomal, then the arbitrators would have had to determine whether or not an award

(1) 5 C. W. N. 877.
(2) 15 East 213; 13 R. R. 449; 104 Eng. Rep. 824.
(3) 10 Ind. Cas. 211; 5 S. L. R. 61.

should be passed against Pokardas. Had he appeared and denied the partnership, then they would necessarily have had to come to some conclusion on the point before they could have even entered on the reference, and this I take to be the effect of the decision in *Kewalram Ganshamdas* v. *Donald Graham & Co.* (3). As pointed out by Sir Barnes Peacock in *Hurree Persad Malee* v. *Koonjo Behary Shaha* (4), all tribunals, whose jurisdiction is disputed on stated grounds, are bound to hold a judicial investigation into such dispute and to take jurisdiction or not, according to the result. If it were not so, the question of jurisdiction would be in the hands of the parties and not of the Court. But the decision of an inferior tribunal on the question of its own jurisdiction is not final. [Per Willes, J., in *London Corporation* v. *Cox* (5).] The finding of the arbitrators on the question is not a finding which the parties have bound themselves to accept ; it involves the issue whether they bound themselves to accept any finding at all, and it is not, therefore, final, and is open to correction by the Court. Had an award been passed against Pokardas, then he could have objected that the award had been improperly procured against him, inasmuch as it had been procured on the misrepresentation that he was a partner.

But in the present case, no award was asked for against Pokardas personally ; the question whether he was a partner was not in issue before the arbitrators either expressly or impliedly ; they had no jurisdiction to determine it, as the arbitration was solely against the firm.

On the arbitrators applying to the Court to file the award, Pokardas, having received notice that he was a person alleged to be affected by the award, had a right to object to it being filed on any ground which could be properly dealt with under the Arbitration Act. But no award had been improperly procured against him, nor had the arbitrators misconducted themselves in giving an award against the firm "Verhomal-Pokardas." In objecting that he was not a partner to the firm and not bound by the award, he was raising questions altogether outside the award. He was, in effect, asking the Court to make a declaration that he was not a partner in the firm of "Verhomal-Pokardas," inasmuch as he apprehended that Messrs. Forbes, Forbes & Co., would seek to take out execution against him as a partner. He has an undoubted right to have this question decided in an appropriate suit, but it is not a question that can properly be raised or decided in a proceeding based on an application by the arbitrators to file their award, passed, not against him personally, but against the firm. The practice of heading applications by arbitrators as if they were suits between the parties to the reference seems to have given rise to the theory that any questions ancillary to the arbitaration proceedings between the parties to the reference can be raised and adjudicated. But, whatever be the order of the Court, it is the award and not the order of the Court, that is enforced as a decree; the question whether execution can issue under such award against a particular person is one that must be determined in execution proceedings.

The order of the Court that the award be filed as against defendant No. 2, is, no doubt, open to misconstruction ; but, in view of what has been said, it can be held legally to do no more than finally debar defendant No. 2 from objecting to the award being filed. It cannot be held to be equivalent to a declaration that he is a partner in the firm of "Verhomal-Pokardas." It must be construed as, what it actually is, an order holding the award to be a proper award within the meaning of sections 13, 14 and 15 of Indian Arbitration Act.

As I am of opinion that the order of the lower Court was correct, though based partly on reasons which we consider erroneous, I would reject the application with costs.

HAYWARD, A. J. C.—I concur. It was open to Messrs. Forbes, Forbes, Campbell & Co., to have proceeded to arbitration personally against Verhomal and Pokardas. If they had done so, the arbitrators might, no doubt, have been required to ascertain whether Verhomal and Pokardas were, either or both of them, bound by the

(4) 1 Marshall 99; W. R. (F. B.) 29; 1 Ind. Jur. (O. S.) 20.

(5) (1867) L. R. 2 H. L. 239 at p. 262; 36 L. J. Ex. 225; 16 W. R. 44.

submission as partners in the firm of Verhomal-Pokardas, and so subject to the jurisdiction of the arbitrators. But this inquiry would not have been final, as it would have related to the jurisdiction of the arbitrators to make their award, which could only be finally decided by the Court.

It has not been contended that Messrs. Forbes, Forbes, Campbell & Co., were not entitled to adopt the alternative procedure of arbitration, not against Verhomal and Pokardas personally, but against the firm of Verhomal-Pokardas, on the analogy of Order XXX of the first Schedule, Civil Procedure Code. That would appear to have been the procedure actually adopted, which involved no determination by the arbitrators of the persons constituting the firm, but resulted in an award generally against the firm of Verhomal Pokardas. No question of jurisdiction, therefore, properly arose upon filing the award for the determination of the Court.

It would, in my opinion, be premature at this stage to consider the further important question, which indeed has not been argued before us, and may not arise, whether execution could issue, if at all, on such award against anything more than the property of the partnership, under Order XXI, rule 50, of the first Schedule, Civil Procedure Code.

Application rejected.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 16 OF 1911.
February 25, 1913.
Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.
Srimati LAHURI BIBI—DEFENDANT No. 7
—APPELLANT
versus
BIJOY CHAND MAHATAP—PLAINTIFF
AND OTHERS, REMAINING DEFENDANTS—
RESPONDENTS.

Possession—Adverse possession—Defendant's adverse possession when may be supplemented by previous adverse possession of another person—Limitation Act (XV of 1877), s. 3, Sch. II, Art. 144—Adverse possession of defendant must be of the same nature as that sought by the plaintiff.

The question whether a defendant can supplement his own adverse possession by the previous adverse possession of another person, must depend on whether he can be said to have derived his liability to be sued from or through that other person.

Padajirav v. *Ramrav*, 13 B. 160 at p. 165, referred to.

A defendant who is a lessee for less than 12 years cannot add to the period of his adverse possession under his lease, the period during which his lessors were in adverse possession prior to the grant of his lease.

The words "possession of the defendant" in Article 144 of the Limitation Act cannot by reference to the defamation of "defendant" in section 3 be reasonably held to include the possession of another person, a co-defendant still in possession under a different title.

The adverse possession of a defendant must be of the same nature as that sought by the plaintiff.

Umrennessa v. *Muhammad Yar Khan*, 3 A. 24, followed.

Therefore, the defendant cannot set up his possession as a permanent lessee as adverse in a suit by the plaintiff for possession as proprietor.

Appeal from the decree of the District Judge of Hooghly, dated September 29th, 1910, reversing that of the Additional Sub-Judge of that District, dated May 10th, 1909.

Babu *Jogendra Nath Mukherji*, for the Appellant.

Babus *Basanta Kumar Bose*, *Shoroshi Charan Mitra* and *Shiba Prosanna Bhattacharyya*, for the Respondent.

JUDGMENT.—The appellant was one of the defendants. The plaintiff had purchased certain property at an execution sale in February 1896. The suit was instituted for possession of the property on the 21st January 1908, and in that suit the previous owners of the property were made defendants. At some later date, which was subsequent to the expiry of 12 years from the plaintiff's purchase, the defendant-appellant was made a party upon the ground that he had been granted a permanent lease by the previous owners who had wrongfully retained possession since the plaintiff's purchase.

The only ground taken before us is the ground of limitation. It is contended that the defendant-appellant can claim the benefit of Article 144 of the Limitation Act. His lease was granted as late as July 1907. He had, therefore, not been 12 years in possession under his lease. But it is contended that he is entitled to add to the period of his possession under his lease the eleven years during which his lessors were in possession adverse to the plaintiff prior to the grant of his lease, that he can thus claim adverse

possession from February 1896, the date of the plaintiff's purchase till the date when he was made a defendant in the plaintiff's suit. This period being in excess of 12 years it is contended that his case comes within the provisions of Article 144.

We do not doubt that title to a limited interest can be acquired by adverse possession, but we see no substance in the contention that the appellant was entitled to add the period of his lessor's possession to his own. We have been referred to certain cases, more specially to the case of *Padajirav* v. *Ramrav* (1), in which Sargent, C. J., held that the question whether a defendant can supplement his own adverse possession by the previous adverse possession of another person must depend on whether he can be said to have derived his liability to be sued from or through that other person. Article 144 says that the twelve years must be from the date when the possession of the defendant becomes adverse to the plaintiff; and in the definition in section 3 of the Act it is said that the word "defendant" must be held to include the person from or through whom the liability to be sued is derived. The definitions in section 3 are, however, subject to repugnancy in the context, and the words "possession of the defendant" in Article 144 cannot, by reference to the definition in section 3, be reasonably held to include the possession of another person, a co-defendant, still in possession under a different title. The case of *Padajirav* v. *Ramrav* (1) is distinguishable. Moreover, we are in general accord with the opinion expressed by Pearson, J., in *Umrunnissa* v. *Muhammad Yar Khan* (2), that the adverse possession of a defendant must be of the same nature as that sought by the plaintiff, at any rate in a case of the present kind. The defendant cannot set up his possession as a permanent lessee as adverse in a suit by the plaintiff for possession as proprietor. Further, the title asserted by the defendant during his possession was merely a title to hold under the other defendants in the case. The title of the other defendants was a vital part of the appellant's claim. He does not pretend that he can claim the benefit of Article 144 on behalf of the other defendants: he cannot, therefore, claim the benefit of the Article for himself, for his position was entirely dependent upon theirs.

The suit, therefore, was not barred by limitation as against the defendant, and the appeal must be dismissed with costs to the plaintiff-respondent.

Appeal dismissed.

(1) 13 B. 160 at p. 165.
(2) 3 A. 24.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 5 OF 1910.

April 24, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Musammat ASSAT AND OTHERS—APPELLANTS

versus

DHAMANMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 27—New case set up in appeal—No fresh evidence to improve case permissible—New question requiring evidence for solution not entertainable at the stage of argument in the first Court—Practice—Pleadings.

Plaintiff's case in the first Court was that his vendors were co-owners with the defendant. In the Appellate Court, however, he tried to make out that the defendant was constructive trustee for his (plaintiff's) vendors:

Held, that this new case ought not to have been entertained even if an amendment of the plaint had been applied for.

Under Order XLI, rule 25, remand can only be made when the lower Court has omitted to frame or try any issue or to determine any question of fact essential to the right decision of the suit.

Even under Order XLI, rule 27, the Appellate Court is not justified in giving the respondent an opportunity to improve his case by calling fresh evidence except for some substantial cause. The rule refers primarily to cases where on examining the evidence as it stands some inherent lacuna or defect becomes apparent.

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L.R. 671; 17 M.L. J. 347; 34 I. A. 115, referred to.

An original Court is not justified in entertaining, at the stage of argument and after the close of the evidence, a new question, the solution of which is dependent upon evidence.

Rup Narain v. *Gopal Devi*, 3 Ind. Cas. 382; 13 C. W. N. 920; 6 A. L. J. 567; 10 C. L. J. 58; 5 M. L. T. 423; 11 Bom. L. R. 833; 36 C. 780; 93 P. R. 1909; 146 P. W. R. 1909; 19 M. L. J. 548; 68 P. L. R. 1910 (P. C.); 36 I. A. 103, referred to.

Appeal against the decision of the Sub-Judge, Hyderabad.

Musammat ASSAT *v.* DHAMANMAL.

Mr. *C. M. Lobo*, for the Appellant.

Mr. *Isarsing Hazarising*, for the Respondent No. 1.

JUDGMENT.—Respondent No. 1 sued for the possession of a $\frac{2}{3}$rd share in three Survey Numbers alleging that they had been sold to him by two of three brothers who, he alleged, were the joint owners.

The three brothers were Laldino, Allahrakhio and Chachak. Laldino and Allahrakhio did not dispute the claim, but the heirs of Chachak contended that Chachak was the sole owner.

In the first Court the issue was framed:

"Whether defendants Nos. 1 and 2 (*i.e.*, Allahrakhio and Laldino) owned a 10-anna 8-pie share in the land in suit or whether it all belonged to Chachak as is alleged in the defence ?"

Both parties called evidence on this issue and the Court came to the finding that the land belonged wholly to Chachak.

In appeal the appellant relied on a judgment exhibited in the case that another plot of land Survey No. 261 belonged jointly to Chachak and his brothers. The judgment has been put in as a piece of evidence that the three brothers were holding property jointly. It was, however, suggested that Chachak had acquired the land in suit as frontage of the joint Survey No. 261. The Appellate Court then framed issues as to whether the land had been so acquired and allowing further evidence to be taken decided the suit on the basis of a finding that two of the three Survey Numbers had been acquired by Chachak as trustee for his brothers.

In this second appeal the heirs of Chachak question the legality of the order of remand.

The order of remand purports to be under section 566 of the Code of 1882 corresponding to Order XLI, rule 25. Under that Order the remand could only have been made when the lower Court had omitted to frame or try any issue or to determine any question of fact essential to the right decision of the suit. That is there must have been some omission on the part of the lower Court. This was not the case here for the lower Court had framed the issues and tried all the facts that arose out of the pleadings. The allegation that the land had been acquired as frontage was not made in the pleadings and it was not the duty of the lower Court to frame issues or decide facts that were not pleaded. Even if the order of remand be treated as one made under Order XLI, rule 27, the Appellate Court was not justified under that rule in giving the respondent an opportunity to improve his case by calling fresh evidence except for some substantial cause. No such cause appears in this case and the section was interpreted by the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway* (1) to refer primarily to cases where on examining the evidence as it stands some inherent lacuna or defect becomes apparent. Therefore, even that section which is wider than section 566 or Order XLI, rule 25, is not intended to enable a defeated suitor in the lower Court to improve his case by importing fresh evidence in the Court of Appeal. The rule on this point is made explicit by the judgment of the Bombay High Court in *Nathu* v. *Umedmal* (2), where it was said that a Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he never had notice during the hearing of the suit. Here the allegation that the land had been acquired as frontage was made for the first time in the Court of appeal. In the case of *Lala Rup Narain* v. *Musammat Gopal Devi* (3) the Privy Council went further and said even that the original Court is not justified in entertaining at the stage of argument and after the close of the evidence a new question the solution of which is dependent upon evidence.

In this case not only did the Appellate Court give the appellant an opportunity of calling fresh evidence which he should have called in the lower Court, but it practically allowed him to make a fresh case. The original case was that the plaintiff's vendors were co-owners with Chachak. The case made out in the Appellate Court was that Chachak was constructive trustee for the

(1) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L R. 671; 17 M. L. J. 347; 34 I. A. 115 (P. C.).

(2) 1 Ind. Cas. 456; 33 B. 35; 10 Bom. L. R. 768.

(3) 3 Ind. Cas. 382; 11 Bom. L. R. 833; 13 C. W. N. 920; 6 A.L.J. 567; 10 C. L. J. 58; 5 M. L. T. 423; 36 C. 780; 93 P. R. 1909; 146 P. W. R. 1909 (P. C.); 19 M. L. J. 548; 68 P. L. R. 1910; 30 I. A. 103.

appellants vendors and that they had, therefore, a right of recourse against the trust property in the hands of Chachak's heirs. This new case ought not to have been entertained even if appellant had applied for an amendment of the plaint.

The Sub-Judge, first class, therefore, acted irregularly in entertaining this fresh evidence. The suit should have been decided on the evidence led in the lower Court. On this evidence plaintiff is only entitled to the decree given by the first Court.

We, therefore, reverse the decree of the lower Appellate Court and restore that of the first Court.

Appeal allowed, appellants' costs throughout on respondent No. 1. Respondent Nos. 2 and 3 to bear their own costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 1 OF 1913.

March 18, 1913.

Present:—Mr. Justice Banerji.

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—PETITIONER

versus

MESSRS. SHEORATAN DAS MOTILAL —PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), ss. 55, 72—Contract Act (IX of 1872), ss. 73, 161—Detention of consignment by Railway Company—Illegal detention—Tort—Liability of Railway Company for damages—Bailee and bailor.

An ordinary bailee would not be entitled to detain the goods baiied for recovery of money due to him from the bailor on some other account but a Railway Administration has by section 55 the power to detain the goods. Where this power is exercised illegally or wrongfully the Railway Company is liable for the illegal or wrongful detention and it cannot claim exemption from liability any more than any other person who wrongfully detains another man's goods.

Section 73 of the Contract Act relates to breaches of contract and not to torts.

Petition for revision against the decision of Judge of Small Cause Court at Cawnpore, dated the 1st of July 1912.

Mr. *Ladli Parshad*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—The facts of this case are these:—Some goods were consigned to the plaintiffs at Howrah to be delivered at Cawnpore. They arrived at Cawnpore on the 18th of September 1911. On the plea that the weight of the goods as specified in the receipt granted by the office at Howrah was shorter than the actual weight of the goods, the East Indian Railway demanded from the plaintiffs a further sum of Rs. 8-10 which the plaintiff refused to pay. The goods, however, were delivered to the plaintiffs' agent and were taken away. Subsequently another consignment of goods addressed to the plaintiffs was received at Cawnpore. On the consignment the fare charged was in excess of what was properly due. The Railway authorities detained these goods under the power vested in them by section 55 of the Railways Act, 1890. That section provides that if a person fails to pay, on demand made by or on behalf of a Railway Administration, any rate, terminal, or other charge due from him in respect of any goods, the Railway Administration may, if the goods have been removed from the Railway, detain any other goods of such person then being in or thereafter coming into its possession. In exercise of this power the Railway Company detained the second consignment of goods for a period of nearly two months. The plaintiffs thereupon paid the amount demanded from them on account of the previous consignment under protest and removed the detained goods, and then instituted the suit out of which this application arises for recovery of Rs. 8-10 which they had paid under protest, Rs. 5-2 the excess charge made on the second consignment, Rs. 78-12 0 for loss occasioned by fall in the market during the period of detention of the goods and Rs. 13 as interest on the value of the goods detained. The Railway Company admitted their liability for Rs. 5-2 but disputed the remainder of the claim. The Court below was of opinion that the weight of the goods received at Cawnpore on the 18th of September 1911 was not greater than that specified in the receipt granted by the servants of the Company at Howrah. This finding of the Court below must be accepted in revision. There was evidence to the effect that part of the goods was weighed at Cawnpore and was not found to be of greater weight than that mentioned in the receipt. The Court was competent to act on this evidence and on the basis of it to come to a finding on the question of short weight. If, as has been found by the Court below,

the weight charged for was not short, there was no amount payable by the plaintiffs and there was, therefore, no justification for the detention of their goods. The detention was, consequently, illegal and in respect thereof the position of the Railway Company was that of tort-feasor. It is contended that under section 72 of the Railways Act the responsibility of the Railway Company was that of a bailee under section 161 of the Contract Act and that, consequently, the Company was not liable in damages in respect of the wrongful detention to which I have referred above. I am unable to accede to this contention. Chapter VII of the Railways Act in which section 72 appears relates to the responsibility of the Railway Administration as carriers and section 72 refers to the responsibility of a Railway Administration for loss, destruction or deterioration of animals or goods delivered to it for being carried by Railway. This case is not one of loss, destruction or deterioration of goods by the Railway Company as carriers. The goods were carried by the Railway to Cawnpore. It is the wrongful detention of the goods at Cawnpore which forms the gist of the present claim. An ordinary bailee would not be entitled to detain the goods bailed for recovery of money due to him from the bailor on some other account, but a Railway Administration has by section 55 the power to detain the goods. Where this power is exercised illegally or wrongfully the Railway Company is liable for the illegal or wrongful detention and it cannot claim exemption from liability any more than any other person who wrongfully detains another man's goods. The claim was, in my opinion, sustainable and the Railway Company was not protected by section 72 of the Railways Act or section 161 of the Contract Act.

It was next urged that the plaintiffs might have adopted means which existed for removing the goods and are, therefore, not entitled to the damages claimed by them. Explanation 3 to section 73 of the Contract Act is relied on. It is contended that the plaintiffs might on an earlier date have paid the amount demanded from them under protest and removed the goods. As to this I may point out that section 73 relates to breaches of contracts and this is a case of tort. Furthermore the plaintiffs were not bound to pay the amount improperly demanded from them under protest or otherwise. The defendants had no justification for detaining the goods and are liable to pay such damages as were sustained by the plaintiffs by reason of this detention. It was alleged that there was a fall in the market and it was, therefore, claimed that the defendants were liable to pay the difference between the price which prevailed on the date of arrival of the goods and that which prevailed on the date of delivery. This amount of difference which has been found by the Court below has, in my opinion, been rightly awarded to the plaintiffs.

The last ground urged is that the Court below should not have allowed interest on the value of the goods. This contention seems to me to be valid. As damages have been awarded in respect of the fall in the price, interest on the original price should not have been awarded. The amount of the decree of the Court below should, therefore, be reduced by the sum of Rs. 13 awarded as interest on the value of the goods. I accordingly allow the application so far that I reduce the amount of the decree to Rs. 87-0-6. In other respects I dismiss the application. The parties will pay and receive costs in both Courts in proportion to failure and success.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 742 OF 1894.

January 28, 1898.

Present:—Mr. Justice Subramania Aiyar and Mr. Justice Davies.

DARAMMA AND OTHERS—APPELLANTS

versus

MARIAMMA AND OTHERS—RESPONDENTS.

Custom—South Canara—Usufructuary mortgagee entitled to the value of improvements—Improvements, meaning of.

According to the custom in South Canara, a usufructuary mortgagee is entitled to the value of improvements effected by him, provided, however, that the parties have not contracted themselves in the particular transaction out of the custom.

DARAMMA *v.* MARIAMMA.

Improvements are understood to imply any work beneficial to the property, or, in other words, to which a reasonable owner would have consented.

Second appeal from the decree of the District Court of South Canara, in Appeal Suit No. 301 of 1890, modifying that of the Subordinate Judge's Court of South Canara, in Original Suit No. 11 of 1889.

The Hon'ble Mr. *P. L. Rozario*, Officiating Advocate-General and Mr. *K. Narayana Rao*, for the Appellants.

Mr. *K. P. Govinda Menon* for the Hon'ble Mr. *C. Sankaran Nair* and Mr. *K. P. Madhava Row*, for the Respondents.

ORDER.—We are unable to agree with either of the lower Courts that there is anything in the language of the mortgage instrument or Exhibit A to indicate that the intention of the parties was that the mortgagee should forego any claim to the value of improvements, if he was entitled thereto by the Customary Law. The 5th issue seems to have been raised to try the question whether there was a custom in South Canara by which usufructuary mortgagees were entitled to the value of their improvements. No finding has been come to as to the existence or non-existence of this custom, and the question must now be tried, as we find that the parties did not contract themselves out of the custom, if it existed. The question will be whether there is a custom in South Canara entitling a usufructuary mortgagee to the value of improvements effected by him; and if so, what are treated as improvements to be paid for under the custom. In trying this question the Judge should take not only the evidence adduced before himself, but he should issue commissions to the several Munsifs in his District also to take evidence on the point. He must then come to a finding upon the whole of the evidence so taken and submit it to this Court within two months from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court. The further question as to the value of the improvements in this case will be reserved.

In accordance with the above order the District Judge submitted the following

FINDING.—With reference to the order, dated 19th October 1896, of the High Court calling for a finding in Second Appeal No. 742 of 1894, I have the honour to state as follows:—

The remand order recites that "the 5th issue in the suit"—which runs thus:

> What is the value of improvements, if any, effected on the mortgaged properties? and is the same recoverable in addition to the mortgage amount?

"seems to have been raised to try the question whether there was a custom in South Canara, by which usufructuary mortgagees are entitled to the value of their improvements"—

and proceeds that, as no finding has been come to as to the existence or non-existence of this custom, "the question" must now be tried.

"The question" resolving itself in two heads:—

(1) Whether there is a custom in South Canara entitling a usufructuary mortgagee to the value of improvements worked by him.

(2) What are the "improvements" to the value of which he is entitled under such custom.

2. As matter on which my finding on these questions is to rest, I am directed, besides the evidence adduced before this Court also to issue commissions to the several Munsifs in the District to take evidence.

The five Munsifs have submitted the evidence offered before them, oral and documentary (with their opinions on its value and effect): before this Court no evidence is offered.

For appellants Mr. T. Bhavani Rao appeared and argued that

(1) the custom is established by the evidence;

(2) there is no limitation as to the character of the improvements, the value of which the mortgagee is entitled to recover.

For respondents there is no appearance.

3. The evidence so collected is almost entirely in favour of the existence of such a custom, *viz.*, "that the usufructuary mortgagee at the termination of his occupation has a valid claim (in default of any special agreement on the subject) to compensation on account of improvements worked by him during his term of occupation on the lands held under his usufructuary mortgage.

The weight of evidence on this point is so overwhelming that very little discussion of it

DARAMMA *v.* MARIAMMA.

is necessary. Of the six Munsifs, four (Kundapur, Karkul, Puttar and Manglore) give their opinion unhesitatingly in favour of the custom, the 5th (Udipi) says that the evidence given before him does not establish the custom, but he does not consider evidence against the custom so given satisfactory: and the 6th (Kassargode) reports that no evidence was produced before him on which any conclusion could be based.

4. The documentary evidence is (as was naturally to be expected) principally in the shape of original decisions on the point in the Courts of this District and appeals from them.

The oral evidence given before the Kundapur Court in favour of the custom seems to me to carry weight (and the oral evidence of the witnesses for plaintiffs—respondents before the Mangalore Munsif to show that the documents which they produced are of no avail to disprove the custom).

The most important judgments are those marked as Exhibits XLVII, XLVIII and XLIX.

This is a case before the late Barkur District Munsif, in which a very heavy claim for improvements (the level of the lands, which abutted on a river, had been raised; wells and tanks formed; expensive buildings erected; trees planted, etc.) were disallowed in part: on appeal before the Principal Sadar Amin, the claim for improvements was altogether disallowed on the ground of absence of either (1) contract or (2) consent on the other part; in special appeal to the High Court, the claim for compensation was decreed—the learned Judges, Holloway (at that time acting as Chief Justice) and Kindersley (who had served in this District as Sub-Judge) remarking in their order of remand "It is certainly the Customary Law of Malabar" (this is the voice of Mr. Holloway who had experience of Malabar and generally expressed his views positively) "and we are disposed from a number of precedents to believe it to be that of Canara also" (here the utterance is tempered by the more careful expression and less ample experience of Mr. Kindersley in Canara) "that the evicting landlord shall pay the value of the permanent improvements to the tenant."

Although the Customary Law here stated to exist refers to an evicting landlord and tenant, the case in which the order was passed was one of a mortgage in usufructuary possession, and I think there can be little doubt that this decision (passed in 1871) has gone far to create more "precedents" to establish the same custom with regard to mortgagees. That decision was passed 25 years ago and probably has created a "custom" by dint of precedent by this time, even if there was none before. On this point—the existence of such a custom previously—there is no evidence before me. That it exists in Malabar under the Kanom tenure is well-established—and this should have been in Mr. Justice Holloway's time when he referred to the "Malabar Customary Law:" but whether such a custom—as between usufructuary mortgages and other parties recovering the land from them—previously existed in South Canara, there is nothing to show.

Since then (as shown by the exhibits produced in this inquiry) the Courts of this District have obviously followed the dictum above given and applied it to cases similar to the one in which it was given.

My opinion on the first point, therefore, is that the custom as above described (paragraph 3) is now established.

5. It now remains to consider what is the nature of the improvements to compensation (value) for which the outgoing mortgagee is entitled.

Are there any limitations or exceptions?

As noted above, the Vakil for appellants claims that there were none and I cannot say that, on the evidence directly given, there are any exceptions established. But there are considerations which have clearly gone to the establishment of the custom—it is one which approves itself in equity to the human mind and is adopted into the equitable law of England (and most other countries)—which suggest the lines on which the claim to value for improvements in such cases should fairly be—and has, in the former cases, which create precedents, which create custom, been—awarded.

6. The grounds on which an allowance is made to the occupier for time or money which he expends in improving the property in his occupation are:—

(1) that the other party agreed to compensate him for results so achieved;

(2) that "consent" was given to the improvements worked;

(3) that there are fair grounds for presuming that consent would have been given if it had been asked.

That District Munsifs in their reports give lists of certain classes of work which have been accepted by the Courts and others in various cases as forming grounds for valid claims under this head; and we have the word permanent "improvements" are used in the order above referred to (paragraph 4).

But to compile a list of particular classes of work which are to be considered "established as claims for compensation by custom," is to run the risk of excluding some which have been overlooked, simply because they do not happen to have come before the Courts in the cases which are produced in this inquiry as precedents showing the custom; and the term "permanent" is too vague to be of much use.

7. I think, therefore, the best finding that I can give on the second point in the question raised in this order of remand is—

"That compensation has in the past been awarded in cases where the improvements effected have been such that the consent of the other party to the making of such improvements may fairly be presumed—

And that the "custom" has been created by a series of such "award"—and may best be defined in the same words—This also is in accord with the principles of equity.

This second appeal coming on for hearing on 26th day of April 1897, after the return of the above finding from the lower Appellate Court, the Court delivered the following

JUDGMENT AND ORDER.—We accept the findings of the Judge, the objections to which are not seriously pressed, and in accordance therewith declare that the mortgagees (the defendants) are entitled to the value of the improvements effected by them, and by "improvements" we understand any work beneficial to the property, or, in other words, to which a reasonable owner would have consented.

A finding must, therefore, now be come to and reported to this Court as to the value of such improvements. Further evidence may be taken if the Judge considers it necessary. The finding must be submitted within a month after the re-opening of Court after the recess. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

Before receipt of the finding in accordance with the above judgment and order, the parties put in Civil Miscellaneous Petition No. 91 of 1898 praying that the question of the value of improvements may be reserved for determination in any future suit which may be brought for possession and that the order calling for finding may be cancelled.

This petition and the second appeal coming on for hearing the Court delivered the following

JUDGMENT.—As both parties desire it, we cancel our order calling for a finding as to the value of improvements which we leave to be determined in a suit brought for recovery of possession.

The decree in this Second Appeal No. 742 of 1894 can now be drawn up declaring that the defendants are entitled to the value of improvements effected by them as explained in the judgment. We make no order as to costs.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 48 OF 1911.

May 3, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

GHULAM HUSSEIN MULLA ADAMJI —APPLICANT

versus

SAKINABAI AND OTHERS—OPPONENTS.

Arbitration Act (IX of 1899), ss. 12, 15—Enlarging time after expiry of time for award—Suit for partition and possession referred to arbitration--Declaratory award—Incapable of execution—Appointment of Commissioner to partition incompetent—Acquiescence in voidable proceedings of arbitration.

The Court can enlarge the time for making an award under section 12 of the Indian Arbitration Act after the expiry of the time for making it.

Seth Haridas v. *Seth Ootoomal*, 16 Ind. Cas. 861; 6 S. L. R. 89, referred to.

In a suit for partition and possession referred to arbitration, if the award merely declares the shares of the parties, it falls short of the reference. Such an award should be remitted to the arbitrator for completion.

SHEOKARAN *v.* MAHADEO SINGH.

If the Court passes an order on the award appointing a Commissioner to make partition, it would be usurping a function which the parties had appointed the arbitrator to perform. Such an order is not enforcement of the award under section 15 of the Arbitration Act.

A declaratory award is not susceptible of execution.

Where a person has voluntarily acted upon the reference and voluntarily appeared before the arbitrator, he would be held to have acquiesced in the reference although it had been voidable at his option.

Ormes v. *Beadel*, (1860) 30 L. J. Ch. 1; 2 De G. F. & J. 333; 6 Jur. (N. S.) 1003; 3 L. T. 344; 9 W. R. 25, referred to.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *Hirdaram Mewaram*, for the Opponents.

JUDGMENT.—This is an application for revision of an order by the Additional Judicial Commissioner directing an award to be filed. There are only three points raised which involve the jurisdiction of the lower Court to make the order. The first point is that the Court had no power to enlarge the time for making the award under section 12 after the time for making the award had expired. This point, however, is concluded by the decision of this Court in *Seth Haridas* v. *Seth Ootoomal* (1)

The second point is that the award is not final as it is merely a declaration of the shares to which the parties are entitled in the property in suit. In this respect it is clear that the award does fall short of the reference for the subject-matter of the reference was the suit that had been filed for partition and possession. The declaratory award is not susceptible of execution and, therefore, the Court by its order appointing a Commissioner to make partition was usurping a function which the parties had appointed the arbitrator to perform. Such an order is not an enforcement of the award under section 15 of the Act. The Court should have remitted the award to the arbitrator for completion. The third objection is that the reference was procured under undue influence and coercion. The Court refused to go into the evidence following the case of *Ormes* v. *Beadel* (2). No doubt, if the applicant had voluntarily acted upon the reference and voluntarily appeared before the arbitrator he would be held to have acquiesced in the reference although it had been voidable at his option. But here the applicant in his written objections pleaded that the undue influence and coercion continued even during the course of the proceedings before the arbitrator. If that is so, the conduct of the applicant would not amount to acquiescence in the continuance of the contract. This is a matter which could only be decided on the evidence that the lower Court excluded.

We, accordingly, set aside the order of the lower Court and remand the application to the lower Court for re-trial. The Court should admit the evidence of the applicant and decide in first place whether the reference was valid or acquiesced in and if it decides that in the affirmative it will be necessary for it to remit the award to the arbitrator in order that he should conclude his proceedings by making a final award.

Costs to be costs in the cause.

Case remanded.

(1) 16 Ind. Cas. 861; 6 S. L. R. 89.

(2) (1860) 30 L. J. Ch. 1; 2 De G. F. & J. 333; 6 Jur. (N. S.) 1003; 3 L. T. 344; 9 W. R. 25; 128 R. R. 85; 45 Eng. Rep. 649.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1508 OF 1912.

March 31, 1913.

Present:—Mr. Justice Rafique.

SHEOKARAN AND ANOTHER—OBJECTORS—APPELLANTS

versus

MAHADEO SINGH AND ANOTHER—APPLICANTS—RESPONDENTS.

Execution of decree—Decree giving life-estate to decree-holder—Death of decree-holder—Decree incapable of execution.

Where a decree is passed giving life-estate to the decree-holder in a property, the decree becomes incapable of execution if the decree-holder dies before the execution of the decree.

Second appeal from the decision of the District Judge of Azamgarh, dated the 19th of August 1912.

Mr. *Muhammad Ishaq*, for the Appellants.

Mr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The two respondents, Mahadeo Singh and Basdeo Singh, with their

mother Lakhpati Kuar instituted a suit for recovery of possession of certain immoveable property against one Jagram Singh on the allegation that the property in suit belonged to one Sarup Singh who was the father of Lakhpati Kuar and grandfather of the respondents. Jagram Singh was a collateral of Sarup Singh. He resisted the suit on various grounds. The claim of the respondents was dismissed on the ground that it was premature and that it could not be brought in the life-time of their mother. But a decree was passed in favour of Lakhpati Kuar in her own right as the daughter of Sarup Singh. She was decreed a daughter's estate. The first Court passed the decree in her favour on November 26th, 1909, and it was upheld on appeal on May 13th, 1910. Both *Musammat* Lakhpati Kuar and Jagram died before the decree could be executed. The two respondents, the sons of Lakhpati Kuar, filed an application in the Court of the Munsif of Azamgarh for execution of the decree in favour of their mother, against the appellants, who are the legal representatives of Jagram Singh. The appellants opposed the application for execution, on the ground among others, that the decree in favour of Lakhpati Kuar awarded her a life-estate only and could not be executed after her death. The learned Munsif gave effect to this plea and rejected the application. On appeal the learned District Judge reversed the decree of the first Court on the ground that the respondents were the legal representatives of *Musammat* Lakhpati Kuar, the original decree-holder, and that for that reason the decree could be executed by them. The appellants, have come up in second appeal to this Court and press the plea upon which the application was dismissed by the learned Munsif. I think that this appeal must prevail. The question at issue between the parties is not whether the respondents are or are not the legal representatives of *Musammat* Lakhpati Kuar, but whether the decree in favour of Lakhpati Kuar is capable of execution after her death. It is admitted that the decree was passed in her favour as the daughter of Sarup Singh giving her a daughter's estate in respect of the property relating to which the decree was passed in her favour. After her death the decree became inoperative. It may be that the two respondents have a right to succeed to that property in preference to the collaterals of Sarup Singh. But that is a question which should be decided between the rival claimants by a regular suit. The mere fact of the two respondents being the daughter's sons of Sarup Singh does not give them the right to apply for execution of a decree, which became inoperative after the death of their mother. The appeal prevails. I set aside the order of the lower Appellate Court and restore that of the first Court. Costs are allowed to the appellants.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 3 OF 1911.

May 9, 1912.

Present:—Mr. Pratt, J. C.

SOMJIMAL TILLUMAL AND ANOTHER—APPELLANTS

versus

TOLOMAL JETHANAND AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 116, 120—*Suit for money payable under an award—Suit for breach of obligation—Not specific performance—Suit on a bond—Not a suit for specific performance, but a suit for compensation for breach of contract.*

A suit for recovery of money due under an award is governed by Article 120 of the Limitation Act, the suit being one for compensation for breach of the obligation imposed by the award and not for specific performance of the award.

A suit on a bond or contract to pay a specified sum of money is not a suit for specific performance of that bond or contract. Such a suit would be a suit for compensation for breach of contract.

The word 'contract' in Article 116 does not include an award.

Appeal from the decree of the Sub-Judge, Kotri.

Mr. *Rupchand Billaram*, for the Appellants.

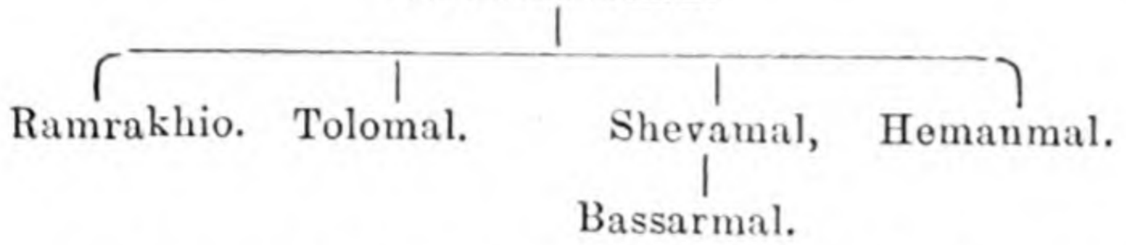
Mr. *Lalchand Hassomal*, for Respondent No. 1.

Mr. *Dipchand Chandumal*, for Respondents Nos. 2 and 3.

JUDGMENT.—The defendants' father, Jethanmal, had four sons, thus—

KAMAR-UD-DIN *v.* MANMATHA NATH MANNA.

JETHANMAL.



Jethanmal died about 1898 and the son Ramrakhio separated from his brothers in 1902. Plaintiffs are *Banias* who had a claim against Jethanmal for debt. This claim was the subject of a reference to arbitration on the 7th January 1904. The reference was between plaintiff Somjimal on the one side, defendants Tolomal, Bassarmal and Hemanmal on the other side. Bassarmal and Hemanmal were minors and Tolomal signed the reference on his own behalf and as the guardian of these two minors. By the award made on this reference certain immoveable property of these three defendants was transferred to the plaintiff in part satisfaction of the ancestral debt which was ascertained to be Rs. 1,826-11, for the balance of the debt Rs. 750, the defendants were ordered to pay cash in yearly instalments of Rs. 125, the first instalment being payable on the 7th April 1905.

This was a suit filed by the plaintiff to recover this sum of Rs. 750 with Rs. 350 interest.

The lower Court held that the suit was time-barred; that the award was a bogus award and that it was not in the interest of the minors and dismissed the suit.

Plaintiffs appeal.

The first question is that of limitation. The Sub-Judge relying on the cases decided in *Sukho Bibi* v. *Ram Sukh Das* (1) and *Raghubar Dial* v. *Madan Mohan Lal* (2), applied Article 113. But I think this Article is not applicable and that the law is correctly enunciated in the case decided at *Sornavalli Ammal* v. *Muthayya Sastrigal* (3).

A suit on a bond or contract to pay a specified sum of money is not a suit for specific performance of that bond or contract. This is obvious from a consideration of section 12 (*a*) and 21 (*a*) of the Specific Relief Act—for if the claim can be satisfied by the payment of money, there is no case for specific performance. Such a suit must be a suit for compensation for breach of contract and it is none-the-less a suit for compensation because it is brought for the specific sum named in the bond or contract, *Ganesh Krishn* v. *Madhavra Ravji* (4).

Hence it is that a suit on a simple bond falls under Article 66 and on that bond when registered under Article 116. A money suit on such a bond could never fall under Article 113. Here the suit is for money payable under an award. It is a suit for compensation for breach of the obligation imposed by the award and not for specific performance of the award.

The award is registered, but there is no warrant for holding that the word contract in Article 116 includes award. By section 30 of the Specific Relief Act, the provisions of Chapter II of that Act apply to awards. These provisions are applicable to suits for specific performance of awards. They are not applicable to suits for compensation for breach of an award. And in either case they do not in any way affect the question of limitation.

There is no Article specifically applicable to a suit for compensation for breach of an award and the suit does not refer to immoveable property. The appropriate Article is, therefore, Article 120. This gives six years from the time when the right to sue accrues. The first instalment was payable on the 7th April 1905 and the suit was filed on the 19th February 1910, and is, therefore, in time.

(1) 5 A. 263; A. W. N. (1883) 16.
(2) 16 A. 3; A. W. N. (1893) 179.
(3) 23 M. 593; 10 M. L. J. 208.
(4) 6 B. 75.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 8 OF 1912.

March 13, 1913.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Beachcroft.

Sheikh KAMAR-UD-DIN—JUDGMENT-DEBTOR—APPELLANT

versus

MANMATHA NATH MANNA—DECREE-HOLDER—AND ANOTHER—AUCTION-PURCHASER—RESPONDENTS.

Execution of decree—Sale—Application to set aside sale on ground that application for execution was time-barred—If maintainable.

SAMANMAL *v.* MAGHANMAL.

A judgment-debtor seeking to set aside a sale, which had actually taken place, cannot take the point that the application for execution was time-barred.

Gangathara Pandithar v. *Rathabai Ammal*, 6 M. 237 and principle underlying *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, 8 C. 51; 8 I. A. 123; 11 C. L. R. 113, followed.

Appeal from the order of the District Judge of Hooghly, dated June 5th, 1911 affirming that of the Third Munsif of Howrah, dated September 29th, 1910.

Babu *Jadunath Kanjilal*, for the Appellant.

Babu *Probodh Kumar Das*, for Mr. *N. C. Burdolai*, for the Respondents.

JUDGMENT.—This appeal and the alternative Rule are directed against an appellate order refusing to set aside a sale in execution, when the case was before us last and we passed our order on the 5th February 1913, we were ignorant of the fact that the decree concerned is a decree for rent, to the execution of which Article 182 of the Schedule to the Limitation Act has no application. It is unnecessary, therefore, for us to make the inquiry which we then contemplated.

The short point raised before us is as to whether a judgment-debtor, seeking to set aside a sale which has actually taken place, can take the point that the application for execution was time-barred. In this instance the application for execution was made three years after the date of the decree and so far as we can see, it was barred by sections 184 and 185 of the Bengal Tenancy Act, 1885, and Article 6 in the third Schedule thereto. It ought, therefore, to have been dismissed, but it was not dismissed; on the contrary, the Court, which was a competent Court, issued a notice on the judgment-debtor under Order XXI, rule 22, Code of Civil Procedure, calling on him to show cause why the decree should not be executed against him, and, on his failure to do so made the order required by rule 23, sub-rule (1) that the decree should be executed. A sale proclamation was then drawn up after notice to him given in accordance with the provisions of rule 66, sub-rule (2) and the sale was held. Now the order made under rule 23 has not been appealed against. It is, therefore, a subsisting and valid order. And we are of opinion following the decision of the Madras High Court in *Gangathara Pandithar* v. *Rathabai Ammal* (1) and the principle which, as it seems to us, underlies the judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2), that it is not open to the judgment-debtor to go behind it by attacking the earlier application as having been presented out of time. The result is that we think that the appeal must be dismissed with costs, and the Rule discharged. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(1) 6 M. 237.
(2) 8 I. A. 123; 8 C. 51; 11 C. L. R. 113.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 57 OF 1911.

May 13 1912.

Present:—Mr. Crouch, A. J. C. and Mr. Hayward, A. J. C.

SAMANMAL GANGUMAL AND ANOTHER—APPELLANTS

versus

MAGHANMAL VERSIMAL—RESPONDENT.

Hindu Law—Debts—Son's liability to pay father's debts—Debt created by decree of Court—Illegal or immoral purpose—Contract Act (IX of 1872), s. 23—Decree in suit for damages for breach of contract to sell trust property—Execution against ancestral property in the hands of sons.

Under Hindu law, sons are bound to pay all debts of their father, unless shown to have been contracted for illegal or immoral purposes.

Debts contracted for illegal or immoral purposes are merely debts of which the consideration or object is not lawful or is immoral within the meaning of section 23 of the Indian Contract Act.

A decree creates a debt, and in deciding the question of a Hindu son's liability we must look to the purpose for which the debt was created, and not to the circumstances under which the original liability was incurred.

A debt of the father arising out of a decree passed against him for damages for breach of contract to sell property held by him as a trustee, is enforceable against his son's share of the ancestral property of the family.

Appeal against the order of Mr. E. M. Pratt Judicial Commissioner of Sind.

Mr. *Dipchand Chandumal*, for the Appellants.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Respondent.

SAMANMAL *v.* MAGHANMAL.

JUDGMENT.

CROUCH, A. J. C.—This is an appeal against the order of Pratt, J. C., dismissing an application by Samanmal and Lillomal sons of Gangumal, objecting to a decree passed against their father being executed against their shares of the ancestral property of the family.

Maghanmal had filed a suit (No. 277 of 1910) against Gangumal, and the sons of his brother Panjumal, for damages for breach of contract to sell certain immoveable property of which Gangumal and Panjumal were, at the date of contract, trustees, with no power of alienation. In the plaint, the word fraud is used, and in the written statement of the sons of Panjumal it was contended that the claim arose "from a wrongful and criminal act." Gangumal put in no defence, and the case proceeded against him *ex parte*. Judgment was given against the sons of Panjumal for Rs. 250, the amount of the earnest money which had been admittedly received by their father; but the suit as for damages was dismissed as against them on the ground that, when their father died, there had been no debt due by him, but only a liability to pay compensation. As against Gangumal it was held that the contract to sell was void for impossibility, under section 56, Indian Contract Act, as the vendor had no title; that Gangumal could have known this with proper diligence, if he did not in fact know it when he entered into the contract. Judgment was given against him for Rs. 1,750.

It appears, therefore, from this judgment, that, prior to the decree being passed against him, there was no "debt" due by Gangumal, and that the decree was passed, *i. e.*, the debt was incurred, in order to compensate Maghanmal for loss suffered through a breach of contract on the part of Gangumal. It has not been proved, that Gangumal knew, as a matter of fact, that he had no power to sell, or that he had any dishonest intention in selling; nor can it be assumed that he had an unlawful or immoral intention.

The decree or debt, to satisfy which the property has been attached was, then, a debt contracted for the purpose of discharging a civil obligation. The agreement to sell may have been entered into for an unlawful or immoral purpose, but has not been proved to be so.

Mr. Dipchand Chandumal has urged that it was obviously an immoral thing to endeavour to sell trust property, and that if a debt is tainted in its origin by immorality, the sons of the person incurring it cannot be rendered liable.

Gangumal died before the property was attached.

I am of opinion that the appeal fails on the allegation of fact. But, assuming that Gangumal deliberately endeavoured to sell property which he knew he could not do, without breach of the terms of his trust instrument, and his purpose in selling could be fairly held to be unlawful, even then I am of opinion that the debt, incurred to discharge the obligation so created, was one which the sons are bound to pay. Under Hindu Law, sons are bound to pay all debts contracted by their father with certain exceptions. The passages from the ancient Hindu texts which state these exceptions are quoted at length in *Durbar Khachar* v. *Khachar Harsur* (1) and *Chakouri Mahton* v. *Ganga Prashad* (2). Here, it is sufficient to say that the only head under which the present debt could come is that of debts that are "not Vyavaharika."

Many translations have been offered of "Vyavaharika," but the best seems to be that suggested by Mookerji, J., in *Chakouri Mahton's* case (2), *viz.*, "lawful, usual or customary." In *Durbar Khachar* v. *Khachar Harsur* (1) Knight, J., considered that "not Vyavaharika" should be rendered "unusual, or not sanctioned by law or custom." The translation suggested by Mookerji, J., is probably as correct a one as can be found in the English language. Usual or customary are, of course, secondary or alternative meanings. The word, evidently, goes back to a time when written law scarcely existed, and people looked for their standard of conduct in discharging obligations to custom and usage. What was customary and usual was regarded as obligatory; debts which the average, conscientious man would ordinarily treat as binding were considered to be lawful debts.

(1) 32 B. 348; 10 Bom. L. R. 297.
(2) 12 Ind. Cas. 609; 16 C. W. N. 519; 15 C. L. J. 228; 39 C. 862.

Knight, J., however, went on to say: "Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices."

It is clear that, to adopt the rule thus laid down would involve the law in great obscurity, and it appears to me, with deference, that the learned Judge has regarded the word from an incorrect point of view. Debts "not Vyavaharika" are not debts which the father, as a decent and respectable man, ought not to have incurred, but may be debts which the father as a decent and respectable man was not bound to discharge. Lawful debts are debts to which the law attaches an obligation to pay; not debts which the law obliges a man to incur. The learned Judges of the Calcutta High Court who recently decided *Chakauri Mahton's* case (2), expressed the opinion that the rule so laid down is not well-founded, that the decision places too restricted a construction upon the term "Vyavaharika," and excludes debts for which the son may be held legitimately liable (page 525). I am, therefore, of opinion that it is undesirable to accept the rule as part of the law obtaining in this Province.

But, under any circumstances, it is, I consider, now unnecessary to attempt to ascertain exactly what the word "Vyavaharika" means in modern English, for a phrase in clear terms of English law was many years ago invented by Indian Judges, and adopted by the Privy Council, to cover not only "debts not Vyavaharika," but also most of the debts which are declared to be exceptions to the general rule according to the texts of Manu, Yajnavalkya, Ushanas, Birhaspati, Gautama and Vyasa see *Chakouri Mahton* v. *Ganga Prasad* (2).]

The earliest Privy Council case which shed light on the point appears to be (*Girdharee Lal*) *Muddun Thakoor* v. *Kantoo Lall* (3). On page 197 occurs this sentence: "If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it." The authority cited was a case decided in the Sudder Court where it had been held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was "*illegal or contracted for an immoral purpose.*"

The next Privy Council case is that of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), wherein their Lordships refer with approval to the conclusion arrived at by Sir M. Westropp in *Udaram Sitaram* v. *Ranu Panduji* (5), that "Subject to certain limited exceptions (as for instance debts contracted for immoral or illegal purpose) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grandfather," and, after referring also to the decision of the Privy Council in *Kuntoo Lall's* case (3) he says that that case was an authority for the proposition that sons could not recover joint ancestral property sold in execution of a decree for the father's debt unless they show that the debts "were contracted for immoral purposes" and that the purchasers had notice that they were so contracted.

In *Nanomi Babuasin* v. *Mothun Mohun* (6), Lord Hobhouse stated:—"The decisions have for some time established the principle that the sons cannot set up their rights against the father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." But as the only authorities referred to in the judgment were *Muddun Thakoor's* case (3) and *Suraj Bunsi's* case (4) we cannot fairly regard the expression "tainted with immorality" as meaning anything more than "illegal or contracted for an immoral purpose."

We have, then, the highest authority for saying that a son is not liable for debts contracted by the father which are "illegal" or which are "contracted for an illegal or immoral purpose," and we have not—unless we give to the phrase "tainted with immorality" of Lord Hobhouse, a meaning wider than it can fairly bear—any such authority for exempting sons from liability for any debts

(3) 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321.

(4) 5 C. 148; 4 C. L. R. 226; 6 I. A. 88.
(5) 11 B. H. C. R. 76 at p. 83.
(6) 13 C. 21; 13 I. A. 1.

that are not so incurred. To all words in the phrase we must necessarily attach meanings that they ordinarily bear when used on formal occasions by English Judges and lawyers. The phrase in no way purports to be an accurate translation of any words to be found in ancient Hindu texts, but it represents, in terms of English law, the approximate equivalent of a rule of Hindu Law.

Now "illegal debt and illegal agreement" are expressions unknown to Indian law, but "unlawful agreement" and "illegal agreement" are terms familiar to English lawyers. An illegal agreement is an agreement of which the matter or purpose is contrary to positive law. An immoral agreement is an agreement of which the matter or purpose is contrary to positive morality recognised as such by the law. Both illegal and immoral agreements are said to be unlawful. (Pollock on Contracts, 7th Edition, page 275).

An illegal agreement seems, therefore, to be the same thing as an agreement entered into for an illegal purpose. We may, therefore, adopt the phrase "debts contracted for illegal or immoral purposes" as the phrase which has been accepted by the highest authority as covering the words "not Vyavaharika."

If we turn to section 23, Indian Contract Act, we find that if the consideration or object of an agreement is forbidden by law or if the Court regards it as immoral, such consideration or object is said to be unlawful, and the agreement is void.

In Pollock's edition of the Contract Act, page 113, it is stated, in reference to section 23, "recently Sale, J., pointed out (what indeed seems obvious) that the word 'object' in this section was not used in the same sense as 'consideration' but was used as distinguished from 'consideration' and meant 'purpose' or 'design.' If this be so, then 'debts contracted for an illegal or immoral purpose' are merely debts of which the consideration or object is not lawful, or is immoral within the meaning of section 23.

That is to say, in testing the morality or legality of the purpose for which a debt was contracted we are to be guided by definite well-known rules of law, and are not at liberty to construe "immoral" and "illegal" in accordance with the loose methods of the ordinary public. And the rule laid down by the Privy Council presents no difficulty of construction.

It is necessary, now, to examine certain High Court decisions which seem to conflict with the view now put forward.

The Bombay High Court appears to have given no decision inconsistent with the rule of the Privy Council, as now construed, until we come to *Durbar Khachar's* case (1) in 1903. As already pointed out, the learned Judges in that case, ignoring all previous decisions, sought a solution of the difficulty in an entirely novel interpretation of "Vyavaharika."

In *Mahabir Prasad* v. *Basdeo Singh* (7), the father had committed criminal breach of trust in respect of certain moneys belonging to his employer. For this offence he was sentenced to two years' imprisonment. His employer also sued him for the moneys, and obtained a decree against him for the same. It was held that the debt for which the decree was obtained was not one binding on the sons, the decree being for money which had been embezzled. This ruling does not appear te have been followed, or even referred to with approval in any later case of the Allahabad High Court. In the recent case of *Jai Kumar* v. *Gauri Nath* (8), a promissory-note had been given to secure the re-payment of money that had been embezzled; and it was held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a pro-note given by the debtor as security for the debt constitutes a valid agreement, and the son was held liable. This decision is inconsistent with the earlier one of the same High Court, and offers a clear rule based on sound legal principles.

The Calcutta High Court also presents only one decision which conflicts with the view now put forward. In *Pareman Dass* v. *Bhattu Mahton* (9), property had been sold in execution of a decree passed in a suit for damages for theft or misappropriation by the father of the persons who sought to recover their shares. It was held that the sons were entitled to succeed. In the judgment appears the following passage:—"The

(7) 6 A. 234; A. W. N. (1888) 47.
(8) 23 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212
(9) 24 C. 672.

cases cited refer to transactions which have been entered into by way of a contract or something approaching a contract between the father and some other person, and the debt which was so contracted it became the pious duty of the sons to pay off. But here there was no debt antecedent to the decree. There was merely a right to damages for a wrongful and criminal act; and so those cases would have no application to the present case. But even if it could be said that that right to damages created a debt before the suit was brought, still it is difficult to see how such a debt was not tainted with either illegality or immorality. The origin of this debt, if debt it was, was a theft committed by those persons who were sued."

This decision involves two important points. *Firstly*, it is doubted whether a decretal debt is necessarily a "debt" within the meaning of the rule of Hindu Law; *secondly*, we have, for the first time, sons held not to be liable for a debt that was not contracted for an illegal or immoral purpose, but was merely "tainted with immorality." What the expression "tainted with immorality," when used as distinct from "contracted for an immoral purpose" precisely means it is impossible to say; it has no precise meaning. One may conjecture that it means sullied with immorality, *i. e.*, slightly immoral; but a debt incurred to re-pay money misappropriated is wholly moral in the eye of the law.

Nor does the law when testing the morality of a contract, look to its "origin" by which it seems are meant the several events without the happening of which the contract would not have been made.

Referring to this case of *Chakouri Mahton* v. *Ganga Prasad* (2), Mookerji, J. says:— "It has been finally argued that the liability of a Hindu son to pay a debt incurred by his father is restricted to cases in which the debt is the result of a contractual obligation, and in support of this view reference has been made to the observations of the learned Judges who decided the case of *Pareman Das* v. *Bhatlu Mahton* (9). It may be conceded that the term "*Rina*" literally understood implies a debt or loan (see Mitakshara on the Institutes of Yajnavalkya, II, 45, 47, 50, 54), but the judicial decisions to which reference has been made indicate that the rule has a much wider application. At any rate we are not prepared to hold that the rule is inapplicable to cases where, as here, the liability was created by a judicial decision. There is no substantial difference in principle between a case in which a person is under an obligation to re-pay money which he has actually borrowed and a case in which he is bound to discharge an obligation created by a judgment of the Court." To this opinion, that of a Hindu Judge of very high reputation, great weight may be fairly attached, and I would myself accept it as correct.

After referring to the theory expressed in *Pareman Das's* case (9) that sons are not liable for a decretal debt which is immoral in its origin, the same learned Judge cited with apparent approval the case of *Kartar Singh* v. *Harjhimal* (10), wherein it was ruled that it was impossible to hold that a debt created by a decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral, for if the father had voluntarily contracted a debt to compensate the person whom he had by a criminal offence deprived of property, the debt could not, without an utter perversion of language, be styled a debt contracted for an illegal or immoral purpose; that on the contrary the debt might be deemed to have been incurred for a highly moral as well as lawful purpose, and the liability imposed by the decree created an obligation unwilling contracted by the father under a lawful compulsion.

The more modern view of the Calcutta High Court, therefore, is that a decree creates a debt, and that in deciding the question of the son's liability we must look to the purpose for which debt was created, not to the circumstances under which the original liability was incurred. In other words, the ruling of the Privy Council must be strictly followed.

In *McDowell & Co.* v. *Ragava Chetty* (11) Raghava had executed a mortgage to plaintiffs to secure a sum of Rs. 6,000 which he had failed to account for. It

(10) 128 P. R. 1879.
(11) 27 M. 71.

was expressly found that the contention that the mortgage was "tainted with illegality" had no foundation (page 75) but, inasmuch as the moneys had been misappropriated under circumstances which constituted the taking itself a criminal offence, the learned Judge, following the decision in *Pareman Dass* v. *Bhattu Mahton* (9), and *Mahabir Prasid* v. *Basdeo Singh* (7) held that the sons could not be held liable in respect of these sums under the Hindu Law rule as to the pious duty of a son to pay his father's debts.

In the earlier case of *Natasayyan* v. *Ponnusami* (12), where a decree had been passed against a Hindu father for moneys dishonestly detained by him, the learned Judges stated. "That rule, as we understand it, is that sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of these debts. Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible *viz.*, to restore to those lawfully entitled money he has unlawfully retained. In our opinion the contention of appellants on this point is opposed to all the principles upon which the rule of Hindu Law rests."

In *Erasala Gurunathan Chetty* v. *Addippally Raghavalu Chetty* (13) a decree had been obtained against the father of plaintiffs for moneys misappropriated. Plaintiff contended that the moneys had been criminally misappropriated and that their shares of the family estate were not liable. The learned Judges refused to hold the sons' shares exempt, on the ground that the evidence was not sufficient to warrant them in holding that the misappropriation constituted a criminal offence; and distinguished the case from *Mahabir Prasad* v. *Basdeo Singh* (7), by the fact that in the latter the parties alleged to have been criminally liable had been prosecuted and convicted and from *McDowell's* case (1) by the fact that the Court had been able to make a finding that the money had been misappropriated under circumstances which amounted to a criminal offence.

It is evident that the Madras High Court has been embarrassed by the decision in *McDowell's* case (1) and has been compelled to draw a distinction between misappropriation that is criminal and misappropriation that is only dishonest. As pointed out by the learned Judges of the same Court, the distinction is opposed to all the principles on which the rule of Hindu Law rests; and there is certainly nothing in any decision of the Privy Council which justifies it.

It appears, therefore, that the Bombay High Court stands alone in its view of the law; and that its view is based on an interpretation of the word "Vayavaharika," which the Calcutta High Court considers incorrect and no other High Court has yet approved. It seems also that the tendency of all High Courts, except that of Bombay, is towards a recognition of the fact that in testing the morality of the purpose for which a debt was contracted we must apply a lawyer's test and not a layman's, we must seek a guide in the Contract Act not in the text books of moral teachers. As soon as this principle is clearly recognised, it will follow that the ruling of the Privy Council will be strictly construed: when strictly construed it will present no difficulty.

To return to the case before us whether we accept the view of the Calcutta High Court, or that of Madras, or of Allahabad the appeal must fail. Appellant bases his case on *Darbar Khachar* v. *Khachar Harsur* (1) and that ruling we are not prepared to follow.

The appeal must be dismissed with costs.

HAYWARD, A. J. C.—I concur in the order proposed by my learned brother, but find myself unfortunately unable to concur entirely in his reasons for the order. The question for decision is whether a debt arising out of a decree for damages for breach of contract to sell property which turned out to be inalienable trust property is an immoral or illegal debt within the contemplation of Hindu Law. If it

(12) 16 M. 99 at p. 104.
(13) 31 M. 472; 3 M. L. T. 394; 8 Cr. L. J. 147.

is not, then the debt here in dispute can be enforced against the joint family property in the hands of the appellants who are the sons of the deceased judgment-debtor under sections 50 and 53, Civil Procedure Code. No precise definition seems to have been given of the term "immoral or illegal" used in reference to debts of the father of a joint Hindu family in the earlier decision but there would appear to me no sufficient ground for supposing they were used with reference to the rules of English Contract Law by their Lordships of the Privy Council. The circumstances would not, in my opinion, justify such a conclusion. English Contract Law in this connection deals with the contractual liabilities of the debtor's own estate based on legal considerations; whereas Hindu Law in this connection deals with the contractual liabilities of the estate of the debtor's joint tenants or co-parceners based on religious considerations. This is indicated perspicuously in the opening paragraph on the subject No. 301 in Chapter IX of Mayne's Hindu Law. It was Hindu Law and not English Law which was under the consideration of their Lordships of the Privy Council. There would appear to me at the same time to be little doubt with all due deference to the learned Judges who decided the case that the definition of the term "immoral or illegal" in this connection given in *Magniram* v. *Laxmi Narayan* (14) cannot be supported by the previous authoritative decision upon the Hindu texts. The correct explanation would appear to me to be found in the following words of Mookerjee, J.:—"Text-writers, as well as judicial decisions, apply the well-known expression 'illegal or immoral debt' to include, not merely debts which are not 'Vyavaharika,' but all the debts which are deemed as not payable by the son according to the texts of Manu, Yajnavalkya, Ushanas, Brihaspati, Gautama and Vyasa." This explanation occurs in the exhaustive judgment of Mookerjee, J. in the case of *Chakouri Mahton* v. *Ganga Prashad* (2). The question whether the debt of a father in any particular case falls within the term "immoral or illegal" must, therefore, be decided by a consideration of the kind of debts which have been held so to fall by previous authoritative decisions upon the Hindu texts. No case has been quoted here in which a debt arising out of a civil decree for damages for breach of contract to sell property which turned out to be inalienable trust property has been held to be an "immoral or illegal debt" according to Hindu Law. The only cases quoted refer to criminal misappropriations and no evidence has been indicated here of criminal breach of trust. The debt, therefore, in this case has correctly been held to be enforceable against the joint family property in the hands of the appellants who are the sons of the deceased judgment-debtor under sections 50 and 53, Civil Procedure Code. The appeal must be dismissed with costs.

Appeal dismissed.

(14) 32 B. 353; 10 Bom. L. R. 281.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1559 OF 1912.

March 27, 1913.

Present:—Mr. Justice Tudball.

BANSGOPAL SINGH AND OTHERS—APPELLANTS

versus

RUP NARAIN SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r 10—Mortgage suit—Costs in appeal—Personal decree against the judgment-debtor.

In a mortgage suit the plaintiffs obtained a decree for sale of the mortgaged property. The defendant appealed. The Appellate Court dismissed the appeal and ordered that the appellant should pay the costs of the appeal to the respondents:

Held, that the decree as to costs in appeal was a personal decree against the judgment-debtor.

Maqbul Fatima v. *Lalta Prasad*, 20 A. 523; A. W. N. (1898), 157; *Mohung Ojha* v. *Ram Bahadur Singh*, 15 Ind. Cas. 23; 16 C. W.N. 731, referred to.

Execution second appeal from the decision of the District Judge of Benares, dated 30th September 1912.

Mr. *Hamilton*, for the Appellants.

Dr. S. *N. Sen*, for the Respondent.

JUDGMENT.—The circumstances out of which this appeal arises are as follows:—The respondent obtained a decree for sale on foot of a mortgage in the Court of first instance. The present appellants-judgment-debtors appealed against that decree. The District Judge dismissed the appeal and the decree as to the costs of the appeal was that the appellants were to pay the costs of the respondent. The judgment-debtors came up to this Court in second appeal. That second appeal was also dismissed and in the decree

DHANJI G. DESHMANAYA *v.* H. A. TAYLOR.

there was a simple order that the appellants were to pay the costs of this Court to the respondent. The decree in the case of each appeal was, therefore, similar, simply dismissing the appeal and awarding to the respondent the costs of the appeals. The decree-holder has applied to the Court below for a final decree in the case for the recovery of the amount decreed to him by the Court of first instance including the costs of that Court. In regard to the costs of the two appeals, he has applied for recovery of the same as against the persons of the judgment-debtors by issue of a warrant of arrest.

This latter part of the application was rejected by the Court of first instance. It referred to the decision of this Court in *Maqbul Fatima* v. *Lalta Prasad* (1). On appeal the lower Appellate Court has ruled that the decree-holder is entitled under the decrees of the two Appellate Courts to recover the costs of those two Courts from the judgment-debtors personally. It has, therefore, on this point overruled the order of the first Court and has, moreover, clearly and distinctly awarded the costs of the appeal against the persons of the judgment-debtors. The latter have come here on second appeal and the plea taken is that the costs of the two Appellate Courts in the original suit can only be recovered from the property or by obtaining a decree under Order XXXIV, rule 6. Stress is again laid on the ruling of *Makbul Fatima* v. *Lalta Prasad* (1). A careful examination of the decision in that case shows that the Court of the Subordinate Judge allowed the recovery of the costs of both Courts, Original and Appellate, by execution against the judgment-debtor personally. The judgment-debtor appealed. In regard to the costs of the Appellate Court his appeal was not pressed and the order of the Subordinate Judge was only set aside in so far as it related to the costs of the Court of first instance. On page 526 of the report there is the following sentence:—"As regards the costs of the Appellate Court, there is no controversy in this appeal." The learned District Judge has referred to the decision of the Calcutta High Court in *Mohunga Ojha* v. *Ram Bahadur Singh* (2). That was a case which seems to me practically on all fours with the present case. As the learned Chief Justice remarked in his judgment: "In cases of this kind what we have to see is not what decree the Court ought to have passed, but what decree the Court has passed. If the Court passed a personal decree for costs, then there is no necessity of having recourse to the procedure indicated in section 90." In the present case I have examined both the decrees of the lower Appellate Court and of this Court which were passed in the appeals preferred by the judgment-debtors. In each case the decree is merely to the effect that the appeal is dismissed and the appellants are to pay to the respondent a certain sum as costs of the appeal. As the decrees stand it seems to me that they are purely personal decrees making the appellants personally liable for the amounts of the costs. Neither in substance nor in form are they decreed for sale. The matter would have been very different had the Court of first instance dismissed the suit for sale and had the Court of Appeal decreed the suit for sale. All the costs up to the decree for sale would then have consolidated and would have been the costs, which are found mentioned in Order XXXIV, rules 2 and 4. As the decrees stand, in my opinion, the decision of the lower Appellate Court is perfectly correct. I dismiss the appeal with costs including fees on the higher scale to be recovered from the persons and other properties of the judgment-debtors.

Appeal dismissed.

(1) 20 A. 523; A. W. N. (1898), 157.
(2) 15 Ind. Cas. 23; 16 C. W. N. 731.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 3 OF 1912.

May 14, 1912.

Present:—Mr. Crouch A. J. C.,
and Mr. Hayward A. J. C.

DHANAJI G. DESHMANAY—APPELLANT

versus

H. A. S. TAYLOR—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 24, 33, 39, 44 (2) (c), 45 (2)—Creditor not proving claim—Proved claim not to be excluded from equal division of assets.

VEERANAN AMBALAM *v.* KARUPPAYYA PILLAI.

A creditor of an insolvent debtor held two decrees but in the insolvency proceedings he proved one only decree, reserving the other for settlement after the discharge of the debtor. The Court recognising the inequity of the tactics, excluded the decree that had been proved, from the benefits of the conditions imposed on the discharge of the insolvent under section 44 (2) (*c*) of the Insolvency Act.

Held, that in view of the provision for equal division of assets contained in sections 33, 39 of the Insolvency Act, the order of exclusion was incompetent.

Under the Provincial Insolvency Act, it is apparently open to any creditor to deprive an insolvent debtor of the remedies intended to be provided for him by the Act by the simple expedient of refraining from proving the claim and of thus excluding it from the schedule framed by the Court.

Appeal from the order of Mr. E. M. Pratt, Judicial Commissioner of Sind.

Mr. *Partabrai Dhanraimal*, for the Appellant.

Mr. *Kikla*, for the Respordent.

JUDGMENT.—The appellant creditor held two decrees for sums of about Rs. 700 and Rs. 3,000 respectively outstanding against the opponent insolvent debtor, but proved for the decree of Rs. 700 only in the insolvency proceedings, reserving the decree for Rs. 3,000 for settlement after the discharge of the opponent insolvent debtor.

The learned Judge recognized the inequity of such tactics and excluded the appellant creditor so far as concerned his decree for Rs. 700 from the benefits of the conditions imposed on the discharge of the opponent insolvent debtor under section 44 (2) (*c*), being unable to direct the inclusion of the decree for Rs. 3,000 in default of formal proof in the insolvency proceedings by reason of the wording of the Provisions of sections 24 and 45 (2) of the Provincial Insolvency Act III of 1907.

We do not think it was open to the learned Judge so to penalize the appellant creditor in view of the provisions for equal division of assets contained in sections 33 to 39. We recognize at the same time the ready means afforded for defeating the objects of the insolvency legislation by the terms of sections 24 and 45 (2) of the Provincial Insolvency Act III of 1907. It is apparently open to any creditor to deprive an insolvent debtor of the remedies intended to be provided for him by the Act by the simple expedient of refraining from proving the claim and of thus excluding it from the schedule framed by the Court. It would appear to have been the intention of the Legislature merely to protect creditors who might receive no actual notice of the insolvency proceedings but in view of the express terms enacted the only remedy would appear to be a further appeal to the Legislature.

We must accordingly modify the order of the learned Judge and direct the discharge to be suspended until 8 annas in the rupee has been paid of all the debts entered in the schedule prepared by the Court.

We dismiss the cross-objections as no sufficient ground has been advanced for our interference. Each party must, in all the circumstances, bear his own costs.

Order modified; Cross-objections dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 252 OF 1910.

November 8, 1911.

Present:—Justice Sir Ralph Benson, KT, and Mr. Justice Sundara Aiyar.

VEERANAN AMBALAM AND OTHERS —DEFENDANTS—APPELLANTS

versus

KARUPPAYYA PILLAI—PLAINTIFF —RESPONDENT.

Madras Irrigation Act (VII of 1865)—Madras Revenue Recovery Act (II of 1864), ss. 2, 42—Sale for arrears of water-cess—Public revenue conveys title free of encumbrance.

A sale for arrears of water-cess payable under Act VII of 1865 would convey a title to the purchaser free of encumbrances.

Second appeal from the decree of the District Court of Madura, in A. S. No. 701 of 1907, presented against that of the District Munsif of Madura, in Original Suit No. 162 of 1906.

Mr. *C. S. Venkatachariar*, for the Appellants.

Mr. *K. N. Aiyah*, for the Respondent.

JUDGMENT.—We are of opinion that a sale for arrears of water-cess would convey a title to the purchaser free of encumbrances. 'Public revenue' is defined in section 1 of Act II of 1864 to include cesses payable to Government on account of water supplied for irrigation and therefore includes the cess payable under Act VII of 1865. Section 42 of Act II of 1864

declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. The plaintiff in this suit, therefore, obtained a title free of the appellant's mortgage. The cases relating to sales for arrears of income, and *abkari* revenue have no bearing on the question before us. It is further urged that the sale for arrears of water-cess was invalid, as no notice was given to the *inamdar*. But this point was not raised in either of the lower Courts even if it was open to the appellant to raise it.

The second appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 130 OF 1911.
September 17, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.

RANGACHARYA APPACHARYA —APPELLANTS

versus

DASACHARYA SANKHALPACHARYA —RESPONDENTS.

Bombay Regulation Act (V of 1827), s. 1—Limitation Act (XIV of 1859), ss. 1 (12), 2—Limitation Act (IX of 1871), s. 2—Repeal of section 1 of Regulation—Interpretation of statutes—Act XI of 1861—Positive prescription, rule of—Repeal by limitation statute—Construction of grant—Trust property—Gift—Construction of deed—Possession of donee from trustee for thirty years—Title.

In 1678-79, a village was given in *inam* to the Swami of a Math for the purpose of meeting the expenses of camphor for the idol used in the ceremony of "Karpur Mangalarti." In 1830, the then Swami gave the village by way of gift (*Krishnarpana*) to *A*, who went into possession as proprietor of the property in 1830. *A*. paid a small sum equivalent to Rs. 20 as *judi* on the land till 1840, after which the payment was stopped. In 1903, the present Swami of the Math sued to obtain a declaration of his title to the village and to recover possession from the heirs of *A*.:

Held, (1) that the original grant to the Swami was in his capacity of a trustee as the legal property was vested in the Swami while the equitable state was in the judicial person, the idol;

(2) that the successors of the Swami held the village as trustees;

(3) that the gift to *A*. was an absolute gift with possession, the word *Krishnarpana* specifically denoting which is irrevocable and absolute;

(4) that the mere temporary condition that a trivial sum of money should be paid as *judi* did not deprive the transfer of its character as a gift;

(5) that by virtue of section 1 of the Bombay Regulation V of 1827, the possession of *A*. ripened into title by the year 1860;

(6) that the effect of Act XI of 1861 was to suspend the coming into force of the Limitation Act XIV of 1859 until 1st January 1862;

(7) that section 1 of the Bombay Regulation V of 1827 being an enactment of positive prescription was not affected by Act XIV of 1859, which was a statute of Limitation;

(8) that the Regulation stood unrepealed till it was repealed by the Limitation Act of 1871;

(9) that the fact that *A*. was an alienee from a trustee did not weaken his case, as section 2 of Act XIV of 1859 did not involve any interference with the prescriptive rights conferred by the Regulation.

Where a later Act does not purport or affect to supersede an earlier Act, the Court will endeavour to read the two enactments together and to avoid conflict, if possible.

First appeal from the decision of the first class Subordinate Judge, in Suit No. 851 of 1908.

Mr. *Jayakar* with him Mr. *Nilkanth Atmaram*, for the Appellant.

Messrs. *Coyaji* and *A. V. Lele*, for the Respondents.

JUDGMENT.—The plaintiff sued to obtain a declaration of his title to the village of Gangapur as Swami of a certain Math known as the Uttaradhi Math. The learned Subordinate Judge of the first class was in the plaintiff's favour upon most of the issues, but upon the issue of limitation was against the plaintiff. He, therefore, dismissed the suit with costs.

The only question with which we are concerned in appeal is the question of limitation, though it will be convenient to consider that question under different heads. We may observe that the argument, which has been somewhat more elaborate than usual, has covered a great many points of interest, but we propose to confine our judgment to those points relevant to our decision.

The defendants in the suit are the successors-in-title of one Mudu Ramacharya to whom in 1830 or 1831 the village in suit was given by his brother, the then Swami Satya Sankalpa. The evidence shows that in A. D. 1678-79, the village was given in *inam* to a Swami named Satyabheenava.

The first question which we must decide is, whether this original grantee was a trustee. Mr. Coyaji for the respondent-defendants argues that he was not a trustee, and for that contention has relied upon the decision in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1). He urges that

(1) 27 M. 435; 14 M. L. J. 105.

this decision shows that a Swami of a Math, as opposed to a temple, is not a mere trustee. It appears to us that the question, whether this decision is to be followed by this Court will be best answered when the point arises, and at that time it will be necessary to reckon with various decisions of our own Court such as *Shankar Bharati Swami* v. *Venkapa Naik* (2). At present, however, as it seems to us, no such question arises because in our view the grantee was a trustee, not because he was called a Swami of an institution called a Math, but because the circumstances of this particular grant set it beyond doubt that the capacity in which he took was that of a trustee. This is shown by the terms of the original grant Exhibit 63, which is corroborated by the inquiries and reports of 1854 and by the *Inam* Commission's proceedings of 1857. These Exhibits show that the village was granted to the original Swami in *inam* for the purpose of meeting the expenses of camphor for the idol. It appears that camphor is burnt in a censer which is swung before the idol in the daily ceremony known as the 'Karpur Mangalarti.' We think that this is a clear case of a trust. The legal property was by the grant vested in the Swami, while the equitable estate was in the juridical person, the idol. The case, therefore, fulfils the definition of a trust which was given in *Hardoon* v. *Belilios* (3) by Lord Lindley, where he said, that to establish the relation of trustee and *cestui que trust* all that is necessary is to prove that the legal title was in the plaintiff and the equitable title in the defendant. That definition appears to us to be in harmony with the definition embodied in the Indian Trusts Act. We have no doubt, therefore, that the original grantee took as a trustee; and if that is so, his successors held by the same title.

In these circumstances, the question arises whether the defendants could acquire and did acquire a title by prescription. The evidence shows that they went into possession in 1830. We say 1830, for the deed of January 1831 refers to an oral gift which has already been made. But for the purposes of the case, it is not material whether the defendants' possession began in 1830 or in 1831. Between 1830 and 1840, the defendants were paying a small sum equivalent to Rs. 20 per annum as *Judi* on the land; but after 1840, this payment was stopped. It has been urged that the payment of this Rs. 20 between 1830 and 1840 indicates that the original transfer could not be regarded as a gift at least until 1840. We are unable, however, to accept that position. The document Exhibit 28 of the 5th of January 1831 proves that the gift to the defendants' predecessor-in-title was an absolute gift with possession. The English word 'absolute', which appears in the translation, is indeed but a weak substitute for the vernacular word employed in this paper. This vernacular word is '*Krishnarpana*' a word which amongst Hindus is reserved to denote specifically, a gift that is irrevocable and absolute. We think that a mere temporary condition that a trivial sum of money should be paid as *Judi* does not deprive the transfer of its character as a gift. We must hold, therefore, that the defendants went into possession as proprietors as early as 1830.

But from the view which we take of the case as a whole, it will appear that, in our opinion, the result would be the same even if the defendants' possession as owners had to be deferred until 1840. In 1830 the law in this Presidency as to prescription was section 1 of the Bombay Regulation V of 1827, which provides that whenever immoveable property has been held without interruption for a longer period than thirty years by any person as proprietor, such possession should be received as proof of a sufficient right of property. It is clear to us that the character in which the defendants held possession was that of proprietors. The gift, as we have said, was an absolute gift to them and it was they who from time to time paid the usual *nazrana* to Government.

Since they went into possession then in 1830, that possession would, under the Regulation, have ripened into title by the year 1860, if in the meanwhile nothing had happened to prevent it. What then is it that is suggested as having happened to prevent the title accruing under the Regulation? According to plaintiff it is the intervention of Act XIV of 1859, section 2 of

(2) 9 B. 422

(3) (1901) A. C. 118; 70 L. J. P. C. 9; 49 W. R. 209; 83 L. T. 573; 17 T. L. R.126.

which provides that no suit against a trustee in his life-time, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time. It appears to us, however, that it is not open to the appellant to invoke this section of the Act of 1859 for the purpose in hand, and that for two reasons. In the first place, the coming into force of the Act of 1859 was deferred by the operation of Act XI of 1861. This Act consists of two sections, of which the first relates to suits and the second to proceedings in execution. The first section which directly concerns us at present enacts that all suits then pending, or which should be instituted before the 1st day of January 1862, should be tried and determined as if Act XIV of 1859 had not been passed. It appears to us, therefore, that for our present purposes the effect of Act XI of 1861 was to suspend the coming into force of Act XIV of 1859 until the 1st of January 1862; in other words, until after the 1st of January 1862, it was not open to the plaintiff or to any person to challenge the defendants' possession in reliance on section 2 of Act XIV of 1859. But prior to the 1st of January 1862, the defendants' possession had grown into title since it began in 1830 and had only thirty years to run. That is the first ground upon which, it seems to us that, Act XIV of 1859 does not assist the present appellant.

Another reason why, in our opinion, that Act is of no avail to him is, that we do not regard it as having affected section 1 of Bombay Regulation V of 1827. It appears to us, both on the words of the enactment and on authority, that this section of the Bombay Regulation is an enactment of positive prescription and, as such, is not affected by Act XIV of 1859, which is a statute of limitation. In support of this view we may refer to two cases decided in this Court by Sir Michael Westropp, namely, *Sitaram Vasudev* v. *Khanderav Balkrishna* (4) and *Rambhat Agnihotri* v. *The Collector of Puna* (5). In the former case the appeal was allowed; and the appellant's argument which prevailed was stated by Mr. Mahadev Chimnaji Apte in these words: "The prescriptive title given by section 1 of the Regulation could not be taken away either by Act XIV of 1859 or Act IX of 1871 in the absence of any provision, either express or implied, to that effect. But neither of the Acts contains any such provision". In his judgment, conceding this argument, Sir Michael Westropp refers to the Privy Council's decision in *Maharana Fatesangji* v. *Desai Kallianrayaji* (6) to the effect that section 1 of Regulation V of 1827 is "an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV of 1859, and to stand unrepealed in the Presidency of Bombay." We remark in parenthesis that the Regulation stood unrepealed till it was repealed by the Limitation Act of 1871. The Act of 1859 did not purport in any manner to repeal or supersede the Regulation.

To revert to Sir Michael Westropp's judgment, the learned Chief Justice says in a later passage that the defendant in that case had acquired a prescriptive title by his uninterrupted possession as proprietor for more than thirty years previously to the passing or coming into force of Act IX of 1871. And towards the end of his judgment where *Surtees* v. *Ellison* (7) was considered, the Chief Justice goes on to say, that in the opinion of the Bench "a title acquired under an enactment of positive prescription, such as Regulation V of 1827 before it was repealed, is a transaction past and closed."

As we have noted, the Regulation of 1827 was not repealed till 1871, and it is clear that if that date is to be accepted as the ultimate date up to which the defendants' possession should be reckoned, they have far more than the statutory period in their favour. In *Rambhat Agnihotri's* case (5) similar language was held by the Chief Justice, who points out that the law of prescription in this Presidency remained as it was established by the Regulation of 1827 until that Regulation was expressly repealed by section 2 of Act IX of 1871.

These authorities seem to us to decide the point now in controversy. Mr. Jayakar

(4) 1 B. 286.
(5) 1 B. 592.

(6) 10 Bom. H. C. R. 281; 21 W. R. 178; 13 B. L. R. 254; 1 I. A. 34.
(7) (1829) 9 B. & C. 750 at p. 752; 4 Man & Ry. 586; 7 L. J.(o. s.) K. B. 335; 109 Eng. Rep. 278.

seeks to avoid their authority on the ground that this particular case is a case of an alienation from a trustee, and he argues that at least so far as the case of trustees is concerned, the Regulation of 1827 must be held to be repealed by section 2 of the Act of 1859. The rule of interpretation is, of course, that where, as here, the later Act does not purport or affect to supersede an earlier Act, the Court will endeavour to read the two enactments together and to avoid conflict if possible. It appears to us that conflict in this case is easily avoided.

On the authorities which we have quoted, the reason why section 1 of the Bombay Regulation is not affected by the Act of 1859 is, because that section of Regulation deals with positive prescription, while the Act of 1859 deals only with the limitation of suits. But if that is a good principle of distinction, it applies, we think, just as much to the case of trustees as to the case of any other person. Section 2 of the Act of 1859 which deals with trusts is as much a section devoted to the limitation of suits as any other section in the Act: and if the other sections are held for the reasons stated not to involve any interference with the prescriptive rights conferred by the Regulation, section 2 of the Act is equally incapable of causing any such interference.

On these grounds, we think that the decision of the lower Court is right, and we dismiss the appeal with costs. One set of costs.

Decree confirmed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 15 OF 1910.

April 24, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

SHIVANDAS BUDHARMAL—APPELLANT

versus

MULOMAL AND OTHERS—RESPONDENTS.

Set off—Equitable set off—Unascertained amount—Distinct transactions—Credit given on faith of goods deposited.

The equity of set off arises out of the recognition of the natural justice of allowing the balance only to be recovered in cases where there have been mutual credits. It arises as a rule when the cross-demands are connected by being part of the same transaction or series of transactions. But it may arise otherwise, it may arise where the transactions are distinct, if the one party has given credit to the other on the faith of goods deposited by the other party with him.

Appeal from the decision of the Sub-Judge, 1st class, Sukkur.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *Isardas Oodharam*, for the Respondents.

JUDGMENT.—The appellant sued to recover a sum of money due from the respondent as balance of a commission agency account. The respondent was allowed to set off an amount due to him by the plaintiff as damages in respect of two contracts of sales of grain to the plaintiff.

The set off was of an unascertained amount and the lower Appellate Court has, therefore, allowed the set off only as an equitable set off. Mr. Dipchand contends that as the cross-demands arose out of different transactions the one should not have been set off against the other. Now the equity of set off arises out of the recognition of the natural justice of allowing the balance only to be recovered in cases where there have been mutual credits. The Courts will take hold of a very slight thing in order to give effect to this equity and to do justice.

No doubt, in addition to the cross-demands there must be some equity connecting them and calling for the application of the rule of set off. This arises as a rule when the cross demands are connected by being part of the same transaction or series of transactions. But it may arise otherwise—it may arise where the transactions are distinct if the one party has given credit to the other on the faith of goods deposited by the other party with him. Here at the time of the contracts of sale either the plaintiff's grain was lying with the defendant for sale as commission agent or the defendant had those sale-proceeds in his possession.

We don't think it would be putting any undue strain on the evidence if we inferred that the credit given to plaintiff was on the faith of this money or these goods for the defendant seems to have habitually bought and sold for the plaintiff. This would

establish an equity connecting the transactions and justifying the set off.

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 498 OF 1912.

March 19, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

BISSESHUR SANAMAT—JUDGMENT-DEBTOR—APPELLANT

versus

JASODA LAL CHOWDHRY—DECREE-HOLDER—RESPONDENT.

Limitation—Execution of decree—Mortgage decree under old Code—Several applications for execution—Last application under new Code, but after twelve years from decree—Applicability of the new Code—Civil Procedure Code (Act XIV of 1882), *s.* 230—*Civil Procedure Code (Act V of* 1908), *s.* 48.

A mortgage decree passed under the old Civil Procedure Code cannot be executed after twelve years from the decree if the last application for execution is made after the new Civil Procedure Code of 1908 has come into operation.

A preliminary decree on a mortgage was passed on September 22, 1896, and it was made absolute on April 27, 1897. There were many applications for execution, and on April 28, 1908, the seventh application was preferred, but it was dismissed. Then the new Civil Procedure Code came into operation on January 1, 1909. On December 18, 1911, the present application was made twelve years after the date of the decree:

Held, that the present application was not in continuation of the next preceding application and was, therefore, barred under section 48 of the new Civil Procedure Code of 1908.

Konsilla v. *Ishri Singh*, 6 Ind. Cas. 188; 32 A. 499, 7 A. L. J. 420, not followed.

Appeal from the order of the District Judge of Backergunge, dated September 18th, 1912, confirming that of the Sub-Judge of Barisal, dated June 29th, 1912.

Babu *Ram Chandra Majumdar* and *Abinash Chandra Guho*, on behalf of the judgment-debtor, Appellant, contended that, although the decree was passed under the old Civil Procedure Code of 1882, and, therefore, being a mortgage decree it did not come under section 230 of that Code, that it could be executed at any time after the passing of the decree and not restricted to the limitation of twelve years from the date of the decree like a money decree, yet as section 48 of the new Code has done away with the distinction between money decrees and mortgage decrees in this respect and provided that no decree can be executed after twelve years from its date, and as the present application has been made after twelve years from the date of the decree, it is barred under section 48.

Babus *Dwarka Nath Chakravarti* and Dr. *Sarat Chandra Basak*, on behalf of the decree-holder, Respondent, submitted that as the decree was passed under the old Code, section 48 of the new Code restricting the time for execution should not be held to apply to it. The decree being passsd under the old Code and being a mortgage-decree can be executed at any time under section 230 of the old Code which applies to it. See *Konsilla* v. *Ishri Singh* (1).

JUDGMENT.

JENKINS, C. J.—This is an appeal from an appellate order made in execution proceedings. The decree holder, who had obtained a decree on a mortgage, applied successfully to the Court for sale of the property. Thereupon, the judgment-debtor presented the application out of which the present appeal arises. He sought to have this sale order set aside on the ground that the application was barred under section 48 of the Code of Civil Procedure. His application was dismissed by the Subordinate Judge and this order has been confirmed by the lower Appellate Court. It is from this last order of the lower Appellate Court that the present appeal is preferred. It is necessary to set out a few facts to explain the case. The preliminary decree on the mortgage was passed on the 22nd of September 1893, and it was made absolute on the 27th of April 1897. The application for sale which is impugned by the application now under consideration was made on the 18th of December 1911 more than twelve years beyond the date of the decree. This, it is said, brings into play the provisions of section 48 of the present Code of Civil Procedure which provides that "where an application to execute a decree (not being a decree granting an injunction) has been made no order for the execution of the same decree shall be made

(1) 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420.

upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed." By way of answer to this, it is brought to our notice that there were many applications for execution and that on the 28th of April 1908, the seventh application was preferred. On that application there was a sale, but on the 9th of May 1911 that sale was set aside by the High Court. The decree-holder again sought to make his decree fruitful and made an application for sale. That was allowed by the Subordinate Judge but on appeal the District Judge dealt with the matter in this way: He said:—"It is urged on behalf of the judgment-debtor that inasmuch as the original prayer was superseded by the amended application there was only one prayer which was for the sale of half the property and that having been declared illegal, there is no application at all of which the Court can take cognizance. This argument appears to me to be well-founded. There can be no doubt that the amended application took the place of the original application which is, therefore, to all intents and purposes non-existent. That being so, I cannot see how, when the amended application has been dismissed, the decree-holders can now fall back on the original as though it were still unamended. I would, therefore, allow this appeal leaving the decree-holders to file a fresh application." The just result of that order was that the application of the 28th of April 1908 was dismissed. It is the order of dismissal that has occasioned the trouble in this case. The first question that we have to consider is whether the application for sale which was subsequently granted and is now being impugned is a fresh application within the meaning of section 48 or a continuation of the application of the 28th of April 1908. Seeing that the application of the 28th April was dismissed, it appears to be impossible to treat this as a continuation of that dismissed application. Is it then a fresh application within section 48? It has been argued before us that it is not, or at any rate, that the bar that arises, after the expiration of twelve years as provided by that section does not apply. There is authority for this review in *Kounsilla* v. *Ishri Singh* (1). But I must confess that I feel some difficulty as to the decision in that case. When it was put to the learned Vakil for the respondent in this case whether he was making his application under the Code of 1908 or the repealed Code of 1882, he had to concede that it was the new Code of 1908. If so, then section 48 is an integral part of that Code, and no application under that Code, as it appears to me, can be made in disregard of its express conditions, I say that bearing in mind the provisions of section 6 of the General Clauses Act. In this connection it is important to observe that the Legislature evidently considered this Code might and would interfere with rights for there is an express provision in section 154 that "nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement," a provision that would have been unnecessary unless the Code as framed would affect existing rights, under the old Code. It has been urged before us that this view would involve hardship that rights would be imperilled, if not confiscated, but this overlooks the provision which prescribed that though the Code was passed in March 1908, it should not come into operation until January 1909. That provision afforded ample opportunity to all persons having rights under old Code to enforce them before the new Code came into operation.

In my opinion the decision of the District Judge is erroneous, and I think his order must be reversed and the application for sale set aside as barred by section 48 of the Code of Civil Procedure.

The respondent must pay the appellant's costs, hearing fee, two gold *mohurs*.

MULLICK, J.—I agree.

Order reversed.

BIKHOMAL *v.* RAJALMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 26 OF 1910.

April 25, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

BIKHOMAL AND OTHERS—APPELLANTS

versus

RAJALMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 11, *O. II, r.* 2—*Mortgage—Redemption suit dismissed as premature—Subsequent suit for redemption not barred—First suit for declaration and account—Fixing time for payment—Power of Appellate Court.*

Plaintiff, who was in possession of the property mortgaged by him to the defendant, sued for a declaration that the mortgage had been satisfied and for recovery of a certain sum of money which had been overpaid to the mortgagee. The suit was dismissed as premature on the ground that the mortgage debt had not been satisfied.

Subsequently plaintiff sued for redemption.

Held, (1) that treating the first suit as a redemption suit, the second suit was not barred by the operation of *res judicata*;

(2) that the first suit was more than a mere suit for account and did not bar the second suit by Order II, rule 2, of the Code of Civil Procedure.

An Appellate Court when making its own decree is at liberty to fix a fresh date for redemption with reference to the date of its own decree.

Obiter dictum.—Though a redemption decree does not extinguish the equity of redemption until an order for sale is made on an application by the mortgagee, the remedy of the mortgagor to bring a second suit may be barred by *res judicata*.

Appeal from the decision of the Sub-Judge, 1st class, Sukkur.

Mr. *Wadhumal Oodharam*, for the Appellants.

Mr. *Rupchand Billaram*, for the Respondents.

JUDGMENT.—The respondent-plaintiff sued for redemption of a mortgage executed by their assignor to the father of the defendants-appellants in 1891.

The first Court decreed redemption on the payment of Rs. 2,229 and costs on the 1st June 1909.

The lower Appellate Court varied the decree by fixing the 1st June 1910 as the date for redemption.

This is a second appeal by the sons of the sons of the original mortgagee. It is said that the present suit is barred by a previous suit filed by the plaintiffs in 1899 —either by the rule of *res judicata* or by the rule against the splitting of a cause of action enacted in Order XII, rule 2, of the Civil Procedure Code.

In the suit of 1899 the plaintiff sued for a declaration that the mortgage had been satisfied and for recovery of Rs. 61-12-0 which had been overpaid to the mortgagee. The plaintiffs contended that the suit was a redemption suit and the defendants denied that the suit was of that character. The Sub-Judge did not decide whether the suit was or was not a redemption suit but dismissed the suit as premature, as he found that the mortgage debt had not been satisfied.

Now we feel no doubt but that this suit was substantially a redemption suit. It is said that it was only a suit for an account. But plaintiff asked for more than an account; he asked for a declaration that the mortgage had been satisfied, *i.e.*, redeemed. It is said that he should have asked for possession of the land mortgaged. But it is not necessary that a mortgagor suing for redemption should ask for possession if he is already in possession. It is clear from the terms of the mortgage-deed that the mortgagor was to have possession and also from the pleadings that plaintiffs were in possession in 1899.

Treating the first suit, therefore, as a redemption suit, is the present suit barred by *res judicata*.

There have been conflicting decisions on the point whether one redemption suit operates as *res judicata* to bar a second redemption suit. The doubt has arisen from the fact that a redemption decree does not extinguish the equity of redemption which subsists until an order for sale is made on an application by the mortgagee. But the better opinion is that though the right to redeem is not extinguished, the remedy is barred by the operation of *res judicata*. This seems the correct view. It was the view taken by a Full Bench of the Madras High Court in *Vedaparutti* v. *Vallabha Valiya Raja* (1). The same assumption underlies the decision of the Privy Council in *Chaudhri Ahmad Baksh* v. *Seth Raghubar Dayal* (2), for it was held that a mortgagor seeking to redeem was

(1) 25 M. 300; 12 M. L. J. 128 (F. B.).

(2) 28 A. 1; 7 Bom. L. R. 912; 2 C. L. J. 413; 2 A.L. J. 813; 10 C. W. N. 115; 15 M. L. J. 407; 9 O. C. 7; 32 I. A. 229 (P. C.).

not barred by the dismissal of a prior redemption suit only by reason of the fact that he was then a minor and not properly represented. But here the former suit did not bring into issue or adjudicate on the right of redemption. Treated as a redemption suit, it was dismissed as premature on the ground that the cause of action for redemption had not arisen. Mortgage money was still due and there was no tender or offer to pay that amount in the plaint. In this respect the case is very similar to that of *Dondi Bahadur Rai* v. *Tek Narain Rai* (3).

The next contention is that this suit is barred by Order II, rule 2, in that the first suit was for an account only and, therefore, the latter suit is barred. The case of *Bhau Balaji* v. *Hari Nilkanthrav* (4) is quoted in support of this argument. If the former suit had really been one for account only it would have been necessary to consider whether section 15-D of the Dekhan Agriculturists' Relief Act has retrospective effect for this section was expressly enacted to remove the bar created by section 43 of the Code of 1882. See *Laluchand* v. *Girappa* (5). The point, however, does not arise, for the first suit was more than a mere suit for an account. It is said that plaintiffs omitted to sue for possession in that suit, but we have already observed the plaintiffs were then in possession and the cause of action for possession has arisen subsequently.

The last contention is that the lower Appellate Court had no power to extend the period fixed for redemption. But the lower Appellate Court, dealt with the whole decree not with any one term of that decree. It had power to reform and supersede the decree of the original Court and make its own decree the final decree in the suit. There is no doubt that if the period fixed for redemption had not been indicated by a date, but were expressed as a specified period of time, that time would have counted from the appellate decree—*Daulat* v. *Bhukandas* (6), for as said by West, J., in that case the Appellate Court draws up the decree of the lower Court and gives it existence as if made on the day upon which it was thus adopted. The mere fact that the first Court fixed a date makes no difference to the principle and the Appellate Court when making its own decree is at liberty to fix a fresh date for redemption with reference to the date of its own decree.

We, therefore, confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(3) 21 A. 251; A. W. N. (1899) 50.
(4) 7 B. 377.
(5) 20 B. 467.
(6) 11 B. 172.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 519 OF 1912.

October 24, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar.

CHINAPA KARBASAPA LAKMANHALLI—APPELLANT

versus

LADASAHEB BABASAHEB—RESPONDENT.

Step-in-aid of execution—Notice for arrest of judgment-debtor served—Judgment-debtor failing to appear—Warrant issued—No record of application—Presumption—Civil Procedure Code (Act XIV of 1882), s. 245B.

Where a judgment-debtor fails to appear after a notice under section 245B, Civil Procedure Code. 1882, is served on him, and a warrant for his arrest is issued by the Court in the presence of the decree-holder's Pleader, the proceedings constitute an application to take a step-in-aid of execution although there is no record in the proceedings as to any application or requisition by the decree-holder for the issue of a warrant.

As the Court cannot issue a warrant without requisition on the part of the decree-holder, it may be presumed under the circumstances that due application was made for the issue of a warrant.

Dungarsi v. *Ujamsi*, 22 B. 727 and *Bapuchand* v. *Mugutrao*, 22 B. 340 relied upon.

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 192 of 1910, confirming that passed by the first class Subordinate Judge at Dharwar, in Darkhast No. 393 of 1908.

Mr. *G. K. Dandekar*, for the Appellant.

Mr. *D. R. Patwardhan*, for the Respondent.

JUDGMENT.—The question is whether the *darkhast* which has been issued in this case is barred by limitation. It is suggested that there was a bar of limitation between the date of the plaintiff's second *darkhast* of

the 18th of June 1904 and his third *darkhast* of the 26th of June 1907.

The first point urged by the Pleader for the appellants was that there was a step-in-aid of execution on the 31st of August 1904. On that date the notice, which had been issued under section 245-B calling on the judgment-debtor to show cause why he should not be arrested, was returned served, but the defendant did not appear. Under those circumstances, the Code provides by section 245-B (2), that if appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. A warrant was issued by the Court for the arrest of the judgment-debtor and it appears from the *raoznama* that the plaintiff's Pleader was present at the time. There is, however, no record in the *raoznama* or in the proceedings of the case as to any application or requisition by the decree-holder for the issue of a warrant.

It appears to us, however, from the wording of the section, that this was a case in which the Court would not have issued a warrant without requisition on the part of judgment-creditor and under those circumstances we hold that it may be presumed that due application was made on behalf of the decree-holder for the issue of a warrant, and if such application was made that would be a step-in-aid of execution. The presumption that such application was made may be supported upon the authority of the judgments of the Chief Justice in *Dungarsi* v. *Ujamsi* (1) and *Bapuchand* v. *Mugutrao* (2).

We reverse the order of the lower Appellate Court and remand the *darkhast* for execution according to law.

The costs of this appeal and those in the lower Appellate Court must be borne by the respondent.

Order reversed.

(1) 22 B. 727.
(2) 22 B. 340.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3402 OF 1910.

February 24, 1913.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Sheikh KADER BAKHSH AND OTHERS —PRINCIPAL DEFENDANTS NOS. 1, 2 AND 3— APPELLANTS

versus

RAM MANIKYA DAS—PLAINTIFF AND THE REMAINING DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 5—Raiyat, meaning of—Person taking settlement from joint co-sharer without consent of other co-sharers, whether raiyat.

A person who obtains a settlement of agricultural land from the holder of undivided share in a *zemindari* without the assent of the other joint holders, is not a *raiyat* within the meaning of the Bengal Tenancy Act.

Appeal from the decree of the Officiating Second Sub-Judge of Mymensingh, dated June 15th, 1910, affirming that of the Third Sadar Munsif, dated August 4th, 1909.

Babus *Dwarka Nath Chakravarti*, *Baikuntha Nath Dass* and *Surendra Nath Dass*, for the Appellants.

Babus *Harendra Narain Mitra* and *Kali Kinkar Chakravarti*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover possession of land alleged by the plaintiff to belong to him in tenant-right. The landlord's interest in the land is held jointly by the Bhawal Raj and a person named Kripamoyi Debi. The tenant's interest was formerly held by Kailas Chandra Das and his brothers. These persons owned a holding consisting of four plots of land, one plot being homestead and the other three being agricultural. On the 5th *Sraban* 1311 the homestead plot was sold to the brother of the plaintiff by Kailas Chandra Das and on the 6th of the same month the three agricultural plots were sold to Bukshi the defendant No. 2. Thereafter Kailas Chandra abandoned the village and the holding. It is admitted that there is no custom authorising transfers of occupancy rights in that locality without the consent of the landlord. Neither the plaintiff's brother nor the defendant Bukshi, therefore, obtained any right by purchase. For the purposes of this case it is sufficient to say that the result so far was that the holding was vacant and at the disposal of the landlords.

The lands in dispute are the three plots

of agricultural land above referred to. The plaintiff claims to have obtained a settlement of these plots from the landlords and complains that he has been dispossessed by the defendants. The defendants also claim to have obtained a settlement and assert that the plaintiff never obtained possession. The findings are that each party did get a settlement of some kind and that the settlement with the plaintiff was prior to that with the defendants. The Courts of first instance and first appeal both held that the prior settlement with the plaintiff was valid to the extent of the share of the Bhawal Raj in the land, *i. e.*, eight annas odd. The suit was, therefore, partially decreed. The defendants appeal to this Court and contend that the settlement with the plaintiff should have been held to be entirely invalid.

The facts found are as follows. The landlord's interest in the land is held to the extent of eight annas odd by the Bhawal Raj and to the extent of the remaining seven annas odd by one Kripamoyi Debi. The Bhawal Raj was being administered by Rani Belashmani Debi as executrix to the Will of the last holder, when the Court of Wards took charge of the Raj. It is now conceded that under a ruling of this Court the Court of Ward's action was *ultra vires* and when the Rani instituted a suit against the Court of Wards, the latter withdrew from charge of the Raj. During the period of the Court of Ward's management, the plaintiff obtained a settlement from the manager. The manger, however, had no authority to grant a settlement of the entire sixteen annas for the Court of Wards represented the eight annas odd share only and the other share-holder Kripamoyi Debi did not join in the settlement. After Rani Bilashmani Debi resumed charge as executrix from the Court of Wards, the defendants obtained a settlement of the land from her and from Kripamoyi, that is, from the proprietors of the entire sixteen annas. This settlement with the defendants must prevail unless it be held that the prior settlement made by the Court of Wards with the plaintiff is binding on the Rani Bilashmani. It must be remembered that the Court of Ward's possession was not rightful and that, therefore, if the ordinary principles of law be applied, the Court of Wards had no right at their disposal which they could confer on the plaintiffs. The learned Subordinate Judge has for the purpose of getting over this difficulty applied the principle enunciated in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1). In that case the defendants obtained possession as tenants from certain persons who were in actual *bona fide* possession of the *zemindari*. These persons were afterwards found to have no title and the question was whether the true owners who recovered possession upon proof of their title could eject the defendants without notice. It was held that the defendants having obtained a right to hold the land for the purpose of cultivating it, a right which was a good right at any rate against all but the true owners, came within the definition of the word '*raiyat*' in the Bengal Tenancy Act and could not, therefore, be ejected except under the provisions of that Act. It must be noticed that the decision of the case rested entirely on the question whether the defendants were *raiyats* within the meaning of the Tenancy Act or not. The decision of the present case must rest on the same principle. The distinction between the present case and the case referred to is that on that case the settlement was made by holders of the entire sixteen annas whereas in the present case the Court of Wards who made the settlement held an eight annas share only. We have, therefore, to decide whether a person who obtains a settlement from the holder of an undivided share in a *zemindari* without the assent of the other joint holders is a *raiyat* within the meaning of the Tenancy Act. In determining this question for the purposes of such a case as the present we are justified in applying considerable strictness [*Sheo Nandan Roy* v. *Ajodh Roy* (2), *Nundo Kumar Nasker* v. *Banomali Gayan* (3), *Jonab Ali* v. *Rakibuddin Mallik* (4), *Peary Mohun Mandal* v. *Radhika Mohun Hazra* (5), *Kazi Nawaz Khoda* v. *Surendra Nath De* (6),

(1) 20 C. 708.
(2) 26 C. 546 at p. 552; 3 C. W. N. 336.
(3) 29 C. 871 at p. 878.
(4) 1 C. L. J. 303 at p. 305; 9 C. W. N. 571.
(5) 5 C. L. J. 9 at p. 14.
(6) 5 C. L. J. 33 at p. 39; 11 C.W.N. 201; 34 C. 109.

Upendra Narain Bhuttacharjee v. *Protap Chunder Pardhan* (7).]

We have been pressed to hold that when a joint co-sharer landlord settles agricultural land without the consent of his co-sharers, the person with whom the land is settled is a *raiyat*. It has been argued that authority for this proposition will be found in the cases of *Hulodhar Sein* v. *Jooroo Doss Roy* (8), *Radha Proshad Wasti* v. *Esuf* (9), and others in which it is held that the remedy of the dissentient co-sharer in such a case is to sue for joint possession. But we observe that not one of these cases is authority for the proposition contended for. It is nowhere said that a person brought in by one co-sharer only without the assent of the others is a *raiyat*, on the contrary in the latest case of this kind, *Hossein Mahomed* v. *Fakir Mahomed* (10), Jenkins, C. J., expressly refrains from deciding the point. Doss, J., had dealt with the question from the point of view that an occupancy right in respect of a share of a holding cannot be created. The case came before Jenkins, C. J., and Mookerji, J., by way of appeal under the Letters Patent and Jenkins, C. J., decided the question upon the ground that in such a case it is impossible to treat the defendant as a mere 'trespasser. The word *raiyat* is not mentioned in the judgment although the contention must have been expressly raised.

We are of opinion that from every point of view a person with whom land is settled by one co sharer only without the consent of the others cannot be held to be a *raiyat* "No man has a right to intrude upon *ijmali* property against the will of the co-sharer or of any of them" [*Radha Proshad Wasti* v. *Esuf* (9)], a single co-sharer has no right to arrange for such an intrusion. To hold the contrary is inconsistent with the doctrine of the unity of possession between co-sharers under which each is entitled to possession of every portion of the joint property. The principle is recognised by section 183 of the Tenancy Act and to hold that a single co-sharer can by himself create a *raiyati* right of any kind without the consent of his co-sharers would be inconsistent with the whole tenor of the Act. We are fortified in our position by the opinion expressed by Banerjee, J. in the case of *Hari Charan Bose* v. *Runjit Singh* (11), an opinion concurred in by Doss, J. in the case of *Hosain Mahomed* v. *Fakir Mahomed* (10), a *raiyat* is a person who holds land for the purpose of cultivating it. The right to hold land for the purpose of cultivating it can ordinarily be conferred only in its entirety for "the cultivation of an undivided fractional share of a parcel of land will ordinarily be meaningless." We are, therefore, of opinion that the plaintiff in this case when he obtained settlement from a joint fractional co-sharer without the consent of the other co sharers did not thereby become a *raiyat*. The principle laid down in *Binod Lal Parkashi* v. *Kalu Pramanick* (1), has, therefore, no application. The general rule that no person can confer upon another any right in property which is not his own must apply and it must be held that the plaintiff obtained no right from the Court of Wards.

It has been contended that the Court of first instance came to a finding that the plaintiff's tenancy was recognised by Rani Bilashmani after she recovered possession. The Court of first instance found that the plaintiff never was in possession of the land as he alleged and we do not think the findings considered as a whole amount to a finding that the tenancy was recognised.

The plaintiff, in our opinion, failed to prove his title. The appeal is allowed and the suit dismissed with costs in all Courts.

Appeal allowed.

(11) 25 C. 917 *Note*; 1 C. W. N. 521.

(7) 31 C. 703, 8 C. W. N. 320.
(8) 20 W. R. 126.
(9) 7 C. 414; 9 C. L. R. 76.
(10) 4 Ind. Cas. 740; 10 C. L. J. 618.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 798 OF 1912.
March 28, 1913.
Present:—Justice Sir Henry Griffin, Kt., and Mr. Justice Ryves.
RAM CHARAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
HUB BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.
U. P. Land Revenue Act (*III of* 1901), *ss.* 111, 233-*K*—

RAM CHARAN *v.* HUB BAHADUR PINGH.

Partition proceedings—Suit for declaration of possession —Jurisdiction of Civil Court.

A suit for declaration that the plaintiff is in possession of a property which is the subject-matter of a partition, does not come within the scope of section 111 of the Land Revenue Act. Hence a suit filed for such declaration in a Civil Court while partition proceedings are pending is barred by the provisions of section 233-K.

Second appeal from the decision of the District Judge of Jaunpur, dated the 22nd of March 1912.

The Hon'ble Mr. *Gokul Prashad*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondents.

JUDGMENT.—The defendants applied for partition in the Revenue Court of a certain village. There was a bazar standing on a part of the village land. The plaintiffs filed objections in the Revenue Court to the effect that this bazar was their exclusive property. By an order of the Revenue Court they were referred to the Civil Court to obtain a declaration to this effect. Thereupon a suit was brought out of which this appeal has arisen in which they asked for the following relief, namely, that a declaratory decree may be passed in favour of the plaintiffs against the defendants to the effect that the plaintiffs are the owners in possession of bazar Gulzarganj situate in *Mauza* Raiya, *Pargannah* Mariahun District Jaunpur, and that the defendants had no right to the said bazar. At the hearing of the case the Pleader who appeared on behalf of the plaintiffs made a statement to explain what the plaintiffs intended in asking for a declaration that the defendants had no right in the said bazar. The statement shows what the plaintiffs really meant was that though the bazar formed a portion of the village the plaintiffs had been in exclusive possession of it for over twelve years and that a declaratory decree be passed accordingly so that at the time of partition they may claim to have this bazar in their share and the defendants may get compensation for this and other lands. The Court of first instance held that the plaintiffs and their ancestors had been in exclusive possession of the bazar. That Court observes in its judgment:—"The plaintiffs do not claim adverse title to that of the defendants in respect of this bazar, nor do they want it to be excluded from the land belonging to the proprietary body of the village. What they want to be declared is that they are in possession of it like other property". The decree passed by the Court of first instance was to the following effect:—"That the plaintiffs' claim for declaration that they and not the defendants are in possession of bazar Gulzarganj in *Mauza* Raiya, *Pargannah* Mariahun, District Jaunpur, though both the parties have proprietary right in the land occupied by the bazar be decreed. The defendants appealed and in their appeal they challenged the findings of the Court of first instance on issues of fact. The Court below has confirmed the findings of the Court of first instance and the decree passed by it. Two grounds are taken in second appeal to this Court. But they are not seriously pressed. The real ground which the learned Vakil on behalf of the appellant really presses is that the Courts below should not have in view of the amended relief claimed by the plaintiffs given any decree in favour of the plaintiffs at all. We have been referred to the provisions of section 233 (*k*) of the Land Revenue Act which bars the jurisdiction of a Civil Court in all matters relating to partition of *mahals* except as provided in sections 111 and 112 of the same Act. Section 111 provides that where any objection is made by a recorded co-sharer involving a question of proprietary title that question may by order of the Revenue Court be referred to the Civil Court for determination. In the plaint, as presented to the Court of first instance, the question of proprietary title to the bazar was clearly raised. In the course of the trial, however, it transpired that all that the plaintiffs really asked for was a decree declaring that the bazar was in their exclusive possession. A suit for a declaration of this nature is not a suit which could be brought in a Civil Court having regard to the provisions of sections 111 and 233 (*k*) referred to above, and the Courts below if their attention had been drawn to these provisions would, no doubt, have dismissed the suit. A Revenue Court is not concerned with the partition of buildings. We express no opinion as to the ownership of the buildings comprised in the bazar. As the relief eventually claimed raised no question of proprietary

title the suit is not one which could be brought under the provisions of section 111 of the Land Revenue Act.

We must, therefore, allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiffs' suit. As this point was not raised in the Courts below we do not allow the defendants-appellants their costs. The parties will bear their own costs in the Courts below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1502 OF 1912.

March 31, 1913.

Present:—Mr. Justice Rattigan.

JHANDA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BUDHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—*Limitation, decision on the issue of—Question of law—Mixed question of law and fact*—Res judicata.

Where in a redemptien suit the issue of limitation was decided in favour of the plaintiff but on a subsequent date the suit was dismissed under Order IX, rule 2:

Held, on the institution of a fresh redemption suit by the plaintiff, that the decision on the question of limitation in the first suit operated as *res judicata* inasmuch as the issue involved not merely a question of law but a mixed question of law and fact.

Muazam Shah v. *Alam Khan*, 44 P. R. 1908 referred to.

Second appeal from the decree of the Additional Divisional Judge of the Amritsar Division, at Sialkot, dated the 2nd day of July 1912, reversing that of the Munsif, 2nd class, Pathankot, dated the 21st day of April 1911, decreeing the claim.

Mr. *Asghar Beg*, for the Appellants.

Shaikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—On the 9th June 1909 plaintiffs sued for recovery of possession of specified lands by redemption of a certain mortgage which they alleged to exist. The value of the suit for purposes of jurisdiction was Rs. 9. Defendants urged as a preliminary objection that the suit was barred by limitation, and this objection was upheld by the Court of first instance, by its order dated the 7th August 1909, and plaintiffs' suit was dismissed. An appeal was thereupon preferred to the Divisional Judge who, by order dated the 20th April 1910, held (1) that there *was* a mortgage of the land; (2) that the said mortgage had not been proved to have been effected earlier than 1852; and (3) that the suit was, consequently, within time. He accordingly accepted the appeal and remanded the case for decision on the merits. This order of the Divisional Judge was final, as no further appeal lay, as of right, from any decree that he might have passed.

The case was thus remitted to the Court of first instance, and after three abortive hearings, the plaintiffs' claim was eventually dismissed, on the 28th June 1910, on the ground that plaintiff had failed to pay the Court-fee chargeable for service of summonses upon the defendants. The Munsif further remarked, obviously as a reason for enforcing the strict provisions of Order IX, rule 2, Civil Procedure Code, that the plaintiff had given much trouble to the defendants and had not taken the trouble to bring on the record the representatives of one of the defendants who had died. The order dismissing the suit was, however, in express terms passed under Order IX, rule 2, of the Code.

On the 8th October 1910 the present suit was brought (under Order IX, rule 4, of the Code) by the same plaintiff against the same defendants, and in it the plaintiff relied upon the same cause of action and prayed for the same relief as in the previous suit.

Defendants once again raised the preliminary plea that the suit was barred by time. The Munsif decided this and their other pleas against the defendants and granted plaintiff a decree for redemption of the land in suit upon payment of Rs. 9. Defendants thereupon appealed to the Divisional Judge who held that as the present was a fresh suit, based on a new plaint, he was not bound by the order of the Divisional Judge in the former suit, especially as the question of limitation was one of law, and that he was, therefore, competent to decide for himself the question whether the suit was or was not within time. Having so held, he thereupon proceeded to

find that there was in fact no proof of the existence of any mortgage at all, and that, in any event, plaintiffs had failed to prove that the mortgage referred to in the entry of 1852 had been effected within 60 years of suit. He accordingly accepted the appeal and dismissed plaintiffs' suit as time-barred.

Plaintiff has preferred a second appeal to this Court, and it has been urged on his behalf that the question whether the suit was within time had been duly heard and finally decided in the previous suit between the same parties and was, therefore, *res judicata*. In my opinion this contention must prevail. Admittedly, the issue whether the plaintiffs' claim was within time was raised in the former suit, and admittedly that suit was one between the same parties, and was based on the same cause of action as in the present suit. The issue whether the suit of 1909 was time-barred was directly and substantially involved in, and obviously material to, the determination of the former suit, inasmuch as if it had been decided in defendant's favour that suit must necessarily have been dismissed *in limine*. It was duly considered and a formal decision given thereon by the final Court of appeal, (that of the Divisional Judge), and in the circumstances I fail to see how it can now be successfully contended that that decision does not now operate as *res judicata*. The issue was not one merely of law, but involved questions of law and of fact, and the former decision of the Divisional Judge was based on his finding that there *was* a mortgage, and that such mortgage had been effected in 1852, or in other words, within 60 years of suit. The determination of a mixed question of law and of fact may operate as *res judicata* [see *Muazam Shah* v. *Alam Khan* (1)] and none the less so, because the particular issue which has been so finally determined is of a preliminary character, provided, of course, that it is material to the determination of the suit and there has been a final decision thereupon. For example, suppose that *A*. sues to recover certain property on the ground that he is the son of *B*., the deceased owner. The defendant raises the preliminary objection that *A*. is not the son of *B*. and, therefore, has no *locus standi*. A preliminary issue is framed upon this point and the final Court of appeal decides that *A*. is the son and heir of *B*., and as much has a *locus standi* to maintain the suit. The case is accordingly remanded to the Court of first instance under Order XLI, rule 23, Civil Procedure Code, for determination upon the merits. It is, however, subsequently dismissed by that Court under Order IX, rule 2, of the Code, with the result that *A*. brings a "fresh suit" under the provisions of Order IX, rule 4. Is it open to the defendant to urge once again the plea that *A*. is not the son of *B*.? I cannot possibly think so. The case might possibly be different if there had been no decision of the Appellate Court upon the point. If, for example, the Munsif had decided the question of *A*.'s legitimacy in his favour, but had nevertheless dismissed his suit under Order IX, rule 2, or on some other ground. In such a case, the defendant would have no opportunity of challenging the finding by appeal, and there would thus be no *final adjudication* upon it, and it might, therefore, be possibly open to the defendant to contend that the finding could not reasonably be held to be *res judicata*, [but even as to this, see *per contra*, the decision in *Peary Mohun Mukerjee* v. *Ambika Churn Bandopadhya* (2)] But that is not the case here, and upon the particular facts now before me, I must hold that the question whether the present suit is within time, must be determined by reference to the findings of the Divisional Judge in the former suit that there *was* a mortgage and that such mortgage was effected in 1852. As the present suit was brought within 60 years from that date, it must be held to be within time. I, therefore, accept the appeal and under Order XLI, rule 23, Civil Procedure Code, remand the case to the Divisional Judge for determination of the appeal before him upon the merits.

Costs will abide the event.

Appeal accepted.

(1) 44 P. R. 1908.

(2) 24 C. 900.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 182 OF 1910.

November 12, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

BALMUKUND KESURDAS—APPELLANT

versus

BHAGWANDAS KESURDAS—RESPONDENT.

Admission—Evidence—Estoppel—Ejectment suit—Plaintiff to succeed on his own title—Will—Attestation—Acknowledgment of signature—Succession Act (X of 1865), s. 50—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Alternative defence—Power of legal representative.

The express admissions of a party to a suit, or admissions implied from his conduct, are evidence and strong evidence against him. But he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition.

Brojendro Coomar Row Chowdhry v. *The Chairman of Dacca Municipality*, 20 W. R. 223; *Chandra Kunwar* v. *Narpat Singh*, 34 I. A. 27; 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.); *Hari Shankar Partab Singh* v. *Lal Rajhuraj Singh*, 34 I. A. 125; 2 M. L. T. 391; 6 C. L. J. 13; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 29 A. 519 (P. C.), relied upon.

Where a party to a suit puts forward an alternative defence, his legal representative may, on his death, rely on the alternative defence set up by him.

In doing so, the legal representative would not be making a defence inconsistent with that set up by the deceased party or inappropriate to his character as his legal representative.

In an ejectment suit, the plaintiff can succeed only on the strength of his own title.

He cannot be allowed to abandon his own case and adopt that of the defendant and on that footing claim relief.

Shibkristo Sircar v. *Ahdool Hakeem*, 5 C. 602; 5 C. L. R 455 and *Mukhoda Soondary Dasi* v. *Ram Churn Karmokar*, 8 C. 871; 11 C. L. R. 194, relied upon.

It is not necessary that a testator should sign his Will in the presence of the attesting witnesses. It is a sufficient acknowledgment by a testator of his signature to his Will, if he makes the attesting witnesses understand that the paper which they attest is his Will, even though they do not see him sign it.

First appeal from the decision of the first class Subordinate Judge at Broach, in Suit No. 553 of 1907.

Mr. *L. A. Shah*, for the Appellant.

Mr. *Jayakar* (with him Mr. *R. W. Desai*), for Respondent No. 1.

Mr. *M. W. Pradhan*, for Respondent No. 2.

JUDGMENT.—One Kesurdas Bhaktidas died in 1896, leaving three sons, Bhagvandas, Tribhovandas and Balmukunddas. Tribhovandas died unmarried on 8th May 1900. On 19th April 1905, plaintiff Balmukunddas filed this suit to recover possession of certain property from his brother Bhagvandas. He alleged that Bhagvandas had separated from the family during his father's life-time in or about the year 1886, that after his separation the father Kesurdas lived in union with his two sons the plaintiff and Tribhovandas, and that after their father's death, they continued to live in union as members of a joint family till the latter's death in 1900, that thereupon the plaintiff alone became entitled by survivorship to the property which was under Tribhovandas's management, and that after Tribhovandas's death, the defendant wrongfully and fraudulently took possession of the same. Hence this suit.

Defendant Bhagvandas contended that he had never separated from his family, that he was joint with his two brothers, and that on Tribhovandas's death he and the plaintiff were entitled in equal shares to the property in dispute. He further pleaded in the alternative that if the property be held to be the separate and self-acquired property of Tribhovandas, he alone was entitled to the whole of the property under Tribhovandas's Will.

On 10th February 1909, after Bhagvandas had been partially examined, the plaintiff applied for leave to amend the plaint by adding a prayer to the effect that in case the Court came to the conclusion that the plaintiff and defendant were equally entitled to the property in dispute, then the whole of the family property in the possession of each of the parties (including the property in dispute) should be ascertained and divided between them in equal shares.

This application for amendment was granted on 4th March 1909 on condition of plaintiff's giving full particulars of the property to be brought into hotchpot and paying additional Court-fees on the value of said property.

On 7th April 1909, Bhagvandas died leaving a widow Bai Jamna and three daughters. Thereupon, the widow Bai Jamna and one Bhurabhai Jamnadas were brought on the record as the legal representa-

tive and assignee respectively of the deceased defendant. Bai Jamna contended that the property in dispute was the separate and self-acquired property of Tribhovandas, that he had made a Will by which he bequeathed the whole of the property to her husband Bhagvandas, and that her husband had made a Will on 9th January 1901 giving the property to her absolutely. She gave up the contention which had been raised by her husband Bhagvandas that the three sons of Kesurdas were undivided.

Bhurabhai contended that Bhagvandas had sold the property in dispute to him on 7th April 1909 and that the plaintiff had no title to the property.

The Subordinate Judge held that the three brothers, Bhagavandas, Tribhovandas and Balmukunddas were separate in every respect, that the property in suit was the exclusive property of Tribhovandas, that Tribhovandas's Will was proved, and that under the said Will Bhagwandas alone was entitled to the property. He, therefore, dismissed the plaintiff's suit.

Against this decision the plaintiff has preferred the present appeal.

It is urged for the appellant in the first place that Bhagvandas having repudiated all interest under Tribhovandas's Will and having admitted that the family property was joint, it was not open to his widow and legal representative Bai Jamna to contend that the three brothers were separate, and that Bhagvandas took the property under Tribhovandas's Will. It is, no doubt, true that in paragraph 7 of the written statement the defendant Bhagwandas states that the property in dispute belonged to the joint family and that, therefore, Tribhovandas had no authority to make a Will in respect of that property. In his deposition he makes a similar statement to the effect that he did not rely upon Tribhovandas's Will and that the property belonged jointly to him and to the plaintiff. The submission paper (Exhibit 67) also shows that he had agreed to divide the whole property on the footing that it was joint. But it is to be borne in mind that he put forward an alternative case, in paragraph 8 of his written statement, to the effect that in case the Court held the property in suit to be the separate property of Tribhovandas, he alone was entitled to the same under Tribhovandas's Will. The deposition of Bhagvandas being incomplete must be left out of consideration, and the arbitration proceedings fell through owing to the conduct of one party or the other. When the present suit was filed both parties tried to hoodwink the Court by suppressing the real state of facts. Each party set up a case, alleging union or separation, just as it suited his purpose without any regard for the truth. On 2nd December 1903, the plaintiff asked for an adjournment of the case to take legal advice with reference to the subject-matter of the suit. He made a similar application on 16th December 1908, and on 10th February 1909, he at last made up his mind and applied for leave to amend the plaint by putting forward an alternative claim for a partition not only of the property in dispute but also of the whole of the family property in the possession of either party; but when this application was granted on certain conditions, he took no steps whatever to fulfil those conditions. He had family property admittedly worth about Rs. 11,000 in his possession, and although he was ordered by the Court on the 4th March 1909 to bring into hotchpot and pay additional Court-fee, he failed to do so. More than a year after the date of the Court's order, on the last day of hearing, his Pleader, during the course of his reply on the whole case, put in a list of the property which was to be brought into hotchpot. The list was found to be meagre and inaccurate, and the additional Court-fees were not paid. That being the case, under Order VI, rule 18, of the Civil Procedure Code, the amendment of the plaint could not be allowed. He must, therefore, be confined to the case as originally set out in the plaint, *viz.*, that Bhagvandas was separate in estate, while he and Tribhovandas were joint.

The admissions made by Bhagvandas that the whole of the family property was joint are by no means conclusive. In *Hearne* v. *Rogers* (1) the Court observes: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against

(1) (1829) 9 B. & C. 577 at p. 586; 4 Man. & Ry. 486; 7 L. J. (o. s.) K. B. 283; 109 Eng. Rep. 215.

him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition." This statement of the law is adopted by Lord Denman in *Newton* v. *Liddiard* (2). The same principle is laid down in *Trinidad Asphalte Company* v. *Coryat* (3); *Brojendro Coomar Roy Chowdhry* v. *The Chairman of the Dacca Municipality* (4); *Chandra Kunwar* v. *Narpat Singh* (5), *Hari Shankar Partab Singh* v. *Lal Raghuraj Singh* (6).

It is not shown in the present case that the plaintiff ever acted upon the admissions of Bhagwandas. On the contrary, the plaintiff adhered to his case as set out in his plaint up to the death of Bhagvandas. In his deposition he says:—"The defendant began to live separate from my father since Samvat 1939 (A. D. 1882-1883). When the defendant began to live separate, he was given one house, one shop, pots and pans, etc , and ornaments of the value of Rs. 3,000; and he gave up his right...Bhagvandas never lived joint with us after he became separate...He carried on business in grain in his own name. He kept separate books of account. I and he have separate priests...His business and ours was never carried on in common. Defendant was doing his business separately. I had nothing to do with it."

Even in his application for amendment of the plaint, the plaintiff adheres to this case, and applies for a general partition only in the event of the Court's holding his original case to be disproved. Thus it is perfectly clear that the plaintiff never acted upon the admission of Bhagvandas that the three brothers were joint. That being so, neither Bhagwandas nor his widow would be debarred from showing that those admissions were either mistaken or untrue.

Mr. Shah relies on Order XXII, rule 4, of the Civil Procedure Code, which provides that when a defendant dies and his legal representative is made a party to the suit, he may make any defence appropriate to his character as such legal representative. Reference is also made to Daniel's Chancery Practice, Volume 1, page 249, where it is said that a legal representative stands in the same position as the former party, and is bound by his acts. But in the present case, as we have already shown, Bhagvandas put forward an alternative defence. He distinctly claimed the whole of the property of Tribhovandas under his Will. In consequence of this alternative defence the Court raised the issues (1) whether the property in dispute was the separate or self-acquired property of Tribhovandas and (2) whether the Will of Tribhovandas was proved. These issues were raised during Bhagvandas's life-time. It was, therefore, open to his legal representative Bai Jamna to rely upon this alternative defence set up by him, and lead evidence upon those issues. In doing so, she was not making a defence inconsistent with that set up by her deceased husband or inappropriate to her character as his legal representative, and, therefore, she cannot be said to have acted in contravention of the provisions of Order XXII, rule 4, of the Civil Procedure Code.

Moreover, it is not correct to say that Bhagvandas had elected not to take under Tribhovandas's Will. As a matter of fact he accepted the bequest, took possession of the property bequeathed to him, and within a year after Tribhovandas's death he made his own Will (Exhibit 165) by which he gave the property bequeathed to him to his wife Bai Jamna. Further he appears to have relied upon the Will in a suit (No. 8 of 1901) which he had brought against the present plaintiff. Lastly he retained possession of the property left to him by Tribhovandas till his death. This course of conduct clearly and unmistakably shows, that far from repudiating, he had elected to take under Tribhovandas's Will.

It may be further noticed in this connection that this being an ejectment suit, the plaintiff can only succeed on the strength of his own title. He cannot be allowed to abandon his own case and adopt that of the defendant and claim relief on that footing

(2) (1848) 12 Q. B. 925 at p. 926; 6 Railw. Cas. 42; 18 L. J. Q. B. 53; 116 Eng. Rep. 1117.

(3) (1896) A. C. 587; 75 L. T. 108; 65 L. J. P. C. 100; 45 W. R. 225.

(4) 20 W. R. 223.

(5) 34 I. A. 27; 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.).

(6) 34 I. A. 125; 2 M. L. T. 391; 6 C. L. J. 13; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 29 A. 519 (P. C.).

see *Shibkristo Sircar* v. *Abdool Hakeem* (7), *Mukhoda Soondury Dasi* v. *Ram Churn Karmokar* (8).

The next question is, whether the property in dispute was the joint property of the plaintiff and Tribhovandas, as alleged in the plaint. On this point we have the evidence of the plaintiff alone, entirely uncorroborated by any other evidence. On the contrary there is the undisputed fact that on 7th December 1897, the plaintiff passed a release to Tribhovandas (Exhibit 176) by which in consideration of his receiving property worth about Rs. 3,000 he gave up his claim to the remaining assets of a shop which he and Tribhovandas had been carrying on in partnership. The plaintiff admits that after the date of this release Tribhovandas alone had the management of the shop up to his death. This release is quite incompatible with the alleged status of union between Tribhovandas and the plaintiff. It proves on the contrary that they were divided.

It was next contended that Tribhovandas's Will (Exhibit 169) was not genuine and that the evidence in support of the Will was not satisfactory. Two witnesses, Exhibits 168 and 169, were examined on behalf of Bai Jamna. Both of them depose that they attested the Will at the request of Tribhovandas and that the testator admitted having signed it. One of these attesting witnesses Exhibit 168, no doubt, says in cross-examination that Tribhovandas had told him that the Will was merely nominal. It is clear that this statement was made at the instigation of the plaintiff. We agree with the Subordinate Judge in his view that this witness was tampered with.

Mr. Shah contends that this evidence is not sufficient, as the Will was not signed in the presence of the attesting witnesses, while the writer was not examined. It is impossible to say at this distance of time whether the writer is alive or dead. If he is alive, there was nothing to prevent the plaintiff from examining him, and it is not necessary that the testator should sign the Will in the presence of the attesting witnesses. It is a sufficient acknowledgment by a testator of his signature to his Will, if he makes the attesting witnesses understand that the paper which they attest is his Will, even though they do not see him sign it. See *Gwillim* v. *Gwillim* (9), *Smith* v. *Smith* (10), *Beckett* v. *Howe* (11).

The Will was produced by Bhagvandas in Suit No. 8 of 1901, filed by him against the present plaintiff so far back as 9th January 1901, as appears from the Court's endorsement on the back of the Will. Plaintiff knew or must be taken to have known of the existence of this Will, and yet he took no steps to impeach either the factum or the validity of the Will before the institution of this suit. Under these circumstances we hold that the Will of Tribhovandas is satisfactorily proved.

Lastly, it is contended that the plaintiff was not allowed any opportunity to rebut the defendant's evidence in favour of the genuineness of the Will. With regard to this point, it may be noted that the suit was filed in the District Court of Broach in 1905 and was transferred to the first class Subordinate Judge's Court in 1907. The case dragged on for several years. The plaintiff gave numerous applications to call witnesses but not one was examined; and finally on 20th June 1910, the plaintiff's Pleader stated in his *purshis*, Exhibit 161, that "he had no further evidence to adduce at present." He did not state that he had reserved any evidence to rebut, if necessary, the defendant's evidence. On 20th June 1910 defendant's evidence was closed. On that day plaintiff applied for leave to give rebutting evidence and asked for four or five days' time to do so. The application was granted and the case was adjourned to 2nd July 1910. On that day, instead of examining any witnesses, the plaintiff applied to the Court to summon four witnesses, two of whom had been named before and not called. Under these circumstances, the Subordinate Judge was right in rejecting this application. It cannot fairly be contended that the plaintiff was not given any opportunity to call rebutting evidence.

The Will being satisfactorily proved, the title to the property in dispute is now vested

(7) 5 C. 602; 5 C. L. R. 455.
(8) 8 C. 871; 11 C. L. R. 194.
(9) (1859) 3 Sw. & Tr. 200; 29 L. J. P. 31.
(10) (1866) 1 P. & D. 143; 35 L. J. P. 65; 12 Jur. (N. S.) 674; 14 L. T. 417; 14 W. R. 648.
(11) (1869) 2 P. & D. 1; 39 L. J. P. 1; 21 L. T. 400; 18 W. R. 75.

in Bai Jamna, and plaintiff's claim must be rejected.

We confirm the decree and dismiss the appeal with costs.

Appeal dismissed; Decree confirmed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 143 AND 144 OF 1911.

February 28, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

RAM BHAJAN PANDAY AND OTHERS —DEFENDANTS—APPELLANTS

versus

UDIT PANDAY AND OTHERS—PLAINTIFFS —RESPONDENTS.

Arbitration—Award—Decree based on award—Appeal, whether lies—Arbitrator leaving certain work unfinished—Misconduct of arbitrator.

When a decree has followed an award, it is not appealable on the ground that the award is altogether invalid because the arbitrator failed to do certain things which he was bound to do under his appointment, nor on the ground that he has been guilty of misconduct in not carrying out the duties which were imposed on him.

Ghulam Jilani v. *Muhammad Hussain*, 29 I. A. 51; 12 M. L. J. 77 (P. C.); 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 25 P. R. 1902, and *Hunsraj* v. *Sundar Lal*, 12 C. W. N. 585; 10 Bom. L. R. 581; 7 C.L.J. 520; 138 P. L. R. 1908; 18 M. L. J. 266; 99 P. W. R. 1908; 14 Bur. L. R. 146; 80 P. R. 1908; 35 C. 648; 35 I. A. 88 (P. C.), relied upon.

Appeal from the decree of the first Sub-Judge of Gaya, dated January 31st, 1911.

Babus *Jogesh Chandra Roy* and *Chandra Sekhar Prasad Singh*, for the Appellants.

Babus *Umakali Mukherjee* and *Rajendra Prosad*, for the Respondents.

JUDGMENT.

HARINGTON, J.—In these two appeals, a preliminary objection is taken that no appeal lies. The matters in controversy between the parties had been referred to an arbitrator, the order of reference having been made by the Subordinate Judge. The arbitrator made an award on December the 23rd, 1910, and, on January the 3rd, 1911, one of the parties took exception to the award. These objections were overruled and a decree was made in accordance with the terms of the award in each suit and, against those decrees, the present appeals have been filed. We have now to determine whether these appeals can lie at all.

It is perhaps not quite clear what the precise ground of objection to the award is, but I understand from the arguments of the learned Vakil for the appellant that the objection is that the award is altogether invalid because the arbitrator failed to divide some of the properties which he ought to have divided under his appointment. If that is the objection, that is provided for under clause 14 of the second Schedule of the Code of Civil Procedure; and it was the duty of the objector to go to the Court under that section in order that the award might be remitted. Then, it is also argued that the arbitrator has been guilty of misconduct in not carrying out the duties which were imposed on him. That is a matter which would fall under clause 15; and, in either case, the decision of the Judge would be final because under clause 16 the right of appeal from the decree is expressly taken away in all cases where the judgment has been pronounced, except in so far as the decree is in excess of, or not in accordance with, the award. It is said that, inspite of that section we are entitled to interfere; but, in our view that section concludes the matter and appeals do not lie against the decrees made on an award, except in so far as the decrees are in excess of, or not in accordance with, the award. The matter has been before the Judicial Committee of the Privy Council who in the case of *Ghulam Jilani* v. *Muhammad Hussain* (1) have laid down that the object of the Civil Procedure Code is to secure the finality of an award and that where an award has been duly made on a reference in a suit and the Court has refused to set it aside, then the Court must pass a decree on it. The law has been similarly laid down in a very recent case [*Hunsraj* v. *Sundar Lall* (2)]. In that case which was an

(1) 29 I. A. 51; 12 M. L. J. 77 (P. C.); 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 25 P. R. 1902.

(2) 12 C. W. N. 585; 10 Bom. L. R. 581; 7 C. L. J. 520; 138 P. L. R. 1908; 18 M. L. J. 266; 99 P. W. R. 1908; 14 Bur. L. R. 146; 80 P. R. 1908; 35 C. 648; 35 I. A. 88 (P. C.).

appeal from the Chief Court of Punjab, the Chief Court dismissed the appeal from the decree of the District Judge on the ground that the appeal was incompetent inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award. That was a case in which it was sought to appeal against the decree which was passed in accordance with the award of the arbitrator. The Chief Court dismissed it on that ground and the Judicial Committee approved of the view taken by the Chief Court. There is not only the express enactment but there are the decisions of the Judicial Committee showing how that enactment must be enforced. For these reasons, I think that the appeals must be dismissed with costs.

I am of opinion that the justice of the case will be met if one hearing fee be given in both the cases, it having been assessed according to the scale of the Court.

We are informed that the paper-books in these cases are in the course of preparation. The respondents are entitled to the costs of the paper-book which has already been spent and the unexpended portion will be refunded to the parties.

CARNDUFF, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 119 OF 1912.

September 19, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

JAMSETJI NASSARWANJI GINVALLA AND OTHERS—DEFENDANTS—APPELLANTS

versus

HIRJIBHAI NAVROJI ANKLESARIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Fraud—Partnership—Death of a partner—Assets retained in business—Executrix of deceased obtaining order of Probate but not taking out Probate—Revocation of Probate—Conveyance of assets by surviving partners and executrix—Estate bound—Letters of Administration obtained after death of executrix—Trust—Accounts, suit for—Limitation Act (IX of 1908), ss. 10, 17, 18, Sch. I, Arts. 91, 106, 120—Contract Act (IX of 1872), s. 241—Probate and Administration Act (V of 1881), s. 50.

A partnership business was carried on by *A.* and his brothers. On 7th February 1885, *A.* died, leaving him surviving a widow, *B.*, and three minor sons, of whom the eldest was *C.* *A.* made a Will appointing his widow, *B.*, as the guardian of his minor sons and making the minors the residuary legatees of all his property including his share in the partnership business. After his death the assets of *A.* were retained in the firm by the surviving partners. Until 1895, certain sums were drawn by *B.* from the firm for the maintenance of herself and her children and she was credited with interest on the deposits and a share of the profits.

In 1895, *B.* applied for Probate of *A.*'s Will and though an order was made for the issue of Probate to her she did not actually take out Probate.

In the year 1895, the firm was in difficulties and the formation of a joint stock company was resorted to in order to prevent a financial disaster. Accordingly on 30th November 1895, the three surviving partners of *A.* and *B.* transferred to the joint stock company the property of the partnership and the estate of *A.* in consideration of Rs. 1,04,000 in fully paid up shares of the value of Rs. 200 each; out of these shares the creditors of the partnership, received fully paid up shares to the amount of their claims and 360 fully paid up shares were held in trust for the surviving partners and *B.* The unfair dealing in this arrangement was disclosed to *B.* in 1897 but she took no action in the matter, and died in 1905.

On 21st January 1909, *C.* brought this suit for rendition of accounts of all the assets of *A.* against two of *A.*'s surviving partners and the representative of the third deceased partner. In the plaint *C.* alleged that he became aware of the falsehood of the representations and fraudulent character of the transactions of 1895 in October 1907 for the first time.

On 21st April 1909, *C.* obtained Letters of Administration to the estate of *A.* with the Will annexed. After the institution of the suit, *C.* applied to the District Court to revoke the Probate supposed to have been granted to *B.* and an order of revocation was accordingly made:

Held (1) that *C.*'s suit was barred by time;

(2) that the property left by *A.* and used in the business was a loan under section 241 of the Contract Act;

(3) that it was not proved that the consent of *B.* to the conveyance of 1895 was obtained by fraud;

(4) that *B.* was perfectly competent to enter into the arrangement of 1895 as executrix of *A.*, even without obtaining Probate;

(5) that the arrangement of *A.* was binding on the estate of *A*;

(6) that the claim of *C.* for an account on the footing of the continuance of the original relations between *A.*'s estate and the partnership could not be sustained;

(7) that the District Judge had no jurisdiction to revoke a Probate which had never been issued, especially after the death of *B.* and after the grant of Letters of Administration to *C*;

(8) that time was running against *B.* as the executrix of *A.*'s Will from the date of *A.*'s death.

Fraud in the performance of a contract, apart from its making, is no ground for rescission for restoring the parties to the position which they occupied before the contract was entered into.

Article 95 of the Limitation Act has no application where, on the face of the plaint, no equitable relief is claimed on the ground of fraud.

Abdul Rahim v. *Kirparam Daji*, 16 B. 186 and *Gour Mohan Gouli* v. *Dinonath Karmokar*, 25 C. 49; 2 C. W. N. 76, followed.

Second appeal from the decision of the District Judge of Baroch, in Appeal No. 14 of 1911, reversing the decree passed by the Subordinate Judge at Ankleshwar, in Civil Suit No. 255 of 1909.

Mr. *Setalvad* with him Messrs. *Bhaishankar & Co.*, *L. A. Shah* (acting Government Pleader), and *C. M. Ghandhy*, for the Appellants.

Messrs. *Jayakar*, *Anklesaria* (with him Mr. *R. W. Desai*), for the Respondents.

JUDGMENT.—This suit was filed by Hirjibhoy Naoroji Anklesaria as the administrator with the Will annexed of Naoroji Nassarwanji Ginwalla against Jamshedji Nasserawanji Ginwalla, Ardeshir Nasserwanji Ginwalla and Dinshaw Pestonji Ginwalla, the first two being the surviving partners of Naoroji Nasserwanji and the third being the administrator *ad litem* of the estate of Pestonji, another partner who survived Naoroji, but is now dead. Naoroji Nasserwanji died on the 7th of February 1885 being then a partner with his three brothers in the cotton ginning and trading business in Gujarat which was carried on under the title of Nasserwanji Hirjibhai Cotton Ginning Company.

The plaintiff prays that the first two defendants and the third defendant as administrators of the estate of Pestonji Nasserwanji Ginwalla be directed to render an account of all the assets of the deceased Naoroji Nasserwanji Ginwalla at the time of his death retained and employed by the first two defendants and the said Pestonji Nasserwanji Ginwalla in their business with compound interest with half yearly rests at the rate of nine per cent. per annum.

His suit was filed on the 21st of January 1909, that is to say, about twenty-five years after the death of Naoroji Nasserwanji.

We gather from the findings of the District Judge that Maneckbai, widow of Naoroji, was his executrix according to the tenor of his Will and acted as such until her death in the year 1905. The assets of the deceased Naoroji were retained in the firm by the surviving partners after his death and his estate was treated by them as if Maneckbai had in her representative capacity entered into an agreement with them to remain as a partner although as a matter of fact no such agreement was entered into. The learned Judge concludes from those facts, and we think correctly, that the property left by Naoroji and used in the business was a loan under section 241 of the Contract Act.

It appears that until 1895 certain sums were drawn by Maneckbai from the firm for the maintenance of herself and her children and that she was credited with interest on deposits and a share in the profits. In the year 1895, the firm was in difficulties and the formation of a joint stock company was resorted to in order to prevent a financial disaster. By Exhibit 394, which was executed on the 30th of November 1895, the three surviving partners, together with Maneckbai as executrix of Naoroji and Dinbai as executrix of another predeceased partner Edalji, transferred to a joint stock company, registered in Bombay on the 27th of May 1895, the ginning factories which were the property of the partnership and of the estates of the deceased partners in consideration of Rs. 1,04,000 in fully paid up shares of the value of Rs. 200 each, it being arranged that out of those shares the creditors of the partnership should receive fully paid up shares to the amount of their claims, and as between the partners and the widows of the deceased partners, it was arranged that three hundred and sixty fully paid up shares should be held on their behalf in trust by a man named Gandhi according to the terms of a document Exhibit 428, which is dated the 26th of November 1895.

It was urged against the defendants that the assent of Maneckbai to the conveyance of the 30th of November 1895 to the company was induced by fraud. As to that,

the learned District Judge finds that it has not been proved that she was induced to sign it by means of fraud except that she was induced to believe that she had joined the family firm, but the Judge says that it is possible that the defendants themselves thought that she had become a partner because the monies of the deceased in the partnership had not been withdrawn.

Then it was contended that if the signature of Maneckbai to this document was not obtained by fraud, at all events fraud was practised subsequent to the execution of the document in a manner detrimental to the estate of Naoroji and that the defendants are liable to the plaintiff in respect of it. The fraud alleged is that certain creditors of the partnership received fully paid up shares in excess of the nominal value of their claims. Maneckbai, however, took no action in the matter until her death in 1905, and then, on the 21st of April 1909, the plaintiff obtained Letters of Administration to the estate of Naoroji with the Will annexed. The plaintiff in paragraph 17 A of the plaint alleges that he became aware of the falsehood of the representations and fraudulent character of the transactions mentioned above in October 1907 for the first time.

Now I will assume for the purpose of argument, without coming to a definite conclusion upon the point, that the claim of the representative of Naoroji for an account against his surviving partners was not barred in 1895. It is contended that it was not barred because of the drawings which had been allowed to Maneckbai between 1885 and 1895. In 1895, however, upon the facts found, there was a novation. The situation was completely changed with the assent of Maneckbai in order to save the assets of the partnership in which she, as representing the estate of Naoroji, was much interested. She became a party to the transfer of those assets to the joint stock company and she took as part consideration for the arrangement ninety-five fully paid up shares in the company as the equivalent of the amount of the deposit due to Naoroji from the partnership.

That was an arrangement that she as executrix was perfectly competent to enter into, and it has been found, as I have already pointed out, that she was not induced to enter into it by fraud.

Therefore, *prima facie* the arrangement is binding upon the estate and if it is so binding then the plaintiff's claim for an account against the partners on the footing of a continuance of the original relations between Naoroji's estate and the partnership which subsisted in 1885 cannot be sustained.

But it is said that though Maneckbai was not induced to enter into the arrangement by fraud, there was, at all events, a fraud in the distribution. The learned Judge finds that certain creditors were enabled to put pressure upon the partners and to get an unfair advantage for themselves in the distribution of shares. But that does not indicate any fraud aimed by the surviving partners at Maneckbai or at Naoroji's estate. Naoroji's estate and its representatives Maneckbai got in the distribution an amount of shares which they had arranged to take. Assuming, however, that there was fraud in the distribution, that is to say, in the performance of the contract, apart from its making, that is no ground for rescission and restoration of the parties to the position in which they were before the contract was entered into. It appears to us, therefore, that the act of Maneckbai in 1895 cannot be set aside and that the plaintiff's claim upon that ground must fail.

The learned Judge has, however, come to the conclusion, which does appear to follow very clearly from his findings of fact, that Article 95 of the Limitation Act can be invoked in the plaintiff's favour and that, therefore, the plaintiff is entitled to the relief by way of accounts which he claims in the plaint.

Now it is sufficiently clear upon the authorities, both in this Court and in Calcutta, that Article 95 has no application where, on the face of the plaint, no equitable relief is claimed on the ground of fraud: See *Abdul Rahim* v. *Kirparam Daji* (1) and *Gour Mohun Gouli* v. *Dinonath Karmokar* (2).

The learned Judge, however, finds that there was unfair dealing which was not disclosed until 1898 when Maneckbai was

(1) 16 B. 186.
(2) 25 C. 49; 2 C. W. N. 76.

still acting as executrix. It is, we think, clear that if it was disclosed to the knowledge of Maneckbai, as it appears to have been from a written statement put in by her in Suit No. 608 of 1897 to which we have been referred, she would be obliged to sue for any relief that she might be entitled to on the ground of fraud in distribution within three years from 1897 or 1898; but she lived and acted as executrix until 1905 without taking any action.

In order, however, to get rid of the difficulty which, it was foreseen, would arise owing to the fact that Maneckbai acted as executrix, the plaintiff applied after the institution of this suit to the District Judge, Mr. Tyabji, for an order to revoke the Probate which was supposed to have been granted to Maneckbai in 1895 of the Will of Naoroji. As a matter of fact in 1895, an order had been made by Mr. Moore, the Assistant Judge, that Probate should issue to Maneckbai as executrix of the Will of Naoroji. Maneckbai, however, never took out Probate. Therefore, no Probate ever was issued. Nevertheless, Mr. Tyabji was induced to make an order revoking the grant of Probate made on March the 7th, 1895. There was no such grant in existence, and if Mr. Tyabji under the terms of section 234 had a jurisdiction on the grounds stated to him to revoke the Probate which, we think, is extremely doubtful, he certainly had no jurisdiction to purport to revoke a Probate which had never been issued, quite apart from the fact that Letters of Administration to the same estate had already been granted by him and that person who, he supposed had obtained Probate, was already dead. He seems to have recognised his mistake after the appeal in this suit had come before him, because, he states in his judgment that "when the order for Probate was revoked, it was not known that Maneckbai had acted as executrix." This attempt to revoke the Probate, which did not exist, was apparently resorted to with the idea that it might help the plaintiff in argument to get over the effect of the acts of Maneckbai as executrix.

It was contended by Mr. Jayakar, as we understood, on behalf of the respondents, that the Court would not regard the acts of Maneckbai as the act of an executrix, because she had not taken out Probate of the Will. But the plaintiff has himself got over that difficulty by taking out Letters of Administration with the Will annexed. That appears clearly from Williams on Executors, page 222, and the case of *Johnson* v. *Warwick* (3), which is there referred to.

Then the District Judge having come to the conclusion, without stating his reasons, that time did not run against the executrix from the time when she became aware of the unfair distribution in 1898, says—"Assuming that the plaintiff knew all the facts which entitle him to sue the defendants before 1909, an assumption which is not borne out by the evidence, although it appears from his letters and evidence that he and his elder brother and others took part in a consultation with Mr. Manecksha Taleyarkhan, who was a High Court Pleader, before shares were distributed, and that he heard in or about 1895 that the estate of his father was not legally a partner, that he suspected in 1896 that the full amount due to the estate had not been paid, all this information was received by him before he became administrator." That, however, does not appear to us to be any answer, because time was running against Maneckbai as executrix of the Will from the date of the death of the testator, she being a person who even without Probate was capable of instituting a suit, although she might not be able to proceed as far as decree without taking out Probate. The learned Judge then proceeds to state that "he, that is, the plaintiff, had not become fully acquainted with the facts on or before the date of the plaint and the failure was not due to negligence on his part." We are not aware upon what ground he bases this conclusion, and if it were necessary to decide the question with reference to the plaintiff's knowledge, we might have to remand the case for a further and better finding upon the point.

We are, however, of opinion that the suit is barred for the reasons already stated. We, therefore, reverse the decree of the District Judge and dismiss the suit with costs throughout on the plaintiff.

Decree reversed.

(3) (1856) 17 C. B. 516; 25 L. J. C. P. 102; 26 L. T. (o. s.) 220; 104 R. R. 780.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 150 OF 1912.

February 24, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

BHAJAN BEHARI SHAHA—JUDGMENT-DEBTOR—APPELLANT

versus

GIRISH CHANDRA SHAHA—DECREE-HOLDER—RESPONDENT.

Execution of decree—Limitation—Date of decree—Date of judgment—Delay in complying with Court Fees Act in stamping decree—Payment of Court-fee to complete decree—Step-in-aid of execution—Limitation Act (IX of 1908), *Sch. I, Art.* 182, *and cl.* (5).

Whatever the date on which a decree may be stamped as required by the Court-Fees Act, the date of the decree for the purposes of Article 182 of Schedule I of the Limitation Act of 1908 must be taken to be the date of the judgment.

The payment of the Court-fee is merely a proceeding for validating the decree, and is not a step-in-aid of execution.

Appeal from the order of the first Sub-Judge of Dacca, dated March 1st, 1912.

Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*, for the Appellant.

Babu *Harendra Narayan Mitra*, for the Respondent.

JUDGMENT.—In our opinion the order from which this appeal has been preferred is not correct. The decree of which execution is sought bears date the 20th of August 1907. Article 182 of the Limitation Act, by which limitation in this case is governed, provides that the period for the execution of the decree is three years from the date of the decree. The date of the decree is that which is indicated in section 205 of the Civil Procedure Code of 1882 and Order XX, rule 7, of the present Code. It is provided by the *rule* that the decree shall bear date the day on which the judgment was pronounced. This is the view of the date of the decree that has been accepted by the High Courts of Calcutta, Bombay and Allahabad. It is, however, urged that as the decree in this case was not stamped as required by the Court Fees Act, until the 23rd of June 1911, the present applicants, as claimants under defendants Nos. 14 and 15, are outside this rule. I fail to follow that reasoning. It appears to me that whatever the date on which the applicants or their predecessors chose to comply with the Court Fees Act, the date of the decree for the purposes of Article 182 must be taken to be that which I have indicated. As an alternative it is suggested that the payment of the fee was a step-in-aid of execution. But I cannot so regard it. It was merely a proceeding for validating the decree in favour of defendants Nos. 14 and 15, and in no sense a step in execution or in aid of execution.

For these reasons I hold that the appeal must be allowed with costs, hearing fee one gold *mohur*.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 603 OF 1906

September 13, 1907.

Present:—Mr. Justice Miller.

SRINIVASA PILLAI—PLAINTIFF—PETITIONER

versus

KANNAN, MINOR, BY HIS MOTHER AND GUARDIAN VENKATAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), *s.* 16—*Endorsement in full—Actual words of direction to pay not necessary—What is equivalent to a direction sufficient.*

If an endorsement contains what is equivalent to a direction to pay to the endorsee, though it may not contain actual words of direction, it would contain a direction to pay within the meaning of section 16 of the Negotiable Instruments Act.

An endorsement to the effect that the note had been made over to so and so on a particular date over the signature of the payee, with the delivery of the note to the endorsee, is an endorsement in full and can operate as a negotiation.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif's Court of Tiruvellore, in Small Cause Suit No. 755 of 1906.

Mr. *B. Sitarama Rao* for Mr. *T. V. Muthukrishna Aiyar*, for the Petitioner.

Mr. *K. C. Desikachariar*, for the Respondents.

JUDGMENT.—I think the District Munsif is wrong and that there is here an endorsement in full. The endorsement runs: "This note has been made over to so and so on 31st March" and is signed by the payee and the note so endorsed was delivered to the endorsee. The only question is whether in the absence of a direct request to pay, the endorsement

can operate as a negotiation. It seems to me that if it contains what is equivalent to a direction to pay to the endorsee, though it may not contain actual words of direction, it will contain a direction to pay within the meaning of section 16 of the Negotiable Instruments Act. I think the endorsement in the present case can be construed as a direction to pay the amount of the note to the person named in it, and is an endorsement in full (compare the cases noted in Bigelow on Bills, Edition of 1893, p. 69).

The District Munsif's decree must, therefore, be set aside and the suit remanded for disposal.

Costs will abide the result.

Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 420 OF 1910.

June 6, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

BASHESHAR NATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Diwan DEVI PERSHAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), *Sch. I, Arts.* 113, 144—*Agreement declaring rights of parties—Completion of title—Suit for partition on basis of agreement—Accrual of right to sue—Compromise of disputed and doubtful rights—Consideration—Misrepresentation inducing agreement*—Onus probandi—*Agreement acted upon—Minor—Hindu Law—Joint family—Members of Hindu joint family—Act of adult members for minor's benefit—Question taken up by Court* suo motu.

On the 19th January 1904, three sets of claimants to the property left by a deceased person entered into a compromise by which they settled their conflicting claims amicably and drew up an agreement which was registered.

Shortly after, however, some of the claimants applied for Letters of Administration to the estate. During the pendency of the proceedings, in March 1904, there was a note of the Court that the Counsel of one set of the claimants objected to the compromise on the ground that they had been imposed upon in the matter of the degree of relationship of the other claimants. Letters were given jointly to three different sets of parties as agreed in the compromise. None of the parties appealed. But another person, alleging himself to be the adopted son of the deceased entered a *caveat*, appealed and the case was sent back for re-trial. On the 24th May 1907, Counsel for one of the claimants stated that the agreement was void on account of compulsion and misrepresentation and because it was without consideration, it was added that the agreement had nothing to do with a suit for Letters of Administration. Issues as to the relationship of the parties to the deceased only were framed. Letters were granted to one of the claimants. No decision was given as to the mutual settlement.

On the 8th March 1909, one of the claimants instituted a suit for possession by partition of one-third share of the property left by the deceased, which was alleged to be in the joint possession of the parties on the strength of the registered agreement, dated the 19th January 1904:

Held, (1) that the suit was not barred by time. The Article applicable to the facts of the case was Article 144 of the first Schedule to the Limitation Act and not Article 113;

(2) that by the agreement, the whole of the property left by the deceased was considered as having become lawfully vested in all the three sets of claimants jointly in equal shares, and nothing remained to be done by any one party in future with a view either to complete its own title to the one-third share of the property or to convey to the other parties their respective shares in the same;

Talewar Singh v. Bahori Singh, 26 A. 497 at p. 499; A. W. N. (1904) 72, distinguished.

Sornavalli Ammal v. *Mathayya Sastrigal*, 10 M. L. J. 208; 23 M. 593 and *Kuldip Dube* v. *Mahant Dube*, 11 Ind. Cas. 605; 34 A. 43 at pp. 46, 47; 8 A. L. J. 1138, referred to.

(3) that even if Article 113 were applicable, the right to sue accrued, not in March 1904, but in 1907;

(4) that the agreement embodied a compromise of disputed and doubtful rights, which was entered into in good faith by all the parties concerned and consequently there was valid consideration for the agreement;

Rajunder Narain Rae v. *Bijai Gobind Singh*, 2 M. I. A. 181 & 253 (P. C); 18 Eng. Rep. 269 and 296; *Olati Pulliah Chetty* v. *Varadarajulu Chetty*, 31 M. 474; 18 M. L. J. 469, referred to.

(5) that the onus of proving that the agreement in question was entered into by the defendants by reason of certain misrepresentations on the part of the plaintiffs, lay upon defendants;

(6) that the compromise was to some extent at least acted upon by the parties as appeared from their conduct in relation to the Letters of Administration proceedings;

(7) that the point that the agreement was not binding upon some of the parties, who were minors at the time it was entered into, ought not to have been taken up by the District Judge on his own motion. The alleged minors, at the time of the agreement, being members of a joint Hindu family with the other defendants who were adults, must be bound by the agreement, as the latter acted as *de facto* guardians on their behalf and for their benefit in entering into the agreement in question.

First appeal from the order of the District Judge, Delhi, dated 21st March 1910, decreeing plaintiffs' claim.

The Hon'ble R. B. *Shadi Lal* and Rai Sahib Lala *Sukh Dial*, for the Appellants.

The Hon'ble K. B. *Muhammad Shafi*, for the Respondents.

BASHESHAR NATH *v.* DEVI PERSHAD.

JUDGMENT.—This is an appeal from a preliminary decree passed by the District Judge of Delhi in a suit brought by the plaintiffs-respondents against the defendants-appellants and also against *Musammat* Rakhi and Kaka Mal (who have been impleaded as respondents in this appeal) for possession, by partition, of one-third share of the property left by *Musammat* Ram Dai, widow of one Umrao Singh, a resident of Delhi. Umrao Singh died about 45 years before suit, and the property left by him came into the possession of his widow, who succeeded to the usual life-estate. She died on the 12th December 1903, and upon her death three sets of claimants put forward their claims to the property of Umrao Singh, namely, (1) plaintiffs, (2) defendants Nos. 1 and 2 and (3) defendants Nos. 3 to 8. The first two sets of claimants each claimed to be the collaterals of Umrao Singh. The second set of claimants alleging that they were the deceased's nearest collaterals and as such entitled to succeed exclusively to the property; while defendants Nos. 3 to 8, constituting the third set of claimants who are admittedly the grandsons and great-grandsons of the sister of Umrao Singh, denied that the deceased had left any collaterals and claimed to be entitled to the whole of the property to the exclusion of the other claimants. On the 19th January 1904, these three sets of claimants entered into a compromise by which they settled their conflicting claims amicably and drew up an agreement which was registered on the 20th January. The present suit is based upon that agreement and its provisions will be noticed in detail later on. Meanwhile a short account of previous litigation with regard to the property left to *Musammat* Ram Dai will help to an understanding of the facts of the case. This account is contained in the judgment of the District Judge and it may be reproduced here with advantage:—

"On the 10th February 1904, defendant No. 2 and the husband of defendant No. 1, applied for Letters of Administration to the estate. The present plaintiffs and defendants Nos. 3 to 8 and Gowardhan Das, all entered *caveats*. On the 12th March 1904, Gowardhan Das stated that his son, Radha Mohan, was adopted by deceased.

"This objection was overruled on the ground that the application of the 19th January 1904 did not mention such adoption and that it was plainly an afterthought. On the same date there is a note of the Court that the Counsel of defendants Nos. 3 and 7 objected to the compromise on the ground that they were imposed on in the matter of the degree of the relationship of the other claimants. It was ordered by the Court that Letters of Administration should be given jointly to three different sets of parties as agreed to in the compromise. This order was given at plaintiffs' instance. They pleaded the compromise and asked that action be taken on it.

"Against this order Radha Mohan appealed to the Chief Court, and the case was sent back for re-trial by order, dated the 4th January 1907.

"On remand, the Counsel of defendant No. 3 stated on the 24th May 1907, that the agreement was void on account of compulsion and misrepresentation and because it was without consideration. It was added that the agreement had nothing to do with a suit for Letters of Administration. Issues as to the relationship of parties with Umrao Singh only were framed. No one produced evidence except Radha Mohan. The District Judge held, that Radha Mohan was not adopted and granted Letters of Administration to defendant No. 3, as there was no doubt as to his relationship. No decision was given as to the mutual settlement.

"Various appeals were filed against this order which were decided by the Chief Court on the 12th February 1909. The order of the District Judge was upheld." The present suit was instituted by the plaintiffs-respondents on the 8th March 1909, and the substantial relief asked for by the plaintiffs against defendants-appellants was for possession by partition of one-third share of the property left by *Musammat* Ram Dai, which was alleged to be in the joint possession of the parties on the strength of the registered agreement, dated the 19th January 1904. The defendants raised various pleas which it is unnecessary to set out here in detail, as their nature and scope are sufficiently clear from the following issues which were drawn by the District Judge:—

"(1) Was the execution of the mutual

settlement, dated 19th January 1904, obtained by the false representations alleged?

"(2) Is the deed of settlement otherwise invalid for reasons stated in the pleas or not?

"(3) Did defendants Nos. 3 to 8 subsequently ratify by their conduct the settlement?

"(4) Is the suit within time?

"(5) Are defendants barred from raising the plea of invalidity of the agreement because they have failed to get it set aside within time?"

"It was agreed that the words, 'otherwise invalid for reasons stated in the pleas' in the 2nd issue, included, apart from matters covered by issue (1), the following:—

"(*a*) without consideration;

"(*b*) contrary to law, *i. e.*, against public policy;

"(*c*) that it was never acted upon;

"(*d*) that the plaintiffs themselves acted contrary to it;"

Upon these issues the District Judge held:—

(1) that the false representations alleged to have been made by the plaintiffs before the agreement of the 19th January 1904 was executed were not proved to have been made by them;

(2) that the agreement in question was not without consideration or against public policy and that it was acted upon by both parties;

(3) that defendants Nos. 3 to 7 ratified the agreement by their conduct; and

(4) that the suit was within limitation.

As a result of these findings, the learned District Judge passed a preliminary decree for partition of the property in suit in favour of the plaintiffs, and from that decree defendants Nos. 3 to 8 have preferred an appeal to this Court.

On behalf of the appellants their learned Counsel has contended, *first*, that the plaintiffs' suit must be regarded as one for specific performance of a contract; that their right to sue accrued on the 12th March 1904, on which date, it is said, the appellants refused to abide by the agreement of the 19th January 1904, and that, therefore, the suit, which was brought on the 9th March 1909, was barrred by limitation under Article 113 of the first Schedule to the Limitation Act; *secondly*, that the agreement of January 1904 was without consideration and, therefore, void and unenforceable; *thirdly*, that the agreement was voidable on account of misrepresentation; *fourthly*, that the agreement was not acted upon by the parties; and *fifthly*, that those appellants, who were minors at the time of the agreement, are not bound by it. We proceed to deal with these contentions *seriatim*.

Upon the question of limitation, we have no hesitation in holding that Article 113 of the first Schedule to the Limitation Act has no application to the facts of this case and that the suit is not barred by time. Briefly put, the argument of the appellants' Counsel is that the agreement of January 1904 embodies a contract executory in its nature and not a completely executed contract, that it was agreed between the parties that each set of claimants, shall become owner of one-third share of the property in dispute after certain preliminary steps had been taken for obtaining a joint succession certificate or a joint grant of Letters of Administration, that the alleged rights of the parties in the property were not recognised as existing *in praesenti*, but that they had to be established *in futuro*, inasmuch as under the agreement each party had a right, if otherwise enforceable, to compel the other parties to carry out its terms at a future time. We think that this argument is based upon a complete misinterpretation of the terms of the document in question and we do not see our way to accept it. The agreement is printed at pages 9 and 10 of the paper-book and its provisions are correctly summarised by the District Judge in the following passage in his judgment:—

"The deed of compromise is an agreement between the three different sets of parties, binding them on the following conditions:—

(1) Each party shall be owner of one-third.

(2) The three parties shall obtain joint Letters of Administration. If this is impossible in law, then the party, obtaining the grant, will give the other parties their share, and the other parties will be entitled to partition either by consent or through the Court. The obtaining of Letters of Administration by one would confer no special right on him.

(3) In the proceedings for Letters of Administration, any objections by other claimants to be resisted jointly.

(4) There are only the three sets of heirs. Any other claimant would be resisted by all the different sets. The agreement has been executed without taking into consideration whether any party is legally entitled to any share or not. It is a final decision.

(5) Besides the property known to be in existence and entered in the deed, any other property of the deceased, which might be discovered later, would also be divided in equal shares."

With regard to the first clause set out above, we may note that the correct translation of the vernacular words used in the agreement is that each party shall *continue to be* owner of one-third; and this clause, read with the fourth clause of the agreement, makes it clear that by the agreement the title of each set of claimants to one-third share of the property was recognised as a subsisting title, that the whole of the property left by *Musammat* Ram Dai was considered as having become lawfully vested in all the three sets of claimants jointly in equal shares, that so far as proprietary rights in that property were concerned, each party admitted the others to be co-owners with itself of the property, and that nothing remained to be done by any one party in future with a view either to complete its own title to the one-third share of the property or to convey to the other parties their respective shares in the same. The contention of the appellants' Counsel that the agreement did not declare the subsisting titles of the parties and that their respective titles had to be perfected in future leads to the anomalous results that at the time when the agreement was executed none of the parties, including the appellants, were owners of the property, and that either the property belonged to no one, or that it belonged to Radha Mohan, the alleged adopted son of *Musammat* Ram Dai. If upon the death of *Musammat* Ram Dai, it became vested in the appellants as the *bandhus of* Umrao Singh, it is unquestionable that by the agreement of 19th January 1904, under which the doubtful claims of the rival sets of claimants were settled by a compromise, the latter also acquired each a complete title to a one-third share of the property and it was upon the footing of such complete title that they agreed to join with the appellants in taking proceedings for obtaining a joint succession certificate or a joint grant of Letters of Administration to the property of the deceased. Upon no other hypothesis can the real object and scope of the agreement be explained, and we, therefore, hold that it embodied an executed contract and not a contract which was executory in its nature.

In connection with this part of the case the appellants' Counsel relied upon the decision in *Talewar Singh* v. *Bahori Singh* (1). That case is very clearly distinguishable from the present, there the compromise which was the basis of this suit and which was held to be governed by Article 113 of the first Schedule to the Limitation Act declared that the parties should transfer the one to the other different portions of the property which were in dispute. No steps were actually taken to complete the transfer thus recited as having been agreed to between the parties, but one of the parties brought a suit to recover the properties agreed to be transferred to him. It was held by the High Court that the suit was one for specific performance of the contract embodied in the compromise and that Article 113 aforesaid was applicable to it. In the body of the judgment the learned Judges distinguished the case of *Sornavalli Ammal* v. *Muthayya Sastrigal* (2), in which the Madras High Court had held that the Article applicable to the claim put forward in that suit for recovery of immoveable property was Article 144 and not Article 113. In that case, as it appears from the judgment," said the learned Judges of the Allahabad High Court, "the title to the property was declared in the plaintiffs' favour by the award, and the award did not provide for the execution of any instrument between the parties or the performance of any condition precedent to the plaintiffs' enjoyment of the land. In other words, the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to possession of it from that date. It is apparent from what we

(1) 26 A. 497 at p. 499; A. W. N. (1904), 72.
(2) 23 M. 593; 10 M. L. J. 208.

have said that this case does not govern a case, such as that which is now before the Court, in which no title is declared by the award. There is merely a recital in the award of agreements entered into between the parties to do certain acts in reference to immoveable properties." This extract from the judgments of the learned Judges of the Allahabad High Court contains the *ratio decidendi* of the case before them and it clearly shows that the present case is analogous to the Madras case referred to in their judgment, inasmuch as by the agreement of January 1904 the title to one third share of the property in dispute was definitely declared in plaintiffs' favour and, therefore, they acquired under the agreement a complete title on the date of the agreement to the said share and became entitled to joint possession of it with the other parties from that date. There was no necessity for them to obtain from the defendants a conveyance in their favour in respect of that one-third share and no such conveyance was provided for in the agreement. The above-mentioned decision of the Allahabad High Court has been noticed in a very recent case decided by the same Court, *Kuldip Dube* v. *Mahant Dube* (3), and in their judgment in the latter case the learned Judges commenting upon the earlier decision say:—

"The facts of this case are worth noting because the *ratio decidendi* is significant. It appears that certain matters in dispute between the parties had been referred to arbitration and that the arbitrator delivered an award in accordance with a compromise entered into by the parties themselves. This award directed, amongst other things, that each party should transfer certain immoveable property to the other and the suit was by one of the parties concerned for recovery of the property agreed to be conveyed. It was held that this was a suit for specific performance of a contract within the meaning of Article 113 of the second Schedule of the Indian Limitation Act. The plaintiff had at the time of his suit no valid title to the property which he claimed what he possessed under the terms of the award was a right to compel the opposite party to give him a valid title-deed by executing a conveyance in his favour. Such a suit may perhaps be a suit for 'specific performance' in the strictest sense of the words."

From these observations it is clear that the present case is not governed by the ruling in *Talewar Singh* v. *Bahori Singh* (1) and that the Article applicable to this case is Article 144 to the first Schedule to the Limitation Act, and not Article 113.

The suit of the plaintiffs is, therefore, amply within limitation. But even if Article 113 were applicable to this case, we think, for the reasons given by the District Judge, that the plaintiffs' right to sue in respect of their one-third share in the property in dispute accrued, not in March 1904 when Counsel for defendants Nos. 3 and 7 simply disputed the validity of the agreement on certain grounds, but in 1907 when performance of the agreement was refused by the defendants and when the Letters of Administration were granted to defendant No 3 alone.

Despite the fact that in March 1904 defendants Nos. 3 and 7 contested the validity of the agreement, Letters of Administration were granted jointly to all the parties to that agreement and the present defendants-appellants accepted that grant as valid and preferred no appeal against the order making the grant. They, therefore, acted upon the agreement *pro tanto*, and it does not lie in their mouth to say that the performance of the agreement was refused by them in 1904 and that the present plaintiffs then acquired the right to sue for specific performance of the same.

With regard to the second contention advanced by the appellants' Counsel, namely, that the agreement of January 1904 was without consideration and, therefore, void, it is only necessary to point out that it embodied a compromise of disputed and doubtful rights, which was entered into in good faith by all the parties concerned and that consequently there was valid consideration for the agreement. The passage in Leake on Contracts (5th edition, page 439), which has been referred to by the appellants' Counsel, really supports the other side. It runs thus:—'Disputed and doubtful claims to legal or equitable rights will support the consideration for a compromise and forbearing to sue for or releasing a *bona fide* claim, which is reasonably doubtful in fact

(3) 11 Ind. Cas. 705; 34 A. 43 at p. 46, 47; 8 A. L. J. 1138.

or in law, though no proceedings have been commenced, is a good consideration." The observations of their Lordships of the Privy Council in *Rajunder Narain Rae* v. *Bijai Gobind Singh* (4) and the decision of the Madras High Court in *Olote Pulliah Chetty* v. *Varadarajulu Chetty* (5) also support the conclusion that the agreement of 1904 was not a void agreement.

The remaining three contentions can be disposed of in a few words. The *onus* of proving, that the agreement in question was entered into by the defendants by reason of certain misrepresentations on the part of the plaintiffs, lay upon defendants [*Rajunder Narain Rae* v. *Bijai Gobind Singh* (4)], and as they have given no evidence whatever to prove the alleged misrepresentations, the third contention must fail. The defendants-appellants had ample opportunity of producing all their available evidence, and they are not at all entitled to a remand to enable them to produce additional evidence on the point under consideration. Further, the compromise was to some extent at least acted upon by the parties as appears from their conduct in relation to the proceedings under Act V of 1881 and the fact that they accepted a joint grant of Letters of Administration to the estate of the deceased under that Act and resisted the claim of Radha Mohan, which was preferred in opposition to them all, shows that some of the conditions laid down in the agreement were duly carried out by them.

As regards the contentions that since some of the defendants-appellants were minors at the time of the agreement it was not binding upon them all, it is only necessary to say that this point was not raised in the Court below by the defendants concerned and that it was taken up *suo motu* by the District Judge, who seems to have decided it partly against them and to have left it partly undecided.

We think that this point ought not to have been taken up by the District Judge on his own motion and in any case the contention is *prima facie* untenable, as the defendants-appellants who are alleged to have been minors at the time of the agreement were members of a joint Hindu family with the other defendants who were adults and the latter acted as *de facto* guardians on their behalf and for their benefit in entering into the agreement in question. The agreement must, therefore, be treated as binding upon them equally with other members of the family.

For the foregoing reasons we maintain the decree of the District Judge and dismiss this appeal with costs.

Appeal dismissed.

(4) 2 M. I. A. 181 & 253; 18 Eng. Rep. 269 & 296.
(5) 31 M. 474; 18 M. L. J. 469.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 413 OF 1912.
February 14, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
HADI HASAN KHAN—PLAINTIFF—APPELLANT
versus
PATI RAM—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 4, Ch. X—Land, meaning of—Grove, not land held for agricultural purposes—Resumption of rent-free grants.

Land held as a grove whether on payment of rent or not is not 'land' held for agricultural purposes. The word 'land' in Chapter X of Agra Tenancy Act which deals with resumption of rent-free grants, is used in the same sense as in section 4 (2).

Sheo Mangal v. *Sardar Singh*, 2 Ind. Cas. 985; 6 A. L. J. 749; *Megh Singh* v. *Nazar Fatima*, Select Dec. Board of Revenue, 4 of 1911, referred to.

Where there was no evidence that at the time when a particular piece of land was granted rent-free it was a grove but it was proved that the grove existed since 1836, the presumption is that the trees were planted with the consent of the *zemindars*.

Second appeal from the decision of the District Judge of Bareilly.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Muhammad Rahmutullah*), for the Appellant.

Mr. *Govind Prasad*, for the Respondent.

JUDGMENT.—This was a suit under sections 150 and 154 of the Tenancy Act for resumption of a rent free grant. The plaintiff alleged that the grant was made for the performance of a specific service in connection with the Holi which he no longer required. The Assistant Collector decreed the claim but on appeal his decision was reversed on the ground that the land being grove land was not land held for agricultural purposes within the meaning of section 4 (2) of the Tenancy Act,

and was not land within the meaning of the word as used in Chapter X of the Act.

In the papers prepared at the Settlements of 1836 and 1872 the land was recorded as held under a service grant, and during the current Settlement it is recorded as a rent-free grant, and the *wajib-ul-arz* says that the land shall be held subject to the service to be rendered at the Holi.

The District Judge has not recorded a definite finding that the land is held rent-free on account of the service but on the evidence no other conclusion is possible.

The plot, however, is a grove, apparently a mango grove, and has been recorded as such at all the three Settlements. 'Land' is defined in the Tenancy Act as land let or held for agricultural purposes. The latest reported opinion of the Board of Revenue is that a grove is not laud as defined in the Act [see *Megh Singh* v. *Nazar Fatima* (1) where a previous decision of the Board regarding a guava grove was considered and distinguished]. In *Sheo Mangal* v. *Sardar Singh* (2), two Judges of this Court doubted whether a grove was land within the meaning of the definition contained in the Act, but the question was not definitely decided and as far as we are aware never has been decided by this Court.

It is impossible to say whether the plot was a grove when the grant, now in question, was made but assuming that it was not then a grove it has been a grove since 1836 and it must be presumed that if the trees were not standing on the land at the time of the grant they were subsequently planted with the consent of the proprietor.

In our opinion land held as a grove whether on payment of rent or not is not land held for agricultural purposes, and we can discover no reason for holding that the word 'land' is used in Chapter X of the Act otherwise than in the sense indicated by the definition.

In this view it must be held that the suit was not maintainable under Chapter X of the Act, nor would it avail the plaintiff if we were to treat the suit as one for ejectment of a tenant, for a rent-free grantee is not a tenant as defined in the Act.

(1) Select Decisions, No. 4 of 1911.
(2) 2 Ind. Cas. 985; 6 A. L. J. 749.

It appears to us that if the plaintiff has any remedy it is by way of a suit in a Civil Court. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 40 OF 1909.

March 19, 1913.

Present:—Justice Sir Richard Harington, Bart. and Justice Sir Herbert Carnduff, KT.,

HARMANAGE NARAIN SINGH—

PLAINTIFF—APPELLANT

versus

RAM GOPAL ACHARI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Mother succeeding son—Power of endowment—Temple built by husband—Idol installed without husband's authority by widow—Validity of endowment—Spiritual benefit.

If a Hindu widow exceeds her power in making a religious endowment in respect of her husband's property, the entire settlement is void.

A Hindu built a temple but did not instal any idol therein nor did he authorise the installation of any idol. There was no evidence that he intended to set up an idol. After his death his son succeeded and after the death of the son, the son's mother succeeded. She executed a deed of endowment in respect of certain properties inherited by her from her son and established an idol:

Held, that she had only a very limited power of alienating property for religious purposes and that only when it could conduce to the spiritual welfare of her deceased husband; that the installation of an idol and the endowment of its temple did not come within the category of acts which conduce to the spiritual benefits of the deceased husband; that a Hindu widow cannot, therefore, endow an idol with her husband's property or a portion thereof to the detriment of the reversioners, for such a dedication could only be supposed to conduce to the spiritual benefit of the widow herself; that a mother's powers to conduce to the spiritual welfare of her son, whose property she has inherited, are less than those of a widow to promote the spiritual benefit of her husband, and that, consequently, the endowment in the present case was invalid.

Lakmi Narayan v. *Kushali*, Borrodaile's Rep. 412; *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* 8 M. I. A. 500; 2 W. R. (P. C.) 59; 19 Eng. Rep. 620, *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy*, 1 W. R. 48 and *Ram Kawal Singh* v. *Ram Kishore Das*, 22 C. 506, relied upon.

Appeal from the decree of the Sub-Judge of Mozafferpur, dated September 22nd, 1908.

Babu *Shorosai Charan Mitra* and Dr. *Dwarka Nath Mitter*, for the Appellant.

Babus *Golap Chandra Sarkar* and *Lakshmi Narayan Singh*, for the Respondents.

HARMANAGE NARAIN SINGH *v.* RAM GOPAL ACHARI.

JUDGMENT.

HARINGTON, J.—This is an appeal by the plaintiff against the judgment of the Additional Subordinate Judge of Mozafferpore in a suit for possession of certain land. The plaintiff claimed as the reversionary heir of the last full owner and his claim was resisted on the ground that the lands in question had been dedicated to the maintenance and worship of certain idols. The property in question formerly belonged to Babu Kamala Proshad Narayan Singh. He died in the year 1874 leaving a son and heir named Dwarka Pershad Narayan Singh and his widow *Musammat* Ram Nandan Koer surviving him. Dwarka Pershad Singh died while yet a child in the year 1876. And his mother then succeeded as his heiress to the property in question. In the year 1897 she executed a deed of endowment in respect of the property in question. The learned Subordinate Judge came to the conclusion that the deed executed by the lady was a *bona fide* endowment of the land for religious purpose but he thought that she had exceeded her powers in alienating so large a proportion of the property she had inherited for this purpose. He, therefore, gave the plaintiff a decree for a moiety of the land which was the subject of the suit.

In appeal before us it has been contended that on the Judge's own finding the decree in favour of the defendants cannot stand, because having found that she had exceeded her powers in making the endowment, that she did, he should have held that the entire settlement was void and should not have made a settlement which was other than the settlement made by the lady. It has also been contended that the endowment was an illusory transaction and that the real object of the lady was under the cloak of religious endowment to benefit some of her favourite retainers out of the property which ought to go to the reversionary heir of her deceased son. Lastly it is contended that even if the settlement be treated as a genuine endowment for religious purpose then the lady had no power to alienate the family property for such a purpose.

Now the first question to be considered is one of fact, namely, was this a genuine endowment or was it merely an illusory transaction. The deed itself, which was executed on the 29th of July 1897, is a registered document. It recites that there was a temple of Mahadeo Ji constructed by the widow of one Ganga Pershad an ancestor of the executant and that of her husband. In the said temple an image of Mahadeo Ji had been set up by that widow. There was another temple containing the images of Ram Janki, Jagannath Ji and Mahabir Ji constructed by Babu Jagdeo Narayan Singh her husband's ancestor and that the images have been placed within the compound of the temple of Lachmi Narayan Ji. It is stated that services were managed by her husband during his life-time and she has done since his death and that her husband constructed a stone temple and gave her verbal permission to set up an image of Lachmi Narayan and to dedicate under a deed of endowment a portion of the landed property. She then goes on to make the endowment in favour of Lachmi Narayan Ji, Ram Janki Ji, Mahabir Ji and Mahadeo Ji of the land now the subject of dispute. The management of the temples is vested in Ram Gopal Achari. To supervise the management nine Punches are appointed. Their duties are to take accounts from the Mohant and to test the propriety or otherwise of the expenses with power to allow or disallow them. They are empowered if the Mohant misconducts himself to appoint another person in his place. After her death the lady provides that all the income from the dedicated property is to be in the hands of Sripat Raot and on his death his son is to succeed him as custodian of the collection money. If Sripat Raot or his heir misappropriate any of the money the same is to be recovered from their person and property. Sripat and his successor are to receive their food and Rs. 5 a month. Provision is then made for recital of Mahabharat and Pancharatan, and Paramdhar Misser is appointed Pujari with a salary of Rs. 10 a month. The power to appoint and dismiss a servant is vested in the Mohant. But he is expressly disabled from appointing any person as Pujari in the place of Paramdhar Misser. These are the principal provisions of the deed of endowment.

It is argued on behalf of the appellant that this is really only a cloak to benefit Sripat Raot and Paramdhar Misser. All the money from the endowment, which amounted to a sum of Rs. 2,200 a year, was to go into the hands of Sripat Raot who is

irremoveable even if he misappropriates the fund. The evidence for the plaintiff is that the actual costs of maintaining the idols and temples was from three to four hundred rupees a year. This was not questioned in cross-examination. Nor was it contradicted unless contradiction can be inferred from the statements of two of the witnesses that the income of the dedicated properties was spent on the endowment. These witnesses were not cross-examined as to the extent of the income that was so spent.

On the other side, it is contended that it was the duty of the lady to endow the temple which her husband had built, that the appointment of the Punches showed that the lady had taken care, that the administration of the endowment should be under an efficient supervision and that Sripat is an old trusted servant and was nothing more than a custodian of the fund under the supervision of responsible people.

In reply to the argument it is pointed out that out of the nine Punches four have disclaimed having anything to do with the endowment in question. Some in their written statements have alleged that they had been appointed without their knowledge, the one of the Punches who has in his written statement not disclaimed his connection with the endowment says that he never had any opportunity to supervise. Sripat says that he has got no money and has made no collection. It is contended, therefore, that the provision as to supervision is quite illusory and that when the evidence comes to be examined it is quite clear that the provisions in the deed were not acted on between the death of the lady in 1904 and the institution of the suit in 1907. Not only did the Punches not supervise but the Mohant himself appears never to have carried out the duties of that office though he says he may have visited the temple 7 or 8 times after the lady's death and looked at the accounts but did not sign them. He says that he carried out the duties of the Mohant by his *mukhtear* Sarswati Pershad. The *mukhtearnama* has been produced and it is a little curious to observe that while the *mukhtear* is given very ample authority with reference to conducting suits and doing other business in Civil, Criminal and Revenue Courts there is no mention of these particular temples and there is no authority to him to perform the duties of the Mohant with reference to the management of the property of this particular endowment. It is quite clear, I think, that the provisions of the deed of endowment, which by the way were only known to the Mohant two years after the execution of the document, were in fact not carried into effect. I am unable to agree with the learned Judge in the Court of the first instance in thinking that the document represents a *bona fide* transaction.

The learned Judge does not believe that the lady received any authority from her husband to establish the idols as is recited in the deed of dedication and he gives good reasons for not believing the evidence on that point. But nevertheless he finds that the deed is a *bona fide* one, because he thinks it is likely that the lady would make provisions for family idols. With great respect to the learned Judge he does not seem to me to have considered the weight to be attached to the circumstances that Punches did not know that they were appointed to supervise and had not consented to their appointment and to the fact that during the three years which elapsed between the lady's death and the suit the terms of the deed of endowment were not carried out. It is very difficult when considering these circumstances and having regard to the great disproportion between the costs of the maintenance of the endowment and the amount of the money which was allocated to it under the settlement to come to the conclusion that it was really a genuine transaction. In my view the evidence on behalf of the defendants does not meet the points I have referred. I do not believe that the endowment is anything but an illusory transaction.

The next question to be considered is whether assuming the endowment to be a *bona fide* settlement of property for religious purpose the lady had any power to make such a settlement.

There are certain facts which is important to bear in mind in considering the law on the subject. The first is that none of the idols were installed and none of the temples built by the person to whose property the lady succeeded. No idol was installed by her husband. He had built a temple. It must be taken that he did not authorise installation of any idol in that temple. There is no evidence that he intended to

set up an idol. The temple may have been built for the idols which had been relegated to the compound of Lachmi Narayan Ji. The other temples had been built and the idols established either by a widow of an ancestor or by the ancestor of the lady's deceased husband. These persons had not thought it necessary to create any endowment for the maintenance of their idols. Then the other fact which is to be borne in mind is that the lady succeeded not as a widow and heiress to her deceased husband but as mother and heiress to her deceased son and there appears to be no authority for saying that a mother and heiress takes any greater estate by inheritance than that taken by a widow and heiress. Indeed it was not contested in the course of the argument that whether an heiress takes as mother, daughter or widow the estate she takes is a restricted one. The onus, therefore, in my opinion, lies on those who allege that this lady had the power to alienate the property she inherited from her deceased son to show that she had that power under the Hindu law.

Now the cases that were cited to us as showing the powers of alienation vested in an heiress were cases with reference to the powers of the widow. Reliance was placed on the case of *Lakmi Narayan Purushottam* v. *Kushali* (1). It was decided in 1817 and contains this answer from the Shastries "that the respondent as widow of the brother's son was at liberty to sell the two houses for the purpose of defraying his funeral expenses or paying his debts but not otherwise though she might at pleasure sell them with any good and religious object in view." It is a little difficult to see what is the precise meaning of this answer unless it means that good and religious object means something *ejusdem generis* with defraying funeral expenses and paying debts. If that be the interpretation it tells against the respondents because it could not be inferred from it that the lady would have power to alienate the property to endow an idol. Other authorities were cited, particularly the case referred to in the judgment of the Court of the first instance, *Collector of Masulipatam* v *Cavaly Vencata Narainapah* (2), which laid down that "for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she, *i.e*, the widow has a larger power of disposition than that which she possesses for purely wordly purposes." Putting the result of the cases at its highest in favour of alienation by the lady it would seem that she had only a very limited power of alienating property for religious purposes and that only when it could conduce to the spiritual welfare of her deceased husband. That may be placed upon the principle to be found in the text of Brihaspati which is quoted by the learned Subordinate Judge and indicates how amongst the Hindus the wife is regarded as half her husband, and it may be that it is this intimate relation which enabled her to use his property for purposes which have been held amongst the Hindus to be beneficial to his spiritual welfare. But there does not seem to be any authority for the proposition that the installation of an idol and the endowment of its temple come within the category of acts which conduce to the spiritual benefits of the deceased husband. On the other hand, there is one direct authority to the contrary in the case of *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy* (3), in which it is laid down that a Hindu widow cannot endow an idol with her husband's property or a portion thereof to the detriment of the reversioners The decision which has the great authority of Shambhunath Pundit, J., rests on the ground that such a dedication could only be supposed to conduce to the spiritual benefit of the widow herself who had made the gift without her husband's consent. There is a later case reported as *Ram Kawal Singh* v. *Ram Kishore Das* (4), in which it was held that when an idol was established by the mother of a deceased man his widow could not make an alienation for a substantial portion of the property for the purpose of endowing that idol. It does appear, however, from the judgment that Judges thought that a very small portion of the property might possibly be alienated for endowing an idol of the husband. These two cases seem to be the only ones that have a direct bearing on the subject. They

(1) Borrodaile's Reports 412.
(2) 8 M.I.A. 500; 2 W.R.(P.C.) 59; 19 Eng. Rep. 620.
(3) 1 W. R. 48
(4) 22 C. 506.

are destructive of the view taken by the learned Judge in the Court below assuming it to be correct to say that a mother and heiress has no greater power than a widow and heiress.

There is no text that has been cited to us which places the mother as heiress of her son in the same close and intimate position in which a widow is placed as heiress to her husband. I should infer from that, that her powers to conduce to the spiritual welfare of the son were less than those of a widow to promote the spiritual benefit of her husband.

Moreover, as in this case the idol was established by the lady without the authority of her husband the maintenance of it would conduce only to her spiritual benefit and for that purpose she would not be entitled to alienate the property inherited by her from her deceased son.

In the view I take of the case it is unnecessary to consider the other question which was argued.

I am unable to agree with the learned Judge in the Court below in his decision either as to the *bona fide* of the transaction or as to the power of the lady. In the absence of any authority to show that a mother and heiress has power to deal with the property as this lady has done, I think, it would be unsafe to hold that such power exists under the Hindu Law.

For these reasons I think that the appeal should be allowed, the judgment and decree of the lower Court set aside and the suit decreed with costs.

The plaintiff will be entitled to mesne profits and the suit must be remanded to the Court of first instance that the amount may be ascertained, and a decree made therefor.

CARNDUFF, J.—I agree with Mr. Justice Harington.

Appeal allowed.

BOMBAY HIGH COURT.
FULL BENCH.

MISCELLANEOUS PETITION.

February 5, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, Justice Sir N. G. Chandavakar, KT., Mr. Justice Davar and Mr. Justice Macleod.

In re THE ADVOCATE-GENERAL OF BOMBAY.

Presidency Towns Insolvency Act (III of 1909), ss. 6, 121—Attorneys—Right of audience before officer appointed under s. 6—Practice—Insolvent Act (11 & 12 Vic. c. 21), ss. 3, 76.

Attorneys of the High Court have a right of audience before the officer appointed by the Chief Justice in the exercise of powers conferred upon him under section 6 of the Presidency Towns Insolvency Act. The words "in the way of his profession" in section 3 of 11 and 12 Vic, c. 21, are sufficiently wide to cover the exercise by Attorneys in matters of insolvency, except before Courts of Review or in Jury trial, of the functions ordinarily assigned in litigation to Advocates.

Section 121 of the Presidency Towns Insolvency Act preserves this right of audience possessed by the Attorneys.

Mr. *Campbell*, for the Bombay Incorporated Law Society.

JUDGMENT.—The question before the Court is whether any Legal Practitioner save Counsel has a right of audience before the officer appointed by the Chief Justice to exercise powers under section 6 of the Presidency Towns Insolvency Act. The officer so appointed is the Clerk of the Court, and he has been appointed *inter alia* to hold the public examination of insolvents and to examine any person summoned by the Court under section 36.

It is provided by section 121 of the Presidency Towns Insolvency Act that nothing contained therein shall take away or affect any right of audience that any person may have had immediately before the commencement of the Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors.

By section 3 of the Indian Insolvent Act (11 & 12 Vic. c. 21), it was enacted that every Advocate and Attorney of the Supreme Courts at Calcutta, Madras and Bombay, respectively, should be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors of that Presidency, and no other persons should practise as Advocates or Attorneys in the said Courts for the relief of insolvent debtors,

In re ADVOCATE GENERAL OF BOMBAY.

It is contended by the Advocate-General that the words "in the way of his profession" do not cover work in the nature of examination of insolvents or witnesses which would ordinarily be within the scope of an Advocate's functions.

When the Statute 11 & 12 Vic. c. 21 was enacted, the Insolvency Jurisdiction in England under the Act for the relief of insolvent debtors, 5 & 6 Vic. c. 116, was exercised by the Judge or Commissioners of the Court of Bankruptcy. That Court was established by 1 & 2 Will. IV, c. 56, by section 10 of which it was enacted that all Attorneys and Solicitors of any of the superior Courts of Law or Equity of Westminster might be admitted after their names were enrolled in the Court of Bankruptcy and might appear and plead in any proceedings in the said Court without being required to employ Counsel except in proceedings before a Court of Review and upon trial of issues by Jury.

The inference is that the words "in the way of his profession" in section 3 of 11 & 12 Vic. c. 21, would be sufficiently wide to cover the exercise by Attorneys in matters of insolvency, except before Courts of Review or in Jury trials, of the functions ordinarily assigned in litigation to Advocates.

In Bombay, so far as we are aware, it has not been the practice to permit Attorneys to plead before the Commissioner of the Insolvent Court. But rule 37 of the Bombay Insolvency Rules, which were approved by Her Majesty in Council on the 14th of July 1870, provided that the examiner appointed by the Court might examine witnesses, and the insolvent or the creditor of the insolvent or assignee of the estate and effects of the insolvent should be at liberty to attend the examiner by himself or Counsel or Attorney and put all such questions to the witnesses which should be proper and relevant in the matter in issue. The office of the examiner in insolvency was abolished on the 1st of November 1881. In certain correspondence with Government, which preceded the abolition of the office, the Chief Justice Sir Michael Westropp stated on the 20th March 1879:—"The office of examiner in the Court for the relief of insolvent debtors has, for the purpose for which it mainly existed, namely, the examination of the accounts of opposed insolvents, of late years fallen nearly into disuse, that task being for the most part performed by the Court itself at the hearing of the case when the opposed insolvent or his clerk are examined as witnesses with books of accounts before them. On the rare occasions on which under the present system it may be necessary to refer the books and accounts to the scrutiny of an officer of the Court, that duty may be performed by the Clerk of the Court."

It, therefore, appears that the functions of the examiner were to be discharged by the Clerk of the Court, when necessary, and as the rule 37 was not rescinded, it must be inferred that the right of audience in such matters as might have been brought before the examiner was not taken away from Attorneys.

In matters other than insolvency, which are conducted before deligates of the Court, it has always been the practice to permit Attorneys to appear and conduct examinations. For example, not only since the establishment of the High Court but during the continuance of the Supreme Court, Attorneys have always appeared to conduct proceedings in the office of the Master in Equity and the Commissioner for taking accounts, and it is a matter beyond dispute that in all Chamber matters, whether before the Prothonotary or before the Judge sitting in Chambers, Attorneys have the same right of audience as Counsel.

It is true, as pointed out by the Advocate-General, that the express rule relating to the right of audience of Attorneys in Chamber matters is confined to the Original Side Jurisdiction. But it is illustrative of the practice of the legal professions in matters which do not come before the Courts. If we were to accede to the contention of the Advocate-General, it appears to us that we should be taking away or affecting a right of audience which Attorneys had before the delegate of the insolvent Court immediately before the commencement of the Act, and we, therefore, answer the question referred to us as follows:—

Attorneys of the High Court have a right of audience before the officer appointed by the Chief Justice in the exercise of the powers conferred upon him under section 6 of the Presidency Towns Insolvency Act.

There will be no order as to costs.

HARKHU SINGH *v.* MUNNA LAL.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 33 OF 1910.
March 19, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

HARKHU SINGH—DEFENDANT—APPELLANT

versus

MUNNA LAL—PLAINTIFF—RESPONDENT.

Mortgage—Mortgage of lands some of which did not belong to mortgagor—Decree against lands belonging to mortgagor—Purchase of those lands by decree-holder in execution of mortgage decree—Mortgage decree whether valid—Decree-holder whether entitled to possession.

A mortgagee brought a suit on his mortgage alleging that by mistake the mortgagor had included in the mortgage land which he had no power to charge, and the mortgagee sought to enforce his charge against those lands only which the mortgagor was able to mortgage. The mortgagee got a decree, brought the property to sale in execution and himself purchased it:

Held, that his purchase was valid; that he was entitled to possession; that he could throw the whole of the mortgage-debt on the lands belonging to the mortgagor, as he sought to enforce his lien against all the property which the mortgagor could charge and exempted nothing over which the mortgage lien really extended.

Imam Ali v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 and *Surjiram Marwari* v. *Barhamdeo Persad*, 1 C. L. J. 337, distinguished.

Appeal from the decree of the Sub-Judge of Patna, dated August 31st, 1907.

Dr. *Sarat Chandra Basak*, Babus *Ambika Pada Chowdhury* and *Hari Bhushan Mukherjee*, for the Appellant.

Babu *Umakali Mukerjee* and Moulvi *Muhammad Mustafa Khan*, for the Respondent.

JUDGMENT.

HARINGTON, J.—This is an appeal by the defendants. The plaintiff is executor of one Behari Lal in whose favour one Damri had executed a mortgage of the lands in dispute in this case and other property in 1896.

In 1906 the plaintiff brought a suit on this mortgage alleging that by mistake Damri had included in the mortgage lands he had no power to charge, and he sought to enforce his charge against those lands only which Damri was able to mortgage, he got his decree, brought the property to sale and purchased it. It was stated in the course of the argument that defendant No. 1 was a party to this suit. He, together with defendant No. 2 and one Nilmoni, since deceased, were in possession under a usufructuary mortgage executed in 1901 of the lands in respect of which the plaintiff had got his decree. They resisted the plaintiff's effort to obtain possession. Hence the present suit.

The learned Judge held that the plaintiff was entitled to possession—but that defendant No. 2 was entitled to redeem—against this decision the defendants have appealed.

The contention on behalf of the appellant is that the plaintiff having given up his rights against a portion of the property, the subject of the mortgage, is not entitled to enforce his lien in so much of the property only as is in their possession. They argue that the plaintiff as mortgagee is estopped from denying the mortgagor's title to the lands comprised in the mortgage deed.

I do not think any question of estoppel arises. The mortgagor asserts that he has purported to mortgage lands which he could not charge. The mortgagee admits the truth of this and indeed that it is the case does not seem to be contested, when the defendants took their usufructuary mortgage they knew what Damri's share was. There is no suggestion that they took their usufructuary mortgage on the faith of any representation made by the plaintiff to them that his mortgage lien extended over lands in excess of Damri's share and if there was no such representation there could be no estoppel as between the plaintiff and the defendants.

In support of the contention that the plaintiff could not throw the whole of the mortgage debt on the property comprised in their usufructuary mortgage the appellants relied on *Imam Ali* v. *Baij Nath Ram Sahu* (1) which followed an earlier case of *Surjiram Marwari* v. *Barhamdeo Persad* (2). But these cases are clearly distinguishable from the present case.

They were cases in which a mortgage had been validly created over the whole property and it was held that the mortgagee could not throw the whole burden of the debt on a small portion of the property after giving up his claim as to the remainder but in the present case no mortgage had been created over the property which the plaintiff exempted from his suit, because that property did not, in fact, belong to the mortgagor Damri. In other words, the plaintiff sought

(1) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(2) 1 C. L. J. 337.

to enforce his lien against all the property which Damri had mortgaged, and exempted nothing over which the mortgage lien really extended.

The appellant's contention, therefore, on this point fails.

Another point was taken, *viz.*, that a sum of Rs. 375 constituted a prior charge over the mortgaged property. I do not find any mention of this sum of Rs. 375 in the memorandum of appeal. All that it is necessary to say is that the Judge has given good reasons for holding that it is not a prior charge. In my opinion all the points urged by the appellant fail and the appeal must be dismissed with costs.

CARNDUFF, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 75 OF 1912.

November 15, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

ATMARAM YEKOBA VANI—

DEFENDANT—APPELLANT

versus

BHILA GANPAT VANI—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Arbitration—Agreement of reference on behalf of minor—Award—Leave of Court not obtained—Minor not bound

A reference to arbitration is itself an agreement and is, in the case of minor parties, subject to the provisions of Order XXXII, rule 7, Civil Procedure Code, 1908.

Lakhmana Chetti v. *Chinnathambi Chetti*, 24 M. 326, and *Pragdas* v. *Girdhar Das*, 26 B. 76; 3 Bom. L. R. 431, followed.

Hardeo Sahai v. *Gauri Shankar*, 28 A. 35; A. W. N. (1905) 171, 2 A. L. J. 493, dissented from.

A suit for partition was filed on behalf of a minor by his next friend, a lady, who gave a *Mukhtarpatra* in general terms to a male relation. The *Mukhtarpatra* did not refer expressly to submission to arbitration. Subsequently, the *Mukhtar* without bringing to the notice of the Court that he was consenting to a reference on behalf of the minor, agreed to a reference to arbitration.

An award was made on this reference. Meanwhile, the plaintiff attained majority and declined to be bound by the award:

Held, that the plaintiff was entitled to have the award set aside.

First appeal from the decision of the Additional Subordinate Judge, first class, Dhulia, in Civil Suit No. 320 of 1908.

Mr. *Nadkarni* (with him Mr. *M. V. Bhat*), for the Appellant.

Mr. *N. M. Samarth*, for the Respondent.

JUDGMENT.—A suit had been filed on behalf of a minor for partition by his next friend Umabai and she shortly after the institution of the suit had given a *mukhtiarpatra* in general terms to a male relation. The *mukhtiarpatra* did not refer expressly to submission to arbitration. Subsequently, the *mukhtiar*, without bringing to the notice of the Court that he was consenting to a reference on behalf of the minor, agreed to a reference to arbitration, and after a considerable time an award was made by a *Sirpunch* or umpire awarding to the plaintiff a certain portion of the joint family property.

The plaintiff on attaining majority declined to be bound by the award.

The learned Subordinate Judge set aside the award and proceeded with the hearing of the suit and passed a decree awarding to the plaintiff considerably more than he would have got under the award.

This appeal is concerned with the question whether the Subordinate Judge was right in holding that the plaintiff was not bound by the award.

It is conceded that if Order XXXII, rule 7, applies to the case, the terms of it were not complied with at the time of the reference to arbitration, and, therefore, the agreement entered into without the leave of the Court expressly recorded is voidable at the option of the plaintiff.

The Allahabad High Court have held that the terms of section 462, which was the corresponding section in the Code of 1882, did not apply to proceedings falling under the Chapter relating to arbitration. That decision is contrary to a decision of the Madras High Court: *Lakshmana Chetti* v. *Chinnathambi Chetti* (1).

Now a reference to arbitration is in itself an agreement. As observed in *Pragdas* v. *Girdhardas* (2), "every submission to arbitration implies an obligation to perform the award of the arbitrator". So that here there was an agreement, on behalf of the minor with reference to the suit, entered into by the next friend through the *Mukh-*

(1) 24 M. 326.
(2) 26 B. 76 at p. 78; 3 Bom. L. R. 431.

tiar; and that agreement was entered into without the leave of the Court expressly recorded in the proceedings. It is, therefore, contrary to the terms of Order XXXII, rule 7. Similarly, after the award had been given, there was a completed agreement in terms of the award, and that was an agreement also in violation of the provisions of Order XXXII, rule 7. We have no doubt that we ought to follow the decision of *Lakshamana Chetti* v. *Chinnathambi Chetti* (1), rather than the decision of *Hardeo Sahai* v. *Gauri Shankar* (3), not only because we think it is correct but also because it was referred to with approval in the case of *Pragdas* v. *Girdhardas* (2), just referred to, a decision which is binding upon us. That is sufficient to dispose of the case. The minor has repudiated the award. He was entitled to avoid it.

The learned Subordinate Judge, therefore, was right in setting aside the award as far as the plaintiff in the suit was concerned and proceeding to decide the suit on the merits.

We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

(3) 28 A. 35; A. W. N. (1905) 171; 2 A. L. J. 493.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 121 OF 1911.

November 12, 1912.

Present:—Mr. Batten, A. J. C.

HABIBULLAH—DEFENDANT—PETITIONER

versus

KARANJU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 20 (2), O. IX, r. 13—'As effectual', meaning of—Limitation for setting aside decree—Defendant can show for purposes of limitation that he was not duly served—Time from which limitation begins to run—Revision—Lower Court not inquiring into the question of limitation.

Where a lower Court has made no inquiry into the question of limitation but has held rather that it had no jurisdiction to go into the question, the High Court will entertain an application for revision.

The words 'as effectual' in clause (2), of rule 20, of Order V, Civil Procedure Code, Act V of 1908, mean 'as effectual for the purpose of enabling the Court to proceed with the suit.' Where the question of limitation comes in, if the defendant can show that the circumstances in which substituted service, having the effect of personal service, could be legally made did not exist, time begins to run from the date he had knowledge of the decree.

Petition for revision against the order of the Divisional Judge, Jubbulpore Division, dated the 13th April 1911, confirming that of the Subordinate Judge, Jubbulpore, dated the 22nd March 1910.

Mr. *S. R. Pandit*, for the Petitioner.

Mr. *Ram Das Chhabildas*, for the Respondent.

JUDGMENT.—The applicant is the defendant in a suit for village profits. The suit was filed on the 15th December 1909. The first two attempts to serve summons on the defendant failed. On the 7th February 1910 the plaintiff put in an application, supported by an affidavit, to the effect that the defendant was avoiding service. The Subordinate Judge ordered substituted service under Order V, rule 20, Civil Procedure Code; this was effected, but the defendant did not appear and an *ex parte* decree for the plaintiff was made on the 22nd March 1910. On the 10th May 1910 the defendant applied to the Subordinate Judge for the *ex parte* decree to be set aside, on the ground that on account of plague he had been absent from his residence in Jubbulpore and only returned on the 10th April 1910, and first heard of the suit and *ex parte* decree on the 20th April 1910. He denied that he had been intentionally avoiding service. The Subordinate Judge held the application of the 10th May to be time-barred as under Article 164 of the Limitation Schedule the period of limitation for an application by a defendant for an order to set aside a judgment *ex parte* is 30 days and the application was made more than 30 days after the date of the decree. On appeal the learned Divisional Judge said:—

"Now whether or not the affidavit filed by plaintiff-respondent was correct in its allegations or not, the Subordinate Judge's action under Order V, rule 20, was legal and in due order and the second paragraph of the rule just quoted declares that service substituted by the order of the Court shall be as effectual as if it had been made on the parties personally. Limitation, therefore, must run from the date of the decree and the application was clearly time-barred. The question of knowledge does not arise at all nor can I enter into it. The appellant's remedy was

clearly by separate suit on the ground that plaintiff's *ex parte* decree was obtained as the result of fraudulent and false allegations made by him [*Tika Ram* v. *Daulat Ram* (1)]. I am aware of the decision of Pinhey, J., in *Mirza Ally Bebanee* v. *Syed Hyder Hoosein* (2) but it can give no help to appellant in the present case in view of the matter of limitation referred to."

Under the former Limitation Act the date from which limitation began to run under Article 164 was the date of executing any process for enforcing the judgment, but under the present Act time begins to run from 'the date of the decree, or when the summons was not duly served, when the applicant has knowledge of the decree'. The question, therefore, is whether in this case the summons was 'duly served' within the meaning of the Article.

Order IX, rule 13, which provides for the setting aside of *ex parte* decrees at the instance of a defendant, does not provide for any other remedy by a separate suit. The ruling, quoted by the Divisional Judge, in *Tika Ram* v. *Daulat Ram* (1) hardly meets the difficulties of the present case, for it is quite possible that there was no fraud on the part of the plaintiff, who may have, in the circumstances, honestly believed that the defendant was evading service of summons.

Under the limitation Article, if the summons was not duly served and if the defendant's allegations as to the date of hearing of the suit and decree are true, then the application would have been in time.

Clause (2) of rule 20 of Order V enacts that "Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally". This provision has been held by the lower Courts to mean that a substituted service conclusively establishes the fact that the defendant is in the same position as if he had been personally served. But I cannot accept this view. Under Order IX, rule 13, when the Court has proceeded with the suit on the assumption, based on the provisions of rule 18 or rule 19 of Order V, that the defendant has been served with the summons, the defendant may nevertheless show that the summons was not duly served. Surely the defendant cannot be in a worse position when there is no assumption that he has been actually served with the summons, and when by the operation of clause (2) of rule 20 of Order V he is merely deemed to have been served with the summons. Even if, for the purpose of proceeding with the suit, the defendant has been personally served, he may still show that in reality the summons was not personally served on him and not served on him in any of the other manners in which service can be legally made. The words in clause (2), 'as effectual,' mean, in my opinion, 'as effectual for the purpose of enabling the Court to proceed with the suit'. Just as the defendant can show that a supposed personal service did not take place, so also, in my view, he can show that the circumstances in which a substituted service, having the effect of a personal service, could be legally made, did not exist. He is entitled to show that the substituted service was not a due service, that is to say, that he was not keeping out of the way for the purpose of avoiding service. Where, as here, the question of limitation comes in, he can show the same thing for the purpose of proving that he was not 'duly served' and that time begins to run from the date he knew of the decree. In this case the Subordinate Judge was, I consider, bound to give the defendant an opportunity of proving *firstly* that he was not keeping out of the way in order to avoid service, and *secondly* that he did not know of the decree until the date stated by him.

It is objected by the non-applicant that no revision application lies to this Court, on the well established principle that a mistake of law, even as regards limitation, does not entitle the aggrieved party to the remedy of revision. But in this case the lower Courts have not inquired into the question of limitation at all. They rather have held that they had no jurisdiction to go into the question. I have, therefore, admitted the application for revision.

For these reasons, I set aside the orders of the lower Courts dismissing the application for an order to set aside the *ex parte* decree, and remand the application for disposal by the Subordinate Judge on the

(1) 4 Ind. Cas. 596; 32 A. 145; 7 A. L. J. 74.
(2) 2 B. 449.

lines above indicated. Costs in this Court and in the Divisional Court will be costs in the proceedings on the application. Pleader's fee Rs. 25.

Application dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 122 OF 1912.

February 20, 1913.

Present:—Justice Sir Henry Griffin, Kt.

SHEO BODH—PLAINTIFF—APPLICANT

versus

SURJAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 23, Sch. II, Art. 31—Small Cause Suit—Suit for damages for withholding possession—Return of plaint—Civil Procedure Code (Act V of 1908), O. VII, r. 10.

A suit for damages on the allegation that the plaintiff got a decree for redemption but for a year after he deposited the amount due in Court he was not put in possession of the property, is not cognizable by a Small Cause Court under Article 31, Schedule II, of the Provincial Small Cause Courts Act.

When a Small Cause Court finds that a suit is not cognizable by it, it should not dismiss the suit but should return the plaint for presentation to the proper Court.

Section 23 of the Act only sets out a special case and does not debar a Small Cause Court from returning a plaint when the suit is not cognizable by it.

Petition for revision against an order of the Judge, Small Cause Court, Allahabad.

Mr. *Damodar Das*, for the Applicant.

Mr. *Uma Shankar Bajpai*, for the Respondents.

JUDGMENT.—The plaintiff, applicant in this Court, filed a suit to recover Rs. 125 as damages from the defendants on the allegation that the plaintiff got a decree for redemption of certain land on the 13th of January 1911, that he deposited the amount due from him on the 13th of March that year but was not put in possession of the property until the 29th November 1911. Apparently he sued to recover the sum claimed as damages for the period between the deposit of the money and the actual possession obtained by him to reimburse himself for being kept out of possession of the property. The suit was filed in the Court of Small Causes at Allahabad. That Court held that the suit was not cognizable by a Court of Small Causes in view of the provisions of Article 31 of Schedule II of the Provincial Small Cause Courts Act. The plaintiff applies in revision against the order of the Court below dismissing the suit. Reliance was placed on a ruling of a Bench of the Calcutta High Court in *Sakari Datta* v. *Sheikh Ainuddy* (1). That ruling appears to support the contention advanced on behalf of the plaintiff that the suit was cognizable by a Court of Small Causes. It was held there that a suit by a mortgagor against a mortgagee for mesne profits for the period during which the latter held wrongful possession of the mortgaged property was cognizable by a Court of Small Causes. On a perusal of the judgment, however, I find that the learned Judges who decided the case referred only to the first part of Article 31. The second part of that article relates to "a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." Although the present suit is framed as a suit for damages it is, undoubtedly, one to recover from the defendants profits which they wrongfully realised from the plaintiff's property. In my opinion the view of the lower Court that the suit is not cognizable by a Court of Small Causes is right. A further contention on behalf of the applicant was that the Court below was wrong in dismissing the suit *in toto* and that what that Court should have done was to return the plaint for presentation to the proper Court. Reference was made to Order VII, rule 10, of the Code of Civil Procedure. It was urged on behalf of the opposite party that the only case in which a Court of Small Causes can return a plaint for presentation to the Court having jurisdiction is that set out in section 23 of the Provincial Small Cause Courts Act. No ruling was cited in support of the construction that the opposite party desired me to place on this section. It appears to me that this section should not be construed in this restricted sense. It sets out a special case in which a Court of Small Causes ought to hand back the plaint for presentation to the proper Court. Under the circumstances it appears to me that the Court below should have returned

(1) 6 Ind. Cas. 336; 12 C. L. J. 620; 14 C. W. N. 1001

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the plaint for presentation to the Court having jurisdiction to entertain the suit. I allow this application so far that I set aside the order of the Court below dismissing the suit *in toto* and in lieu thereof I direct that the plaint be returned to the plaintiff for presentation to the Court having jurisdiction. The parties will pay their own costs.

Application allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1317 OF 1911.

April 8, 1912.

Present:—Mr. Justice Kensington.

Musammat PERTAP KAUR—APPELLANT

versus

JAWALA SHAH—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 7—Guardian—Mother—Uncle.

Until the contrary is proved, a mother is the proper guardian for the person and property of a minor and preference is not to be given over her to the minor's uncle especially when he is separate and was not on good terms with the minor's father during his lifetime. The fact that she will seek the assistance of her relatives in managing the property ordinarily is not objectionable.

Miscellaneous appeal from the order of the District Judge of Sialkot, dated the 31st of October 1911, appointing the respondent guardian of the property of Suchet Singh, minor.

Mr. *Duni Chand*, for the Appellant.

Lala *Parduman Das*, for the Respondent.

JUDGMENT.—This appears to me one of a not uncommon class of cases in which the District Courts are apt to go out of their way to cause trouble by not allowing people to manage their own affairs in their own way.

Dina Nath, a well-to-do *Arora Sahukar*, died about a year ago leaving two widows, a son's widow, and an infant son. The latter inherits the property and the dispute is as to guardianship. The lower Court has very properly appointed the child's mother as his personal guardian but has appointed Dina Nath's brother, Jawala Shah, to be guardian of the property, and has fixed the total maintenance allowance for Dina Nath's family at Rs. 40 a month.

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It is admitted that Jawala Shah separated from Dina Nath some 15 years ago, and that he has a large business of his own to manage. I can see no real reason for assuming that the child's mother is not competent to manage her deceased husband's property for herself or for making her and the other members of her husband's family dependent upon Jawala Shah for a meagre cash maintenance. If the child's interests are to be secured, they are probably safer with his mother than with an uncle who was admittedly not on good terms with Dina Nath. The assumption should be, until the contrary is proved, that the mother will do her best for the child. It is urged that she will seek the assistance of her own relatives, but to this I see no objection whatever. A woman, no doubt, requires some assistance in managing the property, but she is just as likely to be served honestly by her brothers as by her brother-in-law.

The appeal is accepted, *Musammat* Pertap Kaur is appointed guardian of her son's property in place of Jawala Shah, subject to such further orders as the District Judge may consider necessary in regard to the provisions of security. No order as to costs.

Appeal accepted.

SIND JUDICIAL COMMISSONER'S COURT.

FIRST CIVIL APPEAL NO. 29 OF 1910.

May 31, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

FRAMJI BYRAMJI MINWALA AND OTHERS—APPELLANTS

versus

SULLEMANJI SHEIKH IBRAHIMJI—RESPONDENT.

Mortgage by way of conditional sale—Time essence of contract—Sale absolute on expiry of term.

In Sind, in the case of a mortgage by way of conditional sale, time is of the essence of the contract, and at the expiry of the term fixed for redemption, the contract executes itself and the transaction closes and becomes one of sale.

Pattabhiramier v. *Venkatarow Naicken*, 13 M. I. A. 560; 15 W. R. 35 (P. C.); 7 B. L. R. 136; 20 Eng. Rep. 660; *Thumubuswamy Moodelly* v. *Hossain Rowthen*, 1 M. 1; 2 I. A. 241; *Sileman* v. *Lalumal*, (1885) 1 S. S. D. 301, *Ghulam Mohammed* v. *Hariram*, 1 S. L. R. 96, followed.

Appeal against the decision of the Additional Judicial Commissioner of Sind.

FRAMJI *v.* SULLEMANJI.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellants.

Mr. *Wadhumal Oodharam*, for the Respondent.

JUDGMENT.—The first plaintiff, Framji, on the 22nd September 1894, executed a deed of sale of the property in suit to the defendant for the sum of Rs. 10,000. The defendant at the same time executed a counter-agreement in favour of Framji's wife, the 2nd plaintiff, stipulating that in the event of her re-paying the sum of Rs. 10,000 *plus* the cost of any buildings the defendant might have erected on the premises *plus* the balance of rent due within five years he would transfer the property to her.

The plaintiffs alleged that the transaction was one of mortgage and filed this suit in 1908 for redemption.

The lower Court has held that the transaction was one of sale.

The decision proceeds largely on the view that the counter-agreement was to a third person, the plaintiff's wife. The appellants contend, and contend rightly, that it was open to Framji to prove that his wife was only his *benamidar*. If that were established then it was open to the Court to consider the following items of evidence and to determine from them whether the transaction was not one really of the mortgage. There are (1) the alleged inadequacy of the price (2), possession by Framji coupled with the absence in the main deed of any recital as to delivery of possession (3), that the implied covenant to keep accounts in the counter-agreement.

But we need not pursue this point further for even if the transaction be treated as one of mortgage the right of redemption has been extinguished by the expiry of the term fixed by the deed.

The Privy Council held both in *Pattabhiramier* v. *Vencatrow Naicken* (1) and in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (2) that in mortgage with conditional sale time was of the essence of the contract—and that at the expiry of the term fixed for redemption the title of the mortgagee became absolute.

The Madras and Bombay High Courts had laid down a different rule following the English maxim "Once a mortgage always a mortgage." The Madras decision was in 1858 and the Bombay decision was *Ramji* v. *Chinto*(3) in 1864. *Thumbusawmy's* case (2) overruled the Madras decision but nevertheless in view of the suggestion for legislation made at the close of the judgment of the Privy Council, the Madras High Court felt themselves at liberty to follow their own rule for mortgages subsequent to 1858—see the case of *Venkata Subbayya* v. *Venkayya* (4). The Bombay High Court similarly continued to follow the rule in *Ramji* v. *Chinto* (3), as that case had been reflected upon by Privy Council but not overruled. See *Bapuji* v. *Sankaraji* (5).

The legislation recommended by the Privy Council in *Thumbasawmy's* case (2) was undertaken in the Transfer of Property Act which settled the point for Madras in 1882 and for Bombay in 1893. Section 60 of that Act gives a right of redemption to the mortgagor and makes no distinction between one class of mortgage and another. The provisions of this section are not subject to a contract to the contrary and they give a uniform right of redemption in all mortgages overriding any stipulations confirming rights of redemption to a given period. This has been well pointed out in the case of *Perayya* v. *Venkata* (6).

In Bengal and Allahabad and later on in the Punjab the rule once a mortgage always a mortgage was enacted by Bengal Regulation XVII of 1806, and as reference has been made to the case of *Balkissen Das* v. *Legge* (7), I would observe that it was under this Regulation that redemption was there allowed after the fixed period.

But in Sind neither this Regulation nor section 60 of the Transfer of Property Act apply. Nor has there been a course of judicial decisions applying the English rule. On the contrary the Sind Sadar Court in *Sileman* v. *Lalumal* (8) held there was no custom or practice in Sind modifying the old Law of India according to which at the expiry of the term the contract executed itself and the transaction closed and became one of

(1) 13 M. I. A. 560; 15 W. R. 35 (P. C.); 7 B. L. R. 136; 20 Eng. Rep. 660.
(2) 1 M. 1; 2 I. A. 241.
(3) 1 B. H. C. R. 199.
(4) 15 M. 230.
(5) 2 B. 231.
(6) 11 M. 403.
(7) 22 A. 149: 27 I. A. 58; 4 C. W. N. 153.
(8) (1885) 1 S. S. D. 301.

sale. The same view was taken by this Court in *Gulam Mohamad* v. *Haniram* (9).

Even if the transaction in this suit be one of mortgage the plaintiff's right of redemption was extinguished in 1899, and his suit must fail.

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

The plaintiff-appellant to pay the Court-fees of the suit and appeal, *i.e.*, the sum of Rs. 1,950, *i e.*, Rs. 975 of the suit and Rs. 975 of the appeal under Order XXXIII, rule 11.

Appeal dismissed.

(9) 1 S. L. R. 96.

PUNJAB CHIEF COURT,
SECOND CIVIL APPEAL No. 851 OF 1910.
November 12, 1912.
Present:—Mr. Justice Chevis.
BUTA AND OTHERS—DEFENDANTS—APPELLANTS
versus
MAULA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Succession—Custom—Incompetency of adopted son to succeed collaterally—Gujars *of Ludhiana Tahsil.*

Among *Gujars* of Ludhiana Tahsil an adopted son does not succeed collaterally.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 27th April 1910, varying that of the Munsif 1st class, Ludhiana, dated the 31st January 1910, decreeing the claim.

ORDER.—Defendants are sons of Roda who along with Jang succeeded as a step-son to the estate of Gandhi.

The dispute in the present case is as to the property of Mehra and *Musammat* Ahmi and the question is whether defendants as sons of an adopted person are entitled to succeed collaterally in the adopter's family. This question has been decided against the defendants and they appeal.

The matter has never been put in issue, it should have been, consequently defendants have never had proper opportunity of proving their contention.

I remand for inquiry on the following issue.

Among *Gujars* of Ludhiana Tahsil does an adopted son succeed collaterally?

Onus on defendants. Return to be made through the Divisional Judge within four months.

Mr. *Badr-ud-din Kureshi*, for the Appellants.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—By my order of remand of 28th November, 1911, I directed inquiry into the question whether, among *Gujars* of the Ludhiana Tahsil, an adopted son could succeed collaterally. The return to the remand is that an adopted son does not so succeed.

Mr. Badr-ud-din has not argued to the contrary. He simply says he was engaged only yesterday and has not been able to inspect the records.

The finding that adopted sons do not succeed collaterally I take to be correct.

Mr. Badr-ud-Din has said nothing as to ground No. 2 of the appeal. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 426 OF 1911.
April 10, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.
BUDH SINGH—DEFENDANT—APPELLANT
versus
KAWAL NAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Separation—Alienation by one member of joint family, whether valid—Attestation of document—Plea of improper attestation taken in appeal is too late—Pleadings.

A member of a joint Hindu family cannot mortgage the family property without the consent of the other members of the family even to the extent of his share in the property.

In a joint family portions of the income of the joint family property may, by mutual arrangement, be enjoyed by the different members but such enjoyment does not necessarily have the effect of causing a severance of the joint nature of the joint family property.

A plea as to improper attestation of a document cannot be allowed to be taken for the first time at th hearing of the appeal.

BUDH SINGH *v.* KAWAL NAIN.

First appeal from the decision of the Subordinate Judge of Saharanpur, dated the 31st of August 1911.

Mr. *B. C. O'Conor* (with him the Hon'ble Mr. *Moti Lal Nehru* and Mr. *Durga Charan Banerji*,) for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Govind Prashad*) for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to enforce a mortgage executed in favour of their father, Kesho Rai, on the 23th of August 1890 by Prabhu Lal defendant No. 1, for Rs. 1,500. In that bond Prabhu Lal purported to mortgage a fifth share in a number of villages which admittedly were at one time the joint family property of Prabhu Lal, his father, Budh Singh and his brothers. The amount now claimed is Rs. 10,000 and the plaintiffs seek to bring to sale the share hypothecated in the mortgage deed. The defendants to the suit are not only Parbhu Lal himself but his father Budh Singh, his half brother Baru Mal and the minor sons of Baru Mal. Budh Singh resisted the suit on the ground, among others that the property mortgaged was joint family property and that Prabhu Lal was not competent to mortgage any portion of it without the consent of the other members of the family.

The principal question argued before us is that of the validity of the mortgage made by Prabhu Lal. It appears that in 1890 Parbhu Lal brought a suit against his father for partition of the joint family property. In that suit he stated that the family was joint and that the property jointly belonged to all the members of the family. The suit was dismissed by the Subordinate Judge on the 19th of July 1890 on the ground that Prabhu Lal had failed to prove a cause of action for his suit. The cause of action alleged was that the father did not supply him with necessary funds to maintain himself and that by reason of his having married two other wives besides the plaintiff's mother, the father had lost all affection for him and was ill-treating him. The Subordinate Judge dismissed the suit solely on the ground that these allegations had not been substantiated. It is hardly necessary to say that that was no valid ground for dismissing a claim for partition of property which was admittedly joint. The important fact to be deduced from this litigation is that on the date on which the suit was dismissed the family was, according to both parties, joint in every respect.

It is alleged on behalf of the plaintiffs that when Prabhu Lal prepared to appeal against the dismissal of his suit, he was approached by his father, and that Budh Singh (the father) gave him the fifth share which he had claimed in all the property. In order to support this allegation the only evidence of any importance which the plaintiffs have adduced is that of three witnesses who have sworn that the father agreed to give to Prabhu Dayal a fifth share of the income of all the property. Had such a partition been effected before the execution of the bond on which the suit is based, it is very improbable that all mention of such a partition would have been omitted from the bond itself. On the contrary one of the objects of borrowing money under the bond was, as the bond recites the carrying on of the litigation which had been instituted by Prabhu Lal against his father. If, as is alleged, a partition had already taken place and Prabhu Lal had already got all that he wanted from his father, we fail to see why he was borrowing money for the continuance of the litigation. It seems to us, therefore, to be almost certain that before the bond in suit was executed no partition of the family property had taken place. It is clear that Prabhu Lal and his father were not on friendly terms when the litigation was begun and if a partition was effected to put an end to the litigation and to avert the filing of an appeal by Prabhu Lal, it is in the last degree improbable that no document evidencing the partition would not have been executed, or at least an application for mutation of names in accordance with the partition would not have been filed in the Revenue Court. Therefore, there is the initial improbability of such a partition having been made. It is, however, suggested that although a partition may not have taken place immediately before the execution of the bond, a partition may have been effected after the date of the bond that this partition came into operation gradually and that, consequently, the plaintiffs are entitled to enforce the mortgage against the share which Prabhu Lal obtained under the partition. As we have said above, the evidence which the plaintiffs adduced in the case was adduced for the purpose of proving a partition

shortly after the decision of Prabhu Lal's suit by the Court of first instance and the nature of the partition was that Prabhu Lal was given a fifth share in every item of property owned by the joint family. The evidence of a later partition which is relied on is a statement of Baru Mal one of the brothers of Prabhu Lal made in the year 1904, in a suit for pre-emption brought against him in respect of property which he had purchased. In that deposition he stated that seven or eight years before the date on which he gave his evidence his father had privately given one village to him, and two other villages and a portion of a third village to his remaining three sons, to be held by them jointly and that he had kept the remainder of his property for himself. He added that the profits of these properties were received by the brothers for their maintenance but no deed of partition was executed, nor was mutation of names effected, nor was any partition lot prepared. Assuming that this deposition is admissible as evidence in the case, it does not prove the partition alleged by the plaintiffs, which, as we have said above, is a partition of the whole of the family property, under which a fifth share in it was given to Prabhu Lal. The statement of Baru Mal can be explained by the fact that he was resisting a claim for pre-emption, and for the purposes of that suit it suited him to state that he owned the village of Firozabad which put him on the same footing as the pre-emptor in the suit. His statement is also consistent with Budh Singh, the father allowing his sons to enjoy the income of some of his villages without affecting a partition of the family property. It is clear, and this is not disputed on behalf of the respondents, that in a joint family portions of the income of the joint family property may by mutual arrangement be enjoyed by the different members but such enjoyment does not necessarily have the effect of causing a severance of the joint nature of the joint family property. Had the members of the family entered into an agreement to hold the family property in defined shares, a separation of the family would thereby have taken place, although there may not have been a partition by metes and bounds. No such agreement appears to have been entered into in this case by the different members of the family and if the statement of Baru Mal be accepted as true, it does not in any way prove a partition of the family property.

The next circumstance on which the plaintiffs rely is that suits were brought separately by different members of the family in respect of debts which stood in their respective names. This again is not inconsistent with the family being joint specially in the case of members of the class to which Prabhu Lal and his father and brothers belonged. In a family of money-lenders and merchants, like the family in question, while the whole family remained joint, particular members of it carry on small money-lending business, and if in respect of such money-lending business separate suits were brought, the institution of such suits does not raise any inference as to the family being separate. We do not find that any member of the family dealt with any part of the family property as his separate property by mortgaging or otherwise disposing of it, and it is also important to remember that the property stands entered in the name of the father even to this date.

Under these circumstances we are unable to believe the oral evidence adduced by the plaintiffs and to agree with the learned Subordinate Judge that Prabhu Lal had separated from his father, and that the property mortgaged by him was his separate property. The property being joint family property no one member of the family could without the sanction of the other members mortgage any portion of it and, therefore, the mortgage in suit cannot be enforced against those members.

A plea was raised to the effect that no consideration had been paid for this mortgage. In the view which we have already taken of the nature of the mortgage, it is not necessary to enter into this question inasmuch as a personal claim against the mortgagor has already become time-barred. But if we had to go into that question we should have considerable difficulty in differing from the conclusion at which the Court below arrived.

Lastly the learned Advocate for the appellant wished to raise the question that the mortgage had not been legally executed inasmuch as the mortgage deed had not been attested in accordance with the provisions of the Transfer of Property Act. This contention is, of course, the result of the recent

ruling of their Lordships of the Privy Council on the subject but the plea was never raised in the Court of first instance, no issue was joined and no evidence was taken, and it was also not mentioned in the memorandum of appeal to this Court. We, therefore, decline to entertain this contention.

The result is that the plaintiff's suit must fail. We, accordingly, allow the appeal, set aside the decree of the Court below and dismiss the suit, with costs in both Courts including in this Court fees on the higher scale.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 13 OF 1910.

May 31. 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

HEMANDAS THAKURDAS—PLAINTIFF—APPELLANT

versus

DEVISHAH DIN DAYAL—DEFENDANT—RESPONDENT.

Jurisdiction—Place of suing—Principal and agent Creditor and debtor—Place of performance not fixed—Right to sue at place chosen by creditor.

Where an agreement to pay money between a principal and his agent is to be performed without application by the principal, and no place is fixed for payment, it is open to the principal to institute a suit to recover the money due on the agreement at the place where he resides, without proving any implied agreement to pay at such place.

The burden in such a case is on the defendant to prove that some other place was by express or implied agreement fixed for performance.

Appeal from the order of Mr. H. N. Crouch, Additional Judicial Commissioner of Sind.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellant.

Mr. *Hirdaram Mewaram*, for the Respondent.

JUDGMENT.—The plaintiff, a trader in Karachi, sued defendant a commission agent in the Punjab for money alleged due on an agreement entered into in the Punjab.

The defendant contended *inter alia* that the agreement including payment was to be executed wholly in the Punjab and that, therefore, he was liable to be sued only in the Punjab.

The learned Judge upheld the contention and dismissed the suit for want of jurisdiction. His reasons apparently were that plaintiff had failed to prove any implied agreement to pay in Karachi and that commercial usage had been shown to require the creditor to make demand at the residence of the debtor so that defendant could not be required to pay at Karachi under section 49 of the Contract Act.

We find ourselves unable to concur in these reasons. The plaintiff was not bound by any express term of the agreement (Exhibit 3) to make demand of defendant. On the contrary the defendant expressly undertook to make the payment in these words:—"I will, therefore, file a suit on your account.....The money which will be realised will be paid to you. I will file a suit within one month. If I do not do so, I will pay you the money at the market rate." There was no suggestion that payment should only be made on demand at the residence of defendant. Nor, in our opinion, has any commercial usage to that effect been established. No doubt, the parties have usually recovered their dues from one another by *hundis* payable at the residence of the debtor, but it is clear from the evidence of Vishindas and Sobraj (Exhibits 1 and 6) that there is no commercial usage relieving the debtor of his liability to pay his debt at the place appointed under section 49 of the Contract Act.

We think that the agreement was one to be performed without application by the creditor and that no place had been fixed for the performance. It was accordingly open to the creditor to fix a reasonable place without proving any implied agreement to pay at such place. The burden, in fact, was on the debtor to prove that some other place had been fixed by express or implied agreement for performance. The creditor in this case has fixed a reasonable place for performance by filing this suit in Karachi. If the sum claimed should prove to be due on the agreement, that sum must be paid by the debtor in Karachi under section 49 of the Contract Act. The matter, therefore, is within the jurisdiction of the Karachi Courts.

We reverse the decree for these reasons and remand the suit for trial on the merits. Costs to be costs in the cause.

Suit remanded.

DUR MUHAMMAD KHAN *v.* PIRAN DITTA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 792 OF 1910.

February 22, 1912.

Present:—Mr Justice Kensington and Mr. Justice Shah Din.

DUR MUHAMMAD KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PIRAN DITTA—PLAINTIFF, AHMAD BAKHSH—DEFENDANT—RESPONDENTS.

Alienation—Gift by sonless agriculturist in favour of his daughter and sister's sons—Incompetency of his after-born son to object—Collusive suit.

A gift by a sonless Muhammadan agriculturist of ½ of his non-ancestral holding in favour of his daughter's and sister's sons is valid both according to Muhammadan Law and custom and cannot be questioned by an after-born son specially when the latter is in collusion with his father.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 16th April 1910, reversing that of the Munsif, 1st class, Multan, dated the 13th April 1909, dismissing plaintiff's claim.

R. B. Pandit *Sheo Narain*, for the Appellants.

JUDGMENT.—The circumstances of the case appear clearly from the judgments of the lower Courts, which have disagreed. The Munsif dismissed plaintiff's suit finding (1) that the land in dispute was not acquired by a common ancestor of plaintiff and Bahadur Khan, and (2) that the parties are governed by Muhammadan Law and not by custom. The lower Appellate Court has discussed the first point only, and finding that the land must have been inherited from the common ancestor has reversed the decision and given plaintiff a decree for a declaration that he is not affected by a gift made by his father before he was born. The plaintiff-respondent is not represented in this Court but this may be, because he recognises the impossibility of upholding the Divisional Court's decree, which is based on assumption entirely opposed to the evidence on record.

It should be observed to begin with that the gift of 1895 was a very reasonable transaction. Plaintiff's father, Ahmad Bakhsh, was at the time sonless, plaintiff being born only in 1903 The donees are the sister's sons of Ahmad Bakhsh, and one of them is also his daughter's son. The gift covers half the area of a well of which Ahmad Bakhsh had become the sole proprietor by 1895. He himself brought an unsuccessful suit to get the gift set aside in 1906, and it was on the failure of that suit in two Courts that the present collusive suit was instituted on behalf of his minor son in 1907.

The lower Appellate Court's finding about the original acquisition of the well ignores the Settlement record entries of the 1880 Settlement. The well was then shown as held on 50 shares as follows:—

Descendants of Muhammad Khan 30 shares. { 2 daughters of Farid 6 shares. / 2 sons of Sardar Khan 24 shares.

Bahadar Khan 20 shares.

We do not know under what circumstance the entire well subsequently came to be owned by Ahmad Bakhsh, but apparently the remaining sharers have since died out. The essential point is that the detail of shares in the 1880 record distinctly negatives the assumption that the well can have been acquired by the remote ancestor Farid Khan, and goes to support both the findings of the Munsif.

From the Sadar Kanungo's evidence of 17th January 1908, it appears to be not known how Bahadur Khan's name had been cut out of the record after 1880, but this may be due to partition. Any how he was alive in 1907 and gave evidence in the case which does not support plaintiff.

We take it that in 1895 Ahmad Bakhsh was perfectly competent to make this gift both by custom and Muhammadan Law, and there was no one then alive who could restrain him even by Customary Law.

Bahadur Khan did not, in fact, attempt to contest the gift, and there is no reason why the arrangement should be interfered with merely because a son has been born to Ahmad Bakhsh many years later.

The appeal is accepted. The decree of the lower Appellate Court is reversed and that of the Munsif, dismissing plaintiff's suit, is restored, but as it is undesirable to accentuate this foolish family dispute, we direct that the parties shall pay their own costs throughout, so as to avoid further cause of friction.

Appeal accepted.

CHATRAPAT DUGAR *v.* KHARAJ SINGH.

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPLICATION No. 23 OF 1912.

March 11, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

CHATRAPAT DUGAR—APPLICANT

versus

KHARAJ SINGH—OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), *ss.* 15, 46, 47 *—Letters Patent, cl.* 39*—Civil Procedure Code (Act V of* 1908), *s.* 109 (*c*)*—Insolvency, application for—Dismissal of application—Appeal to High Court—Dismissal under Order XLI, rule* 11 *of Civil Procedure Code*, 1908 *—Debts and assets exceeding ten thousand rupees—Substantial question of law—Fit case for appeal to Privy Council—Privy Council appeal.*

A petition was presented to a District Judge under the Provincial Insolvency Act praying that the applicant be adjudged an insolvent, but the petition was dismissed. The petitioner appealed to the High Court, but his appeal was dismissed under Order XLI, rule 11 of the Civil Procedure Code. He then applied for leave to appeal to His Majesty in Council. The assets and the debts exceeded ten thousand rupees, and the question was whether having regard to the provisions of section 15 of the Act the District Judge was competent to dismiss the petition.

Held, that the question was a substantial question of law, and that the case came within section 109 (*c*) of the Civil Procedure Code and, therefore, ought to be certified as a fit case for appeal to the Privy Council.

Application for leave to appeal to the Privy Council from the order of Justice Sir Cecil Brett, KT., and Mr. Justice Sharfuddin, dated April 12th, 1912, under Order XLI, rule 11 of the Civil Procedure Code of 1908.

Dr. *Rash Behary Ghose*, Babus *Hemendra Nath Sen* and *Sachchidanand Gupta*, for the Petitioner.

Babus *Ram Chandra Majumdar*, *Sarat Kumar Mitra* and *Harihar Prasad Singh*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The applicant presented a petition under the Provincial Insolvency Act praying to be adjudged an insolvent, but his petition was dismissed. From this order of dismissal an appeal was preferred to the High Court, but his appeal was dismissed under Order XLI, rule 11. There was an application for review, but that was refused, and it is in these circumstances that the present application has been made for leave to appeal to His Majesty in Council.

The first point we have to consider is whether an appeal lies.

The right of appeal from the High Court to the Privy Council rests on clause 39 of the Letters Patent, and this is elaborated in the Code of Civil Procedure. Section 109 of the Code provides that "subject to such rules as may from time to time be made by His Majesty in Council regarding appeals from the Courts of British India and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council, (*a*) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction, (*b*) from any decree or final order passed by a High Court in the exercise of original Civil jurisdiction; and (*c*) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."

Section 110 deals with cases mentioned in clauses (*a*) and (*b*) of section 109 and provides that in those cases the amount or value of the subject-matter must be as therein stated, and where the decree or final order affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

The procedure is laid down in Order XLIV. Rule (3) of that Order provides that "Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110 or that it is otherwise a fit one for appeal to His Majesty in Council".

In the present case, we are told that the assets are expected to be five lacs or so and the creditors represent an indebtedness very much in excess of that. That is accepted on both sides as substantially representing the actual state of affairs.

It is said that we have no power to grant leave, because no provision for appeal to the Privy Council is contained in the Insolvency Act, and it is urged that sections 46 and 47 of that Act, if any thing, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist and this is a case which comes clearly within the provisions of the Letters Patent and of section 109 of the Code. The only question is whether this is

a case which can properly be certified to be a fit one for appeal to His Majesty in Council [*The Bombay Burmah Trading Company* v. *Dorabji* (1).] It has been suggested before us on the part of the respondents that there has been an abuse of the process of the Court, and the learned Judge of the District so held. But there is no express decision by the High Court to that effect because the appeal was dismissed under Order XLI, rule 11, and where this is done the evidence is not considered but merely the judgment under appeal, more than that we are assured by the learned Pleader, who appears for the applicant and who sought to have the appeal to the High Court admitted, that this is what actually occurred in this case. Therefore, it cannot be said that there is any concurrent finding that there was an abuse of the process of the Court.

Moreover, I think this is a case where a substantial question of law arises as to whether it was within the competence of the District Judge to dismiss the application as he did, having regard to the provisions of section 15 of the Provincial Insolvency Act. In my opinion, therefore, this is a case which comes within section 109 (*c*) of the Code of Civil Procedure, and we ought, therefore, to certify that this case is a fit one for appeal to His Majesty in Council under section 109 (*c*).

Let a certificate be issued accordingly.

(1) 27 B. 415; 5 Bom. L. R. 348.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2404 OF 1911.

April 1, 1913.

Present:—Justice Sir Frederick Robertson, KT.

LEHNA SINGH—PLAINTIFF—PETITIONER

versus

AHMAD DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Contract to supply bricks—Receipt of bricks—Promise to pay—Pro-note—Evidence of the supply of bricks even when document inadmissible for want of stamp.

A contract was entered into between the parties for the supply of bricks to be supplied from time to time. Each time a supply was made, a printed form, evidently used for various purposes, was sent by the plaintiff to be signed by the defendant obviously as a receipt for the bricks. The form showed the amount of bricks supplied, rate to be charged, and the sum chargeable. The signature of the defendant was immediately under the total of bricks supplied, and lower down in the document the words "*qimat indultalab ada kardunga*" were written in Persian. The document was unstamped:

Held, that the document was not a pro-note, but a mere receipt for bricks.

That even in case of inadmissibility of the document for want of stamp the plaintiff was entitled to prove the supply of bricks and the amount due in payment therefor *aliunde*.

In interpreting documents of the kind which clearly are not intended to be pro-notes, the intention of the parties and all particulars connected with the transaction must be considered.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Gujranwala at Lahore, dated the 1st June 1911, confirming that of the Munsif, 1st class, Gujranwala, dated the 16th May 1910, decreeing plaintiff's claim in part.

Mr. *Gokal Chand Naurang*, for the Petitioner.

Mr. *Pestonji Dadabhai*, for the Respondents.

JUDGMENT.—The first point to notice here is that the petition is under section 70 (1) (*b*) and has merely been entered under section 70 (1) (*a*) by a clerical error, and involves a point of law interpretation of which requires consideration.

The claim of the appellant has been dismissed by the learned Divisional Judge on a purely technical defence.

It has been held by him that the documents upon which the suit is said to have been filed must, as regards some of them at least, be considered to be promissory-notes and as these have not been stamped and the law does not permit of a stamp to be made good afterwards it is held that they are not admissible in evidence and, consequently, the suit upon them must fail. It has also been held that there was no separate contract apart from these pro-notes which would entitle the plaintiff to give evidence as to his claim.

I now proceed to consider these two points in order. The first point we have to remember is that this is extremely a technical defence and that, as a matter of fact, the person who should have put on the receipt stamp for one anna, if one was necessary, was the defendant and he is in fact taking advantage of his own tort in putting forward the defence which he has. It is true that the provisions of law are so strict in regard to the admission of documents of this kind

which are not stamped that it is not possible for me to accept such a plea, but at the same time it is to be remembered that equities are against him and the law should certainly not be strained in his favour. From the facts of the case it appears that a contract was entered into between the parties for the supply of bricks. These bricks were supplied from time to time. The real contract between the parties, therefore, was not a transaction on a pro-note at all. It was not a question of mere supply of bricks upon payment straight off by pro-notes, or the loan of money upon pro-notes, it was a question of the supply of bricks from time to time, of which account was taken, and of which the total sum due was finally claimed. Each time the supply of bricks was made a document was sent by the plaintiff to be signed by the recipient, obviously as a receipt for the bricks. It is quite clear from the nature of the transactions which went on that whatever technically may be held to be the legal nature of these documents taken *per se* it was never contemplated by either side that pro-notes should be taken, but simply that a receipt for the supply of goods, as acknowledgment should be given.

I will consider the documents *seriatim*. P. 2 shows the amount of bricks supplied rate to be charged and the sum chargeable. The signature of the defendant is immediately under the total of bricks supplied. It is true that lower down in the document the words "*qimat indultalab ada kardunga*" are written in Persian and, no doubt, it may be held that a document may be signed on any portion of its surface. In interpreting documents of this kind which are not clearly intended to be pro notes we have to consider the intention of the parties and all particulars connected with the transaction and it appears to be clear that the intention of the person who signed these receipts under the statement of the amount of bricks supplied was to admit the receipt of these bricks and nothing more. It is a mere printed form evidently used for various purposes and probably was used for this particular purpose as being ready to hand. P. 3 is of precisely the same nature and the signature is immediately below the entry of the amount of bricks supplied; and so in the case of P. 4.

In P. 5 the column under the amount of bricks supplied is filled up with the words written by the sender and here, consequently, we find that the signature of the recipient is below the word "*indultalab.*"

In P. 7 again, as before, we find the signature immediately below the entry giving the amount of bricks supplied. On this receipt at the bottom of the words in English are printed: "I promise to pay on demand." At the top of the document we find the words "Received bricks or other materials from Bhai Lehna Singh". This shows clearly what nature of the document was intended to be and we also find below "Received the above-mentioned things through..." The blank evidently was intended to be filled in with the name of the carrier. It is perfectly clear that this is not a form a pro-note is usually drawn upon and nothing points to the conclusion that these forms were intended to be used as such. In this case they were used as carter's receipts. What probably suggested the defendant to put up this defence is that the Pleader who drew up the plaint spoke of the cause of action as arising from the date on which these documents were written which, of course, were the dates also on which the goods were supplied. The receipts are not even all in precisely the same form. So much for the documents themselves which I hold not to be pro-notes within the meaning of the Act. It is true that they are on printed forms which by some stretch might be held to come under section 4 within the strict definition of pro-notes but it is perfectly obvious that, as a matter of fact, these printed forms were used because they were at hand and convenient and neither party understood or intended them to be pro-notes.

As regards the second point it is quite clear that the pro-notes did not form a separate transaction involving only the execution of the pro-note immediately upon the receipt of money or goods. It is quite clear that the real transaction was a contract to supply bricks. This contract had been entered into and the order for delivery given long before any pro-notes were executed or thought of and in compliance with that contract the supply of bricks was made; and as each supply was made a receipt was taken on a printed form. Even if it were held that those receipts were pro-notes and not admissible it is to my mind quite clear that the plaintiff is entitled

to prove the supply of bricks and the amount due in payment of those bricks *aliunde*.

I, consequently, accept the appeal, set aside the judgment of the lower Appellate Court and return the case for decision on its merits with reference to the above remarks in regard to that part of the claim which has been dismissed.

Costs to be costs in the proceedings.

Appeal accepted; Case remanded.

PUNJAB CHIEF COURT

CIVIL REVISION PETITION No. 2037 OF 1911.

April 8, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge.

HARJAS MAL—PLAINTIFF—PETITIONER

versus

Musammat KAHNI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *s.* 5—*Decree not filed at the time of appeal—Carelessness—Sufficient cause.*

In filing an appeal, Counsel for the appellant, by a piece of carelessness omitted to file a copy of the decree appealed against but instead put in a copy of a deposition. The mistake was not noticed until long after the expiry of the period of limitation for filing the appeal:

Held, that the Court should have allowed the copy of the decree to be filed, and should have extended the period of limitation under section 5 of the Limitation Act, IX of 1908.

C. v. *C.*, 22 P. R. 1903; 91 P. L. R. 1903, referred to and distinguished.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Lahore, dated the 1st August 1911, confirming that of the Subordinate Judge, Lahore, dated the 27th October 1910, dismissing the claim.

Messrs. *Broadway* and *Gullu Ram*, for the Petitioner.

Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—*Prosonno Kumari Debi* v. *Ram Chandra Singha* (1) and *Wahid Nur Khan* v *Haqdad Khan* (2) have been cited for the petitioner, and *C.* v. *C.* (3) and *Musammat Masum Begam* v. *Madan Mohan Lall* (4) for the respondents. Counsel for the petitioner contended that the copy of the record of the evidence of a witness mistaken in the hurry of the moment for the decree, might well have been mistaken for a decree and bore a one rupee Court-fee stamp, such as would be borne by a copy of a decree, the stamp being signed (for cancellation) by the clerk of the Lahore Divisional Court and dated by him "16-12-1910" the date on which the appeal was filed in the Divisional Court. The Clerk of Court noted that the appeal was within limitation and bore a Court-fee stamp of Rs. 80. He did not note that a copy of the decree had not been filed. The decree was dated 27th October 1910 and the appeal was filed on the 16th December 1910.

Had the clerk noted the absence of a copy of the decree there would have been ample time to file it within limitation. The absence was not noticed until 1st August 1911, and on that date Counsel for the appellant prayed for extension of the period of limitation under section 5 of the Act.

The Division Bench of this Court, whose, judgment is reported as *Musammat Masum Begam* v. *Madan Mohan Lall* (4), did not hold that the period of limitation could not under any circumstances be extended under section 5 of the Limitation Act but said: "We do not think that any special ground for our interfering with the ordinary rules of limitation has been made out." A memorandum of appeal and copy of the judgment of the Court below had been filed and no copy of that Court's decree had been filed. The omission was promptly discovered and pointed out by the Court office and a copy of the decree was obtained and filed after limitation had expired. Here a copy of the decree was in Counsel's possession, but by a piece of great carelessness a copy of a deposition was filed in its place. There was also great carelessness on the part of the Clerk of the Court, who should have noted that the copy filed was not of a decree.

C. v. *C.* (3) appears at first sight to be more in the respondents' favour but the judgment does not, in my opinion, lay down the rule that section 5 of the Limitation Act is under no circumstance applicable to cases in which a copy of the decree appealed from has not been filed within limitation.

Nothing purporting or believed to be a copy of the decree had been filed with

(1) 17 Ind. Cas 155; 17 C. L. J. 66.
(2) A. W. N. (1897) 15.
(3) 22 P. R. 1903; 91 P. L. R. 1903.
(4) 9 Ind. Cas. 222; 8 P. W. R. 1911.

the memorandum of appeal and neither ignorance of the law nor mistake was pleaded. Counsel merely fell back on section 5 of the Limitation Act as a means of evading limitation and the Court held that to grant his prayer "would simply be to cancel section 541, Civil Procedure Code." I understand the meaning of the judgment to be that extension of the period of limitation without adequate cause could not be granted.

The facts differed very widely from those of the present case and the lower Appellate Court should have allowed the copy of the decree to be filed and should have extended the period of limitation under section 5 of the Limitation Act.

For these reasons I allow this application, set aside the decree of the lower Appellate Court and, under Order XLI, rule 23 of the Code of Civil Procedure, remand the appeal for decision on the merits.

Costs of this Court will be costs in the cause.

Application allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2421 OF 1911.

March 20, 1913.

Present:—Mr. Justice Rattigan.

Seth BABU LAL AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

Pandit SUKH DEO SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Execution of decree—Auction sale set aside—Power of Court to order refund of money paid by auction-purchaser—Subsequent agreement between decree-holder and auction-purchaser—No bar.

Where in execution of decree an auction sale is set aside, the executing Court is competent under section 151, Civil Procedure Code, 1908, to direct the decree-holder to refund the money paid to him through the Court by the auction-purchaser; the Court would not be debarred from doing so simply because the decree-holder set up a subsequent agreement between himself and the auction-purchaser, which the latter repudiated.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amemded by Act XXV of 1899, for revision of the order of the Divisional Judge, Delhi Division, dated the 7th July 1911, confirming that of the Subordinate Judge, 2nd class, Delhi, dated the 31st March 1911, ordering the decree-holders to pay into Court the sum of Rs. 167·4 by the 15th of April 1911.

Mr. *Santanam*, for the Petitioners.

Lala *Gopal Chand*, for the Respondents

JUDGMENT.—I have no hesitation in agreeing with the Divisional Judge that no appeal lies from the order of the Munsif, as section 47, Civil Procedure Code, clearly does not apply.

It is contended, however, that the Munsif had no jurisdiction to call upon the decree-holder to refund the money which had been paid to him, through the Court by the auction-purchaser. In my opinion section 151, Civil Procedure Code, gave the Court full authority to direct the decree-holder to refund the money once the auction sale was set aside, and I cannot agree that the Court should have referred the auction-purchaser to a regular suit, simply because the decree-holder alleged that after payment of the money to him, the auction-purchaser had agreed to accept Rs. 743 from him instead of the balance of Rs. 910. The auction-purchaser states that he is not bound by that agreement as the facts were misrepresented to him by the decree-holder and the Munsif finds that such was the case, but be this allegation right or wrong, I cannot agree that the executing Court is debarred from calling upon the decree-holder to refund money paid to him simply because he sets up a subsequent agreement between himself and the auction-purchaser, which the latter repudiates. It appears to me that all that the executing Court in such a case has to look to is that money has been paid through its agency upon a consideration which has admittedly failed, and that it has inherent power to compel a refund of such money to the person who paid it into Court. If the decree-holder has a cause of action based on the compromise, it is open to him to sue the auction-purchaser upon it, but I cannot see that the executing Court has any concern with that dispute, or that the proper course for it to adopt is to refer the *auction-purchaser* to the expense and trouble of a regular suit. I accordingly reject the petition with costs.

Petition rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1166 OF 1911.

January 10, 1913.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

YEDDAMAPUDI LAKSHMI NARASIMHA ROW—PLAINTIFF—APPELLANT

versus

REPALLI SITARAMASWAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Inamdar—*Presumption of grant of* melvaram *only*—*Not in possession—Suit for ejectment of occupant*—*Burden of proof*—Melvaram *and* Kudivaram *rights*—*Grant by Government or by* zemindar—*Waste land*—*Madras Estates Land Act (I of* 1908*)—Suits instituted before the Act came into force—No exchange of* pattas *and* muchilikas.

Where an *Inamdar* is not in possession and he seeks to eject the person who is, it would lie on him to show that both the *melvaram* and *kudivaram* rights are vested in him on the ground that he was in occupation when the *inam* was granted.

It is immaterial whether the grant of the *inam* is by the Government or by the *zemindar*.

The presumption that *melvaram* right alone was granted applies as well to grants made by the Government as to grants by the *zemindar*.

In the case of waste lands, however, the *inamdar* can ask the Court to hold that the *inam* consisted of the entire right in the property, if he can show that the lands were waste at the time of the grant.

A suit instituted before the Estates Land Act came into force without exchange of *pattas* and *muchilikas* or a tender of *patta* cannot be maintained, though the trial is after the passing of the Act.

Second appeal from the decree of the Court of the Temporary Sub-Judge of Masulipatam, preferred against that of the District Munsif of Gudivada, in O. S. No. 381 of 1905.

Mr. S. *Srinivasa Aiyangar*, for the Appellant.

Mr. *V. Rama Doss*, for the Respondents.

JUDGMENT.—The plaintiff in this case is the *mokhasadar* of Viravalli in the old *zemindari* of Nuzvid, and the suit is to eject certain *ryots* from the lands of which they are in occupation. The question for decision raised in the issues is whether the defendants have the right of occupancy in the lands. The District Munsif came to the conclusion that the plaintiff was entitled to eject the defendants. The Subordinate Judge arrived at a different conclusion. The first point raised in second appeal is that there is no presumption in cases like this that the occupying *ryots* have a permanent right in the lands in their possession. The argument is that the presumption that an *inamdar* has only a *melvaram* right applies only to the case of *inams* granted by a *zemindar*, and chiefly to the cases of small plots of land which constitute minor *inams*. The finding in this case is that the *mokhasa* was granted by a *zemindar* of Nuzvid. The *inam* register has not been brought to our notice. We are unable to say that the Subordinate Judge was wrong in saying that it was a Nuzvid *zemindar* that granted the *mokhasa* originally. But assuming that this was not the case we do not think that that would make any difference.

It is contended by Mr. S. Srinivasa Aiyangar, the learned Vakil for appellant, that the reason for presuming that an *inamdar* has only the *melvaram* right as laid down in the cases is that *zemindars* were only farmers of revenue, and that the Government did not grant to them absolutely the land included in their *zemindaris* in consideration of the services which were usually rendered by them and that, therefore, a grant of an *inam* by the *zemindar* could not include the occupancy right in the land. In the case of grants made by *zemindars* this would, no doubt, be the reason for holding that an *inam* does not include the *kudivaram* right in the land. Where a grant is made by the Government the presumption still would be that it intended to grant only the right of the State in the land, which *prima facie* could only be the *melvaram* interest or the right to land revenue. An *inam*, no doubt, may be granted to a person in occupation of the land. But the *inam* itself would still be only the *melvaram* right though in consequence of the grant the *melvaram* and the *kudivaram* rights might become vested in the same person. Where the *inamdar* is not the person in possession and he seeks to eject the occupant, it would lie on him to show that both the *melvaram* and *kudivaram* rights are vested in him on the ground that he was in occupation when the *inam* was granted. We cannot uphold the contention that the presumption that the *melvaram* right alone was granted would not apply to grants made by the Government. The presumption is that the Government did not intend to deal with the rights of the occupants and that they intended to grant only the right of the State in the land. Such right is ordinarily only the right to the land revenue.

It might, no doubt, be otherwise in the

case of waste lands. But it lies on the *inamdar* to show that the lands were waste at the time of the grant before he can ask the Court to hold that the *inam* consisted of the entire right in the property. We must, therefore, hold that the Subordinate Judge was right in throwing on the plaintiff the onus of proving his right to eject the defendants. And, in fact, it was conceded before the Subordinate Judge that the plaintiff must bear the onus of proof in the case.

The learned Vakil for the appellant has dealt very fully with the judgment of the Subordinate Judge and criticised the reasons given for the conclusion he arrived at. In fact he has threshed out the points arising in the case so fully that we have not considered it necessary to hear the respondents' Vakil. It is unnecessary to deal with his arguments in detail as the points raised by him all relate to the appreciation of evidence.

The Subordinate Judge has considered every one of the matters adverted to at the arguments. It may be conceded that the plaintiff proved several facts which required an explanation from the defendants. But we are unable to say that there is any error of law in the manner in which the Subordinate Judge has dealt with those facts. We must, therefore, decline to interfere with his findings and dismiss the second appeal with costs.

The respondents have presented a memorandum of objections objecting to the decree in the plaintiff's favour for rent for five years. The suit was instituted before the Estates Land Act came into force and admittedly there was no exchange of *pattas* and *muchilikas* or a tender of *patta* to the defendants. The suit is, therefore, clearly unsustainable. The decree for rent, must, therefore, be set aside. The suit must be dismissed with costs in its entirety; and the respondents are entitled to their costs throughout on the memorandum of objections.

Decree set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 786 OF 1909.

December 7, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Robertson.

NANDA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHETA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Object of khanadamadi—*Daughter dying without issue*—Khanadamad *succeeding and marrying another wife—Step-sons' incompetency to succeed—Property, whether reverts to the daughter's blood relations.*

The custom of *khanadamadi* in cases where it obtains is designed to benefit the daughter and her issue.

On the death of a daughter, leaving no issue, the *khanadamad* succeeds to the property of her father for life on the equivalent of a widow's estate, and on his death the property reverts to the daughter's blood relations; his sons by another wife have no *locus standi* to claim it.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 22nd April 1909, confirming that of the Subordinate Judge, 1st class, Ferozepore, dated the 30th June 1908, dismissing the claim.

The Hon'ble K. B. Mr. *Muhammad Shafi*, for the Appellants.

Mr. *Harris*, for the Respondents.

JUDGMENT.—The facts of this case are very simple and yet they have led to a curious misapprehension on the part of both the lower Courts.

The pedigree-table below shows the relationship and connection of the parties:—

PHULLA SINGH,

Billa Singh, Bela Singh,

Musammat Ramon, died childless married Kharku married another wife,

Kheta. Bela. Harnaman.

The descendants of Billa Singh are the plaintiffs, and the three sons of Kharku by a different wife, who are no blood relations of *Musammat* Ramon, and through her of Bela Singh and Phulla Singh, are the defendants. It is proved, and admitted on all hands that *Musammat* Ramon and Kharku were allowed to succeed to Bela Singh's property under the custom of "*khanadamadi*," Kharku being a resident son-in-

law, this was also decided in a regular suit. It is also clearly established by authority and admitted, that the custom of *khanddamudi* is designed to benefit the daughter and her issue in cases where it obtains. Kharku was not an adopted son, merely a resident son-in-law. *Musammat* Ramon died many years ago and Kharku succeeded to the property for life on the equivalent of a widow's estate. *Musammat* Ramon left no issue, male or female, and on Kharku's death it appears to us obvious that the property must revert by inheritance to her own blood relations. Kharku was not her "heir" by law or custom for anything beyond a life-estate, and it is clear that if he were not her full heir, the sons of Kharku, by another woman, can have no right to succeed to their step-mother's property. The question is one of simple inheritance, not one of adoption or gift, or reversion to the heirs of the donor; it is one of inheritance to *Musammat* Ramon on the termination of her husband's life-estate and we know of no rule of law or equity which prefers her step-sons to her blood relations in such a case. The appeal is accordingly accepted, and the claim is decreed with costs.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 664 OF 1911.

November 21, 1912.

Present:—Sir Basil Scott, KT, Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

KARSAN SADASHIV PATIL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GATLU SHIVAJI PATIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Abkari Act (V of 1878), s. 43—License—Condition prohibiting sale or transfer—Partnership—Admitting partner in business—Contract Act (IX of 1872), s 23.

A. obtained a license to sell liquor under the provisions of the Bombay Abkari Act. One of the conditions of the license was that he would not sell, transfer or sub-let his right to sell liquor. He, subsequently, joined *B.* as a partner in the business. and was sued by him for an account of the partnership and for recovery of what might be found due to him:

Held, that the contract of partnership was not forbidden by law or opposed to the policy of the Excise Act.

The omission of all reference to the question of sub-letting a part of the right to vend liquor or to admit partners in the business in the form of license sanctioned by Government in 1903 points to the inference that the Abkari Authorities have decided not to prohibit the taking in of other persons into partnership in the profits derived from the selling of liquor under an Abkari license.

Second appeal from the decision of the District Judge of Khandesh, at Dhulia, in Appeal No. 262 of 1909.

Mr. *D. A. Khare*, (with him Mr. *P. D. Bhide*), for the Appellants.

Mr. *Coyajee*, (with him Mr. *P. B. Shingne*), for the Respondents.

JUDGMENT.—This suit was instituted by the plaintiffs for an account of what was due upon a partnership between them and the defendants in respect of a certain liquor-selling business.

The business of selling liquor in the Bombay Presidency is regulated by the provisions of the Abkari Act, Bombay Act V of 1878. It is provided by section 16 that "except as is hereinafter otherwise provided, no liquor and no intoxicating drug shall be sold without a license or pass from the Collector." Section 43 imposes penalties upon whomsoever in contravention of the Act or of any rule or order made under the Act or of any license obtained under the Act sells liquor.

Now the license under the Act was obtained by the defendant No. 1. It has many conditions expressed in it but the only material one for the purpose of this suit is condition No. 19 which provides:—"The licensee shall not sell, transfer to any person or sub-let his right to sell country liquor obtained under the license, and shall enter into no *kabulayat* or agreement for the exercise of the said right which, in the opinion of the Collector, is in the nature of a sub-lease." By the preamble of the license the licensee was given, subject to the conditions expressed, subsequently, an exclusive right to sell country liquor in the shop at Nawapur or in the group or groups of shops mentioned in schedule B for a period of one year from the 1st of April 1904.

The learned District Judge has not gone into the question which was decided by the Subordinate Judge whether a partnership agreement had actually been concluded. The Subordinate Judge thought on the

evidence that he must hold that a partnership agreement had not been concluded. But the District Judge thought it was sufficient to deal with the question of the legality of the agreement, assuming it to be in existence, and he has come to the conclusion that the contract for partnership would be forbidden by law and opposed to the policy and general tenor of the Act and, therefore, cannot be enforced in a Court of law. The first point he takes is that the preamble shows that the right given to sell liquor was a non-transferable right, and he points out that section 43 of the Act and clause 19 of the license provide that no licensee shall sell or transfer to another's name or sub-let the right which he is granted. He says that by admitting the plaintiffs as partners the defendants transferred part of that right to the plaintiffs without their obtaining a license to sell the liquor.

The license is presumably granted by the Abkari Authorities in order that they may have control over the person who is authorised to sell the liquor and in order that the sale of the liquor may not pass out of his control to unauthorised persons. The license with that view prohibits sale, transfer or sub-letting of the right. The authorities are by no means blind to the possibility of partnerships being entered into by licensees in which other persons may become interested in the sale of liquor. In the case of *Hormosji Motabhai* v. *Pestanji Dhanjibhai* (1), the licensees were, by the terms of their license, forbidden to take partners, and as pointed out by Mr. Justice Parsons in *Ganesh Vithal* v. *Shripad Dattobi* (2), the 15th rule of the Abkari Act in force in 1895 provided that the lessee was not without the previous written permission of the Collector to sub-let, in whole or in part, the right to vend conferred upon him by the license or admit persons into his business.

Now here we have a license sanctioned by Government in the year 1903 which omits all reference to the question of sub-letting a part of the right to vend or of admitting partners into the business. What conclusion are we to draw? Are we to infer that the taking in of partners into the business of a licensee is objected to by the Abkari Authorities or that it is not? It appears to us that the only inference must be that the Abkari Authorities have decided not to prohibit the taking in of other persons into partnership in the profits derived from the selling of liquor under an Abkari license.

For these reasons we are of opinion that the decree of the District Judge must be set aside. But that does not dispose of the case; for the question still remains whether the Subordinate Judge was right in holding that there was in fact no partnership agreement. It is much to be regretted that the District Judge did not thoroughly try the case in the first instance instead of necessitating an appeal to this Court on a point of law and a remand, now that we have disagreed with his judgment.

We remand the case for disposal on evidence.

Costs to be costs in the appeal in the lower Appellate Court.

Case remanded.

(1) 12 B. 422.
(2) 20 B. 668 at p. 672.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 4 OF 1911.

June 6, 1912.

Present:—Mr. Pratt. J. C., and Mr. Crouch, A. J. C.

HASSOMAL KALACHAND AND ANOTHER —APPELLANTS

versus

Munshi KOTUMAL HAZARISING— RESPONDENT.

Insolvent-debtor—Trust—Assignment without consent of creditors—No trust created—Remuneration of trustee not recoverable until whole work completed—Pleader trustee—Appropriating first assets realised as his fee—Improper conduct.

An assignment to trustees for the benefit of creditors operates, in the first instance, as a mere revocable mandate to the assignees. No trust is created until the creditors, or some of them, have assented to the deed. Until such assent is given, the assignees are in the position of trustees *de son tort*. If the debtor be adjudicated insolvent before the

assignees have been duly constituted trustees, the assets immediately vest in the Official Receiver.

Ordinarily, remuneration is not, recoverable by a trustee until all the conditions of the trust deed have been fulfilled, that is, until the whole work has been completed, and Courts look with disfavour on any transaction which has the effect of eating up an estate to the direct gain of the trustee.

It is improper for a Pleader, who is appointed trustee under a deed of assignment for benefit of creditors, to appropriate the first assets realised as his fee, before any creditor has assented to the deed.

Appeal against the order of the District Judge, Hyderabad.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellants.

JUDGMENT.—In this case, one Khanchand, being very heavily indebted, executed on the 28th May 1910, a deed whereby he assigned all his assets to Messrs. Gopaldas and Hassomal on trust to get in and realise the assets and distribute the same among the creditors. Messrs. Gopaldas and Hassomal are a firm of Pleaders who had acted for some years in that capacity for Khanchand. The trust provided that they should receive Rs. 1,200 as remuneration, and have a lien on the estate for that amount. The estate was assessed at about Rs. 73,000. No creditor assented to the deed, or was even asked to assent to it. Messrs. Gopaldas and Hassomal realised a sum of Rs. 1,200, about, by the sale of cloth, and, out of this, appropriated Rs. 1,000 as their fee. On the 26th August, a creditor filed an application for Khanchand to be declared insolvent. He was duly adjudicated insolvent. Messrs. Gopaldas and Hassomal handed over all assets in their possession, and, subsequently, on being so ordered by the Court, refunded the Rs. 1,000 retained as fee. The only work done by the trustees appears to have been the realization of the Rs. 1,200, and the despatching and receiving of some letters.

The present appeal is against the order of the District Court ordering the refund of Rs. 1,000. The appellants, however, do not ask for a return of the money, but contend that the lower Court has taken an erroneous view of the law and has unfairly censured the conduct of appellants as unprofessional and improper.

In his order, the learned Judge has found that the trust deed was an attempt to delay or defeat creditors, that appellants had deliberately made themselves parties to an attempt to defeat and delay creditors, that the deed was void *ab initio* that the Rs. 1,000 had been wrongly and improperly appropriated, and that it would be necessary to report Messrs. Gopaldas and Hassomal for unprofessional conduct.

An assignment to trustees for the benefit of creditors operates, in the first instance, as a mere revocable mandate to the assignees. No trust is created until the creditors, or some of them, have assented to the deed. Until such assent has been given, the assignees are in the position of trustees *de son tort*. If the debtor be adjudicated insolvent before the assignees have been duly constituted trustees, the assets immediately vest in the Official Receiver, for he can, and presumably does, exercise the power of revocation vested in the debtor. Between the date of the execution by the debtor of the deed of assignment and the date of adjudication, the position of the assignees is most precarious. They are not fully constituted trustees, and have none of the powers conferred in the trustees by the deed, for the creditors have not assented to it. Nor, on the other hand, have they the same power of disposition that the debtor had immediately before signing the deed. Though, in one sense, they are his agents, they are nevertheless bound to hold all assets that come to them as if they were trustees, until at any rate the deed is duly revoked. Any action they may take is at their peril. They act purely in anticipation of being eventually constituted trustees; if they are never duly constituted then their acts are quite unauthorised.

In the present case, a receiving order having been made before any creditor had assented to the deed, Messrs. Gopaldas and Hassomal became immediately liable to hand over all assets which had come into their hands. The Rs. 1,000, having been paid without authority, had to be made good. The order of the lower Court was quite correct.

But it does not necessarily follow that Messrs. Gopaldas and Hassomal have been guilty of any moral misconduct. It frequently happens that, where a trader is heavily indebted, it is necessary for the protection of his creditors generally that an immediate assignment of all assets to a trustee be effected. The result of such assignment is to

afford temporary protection against attachment in execution. But, though the main object of the assignment be to protect the interests of the creditors generally, it has also as its object, the delaying of any creditor who seeks to gain an advantage over others by rushing into Court and obtaining a decree. As against such creditor it is technically fraudulent; but the assignee is not, therefore, guilty of any moral misconduct.

Where the assignee is a Pleader, and it is a term of the deed of assignment that a certain sum, already settled, be paid to him as remuneration, out of the first moneys realised, the Pleader is in the embarrassing position of having to decide *qua* trustee, whether or not it is to the interest of the beneficiaries generally that his remuneration should have first preference. The answer must, we think, be always in the negative. In the first place, no lawyer trustee can properly settle his own remuneration; the client should have independent legal advice. Again, remuneration is not, ordinarily, recoverable by a trustee until all the conditions of the trust deed have been fulfilled, that is until the whole work has been completed, and Courts look with disfavour on any transaction which has the effect of eating up an estate to the direct gain of the trustee. Any payment made before the creditors have assented to the deed, while the Pleader is still a trustee *de son tort*, must, of course, under any circumstances, be treated as nothing more than a conditional appropriation.

Our opinion, therefore, is that it is improper for a Pleader who is appointed trustee under a deed of assignment for benefit of creditors, to appropriate the first assets realised as his fee, before any creditor has assented to the deed. But as, in the present case, there is reason to suppose that Messrs. Gopaldas and Hassomal had every intention of duly earning their fee, which was not unreasonable high, having regard to the value of the estate and work to be done, and as they frankly disclosed the payment in the accounts submitted to the Official Receiver, and put the amount at the disposal of the Court as soon as they were called on to do so, we do not consider that the matter demands further notice.

We must confirm the order of the lower Court. No order as to costs is necessary.

Order confirmed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 796 OF 1912.

April 2, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Ryves.

ABID HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ASGHAR HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899*)*, s. 36—*Document admitted—Admissibility whether can be questioned.*

Once a document is admitted in evidence no further question can arise under section 36 of the Stamp Act of 1899 as to its admissibility on the ground that it was not duly stamped.

Ramdayal v. *Dhoobey Jhaunnan Lal*, 3 N. W. P. H. C. R. 4, referred to.

Second appeal from the decision of the District Judge of Azamgarh, dated 28th of May 1912.

Mr. *B. E. O'Conor* (with him Mr. *Muhammad Ishaq* and Dr. *S. N. Sen*), for the Appellants.

The Hon'ble Mr. *Abdul Raoof* and the Hon'ble Dr. *Sundar Lal*, for the Respondents.

JUDGMENT.

RYVES, J.—This appeal arises out of a suit for the redemption of a usufructuary mortgage of a 12-anna share in *Mauza* Malgaon. The alleged mortgage is said to have been made on the 1st of April 1857.

The only evidence to prove the mortgage is a certified copy of a *sulahnama* of that date. The record of the suit was destroyed in the mutiny. This *sulahnama* was filed in the Court of the Zillah Judge in a litigation between the predecessors of the parties to this suit in which partition of the 12-anna share was sought. The genuineness of this copy was contested in both the lower Courts, but both Courts have held that it was genuine. This finding is binding on us. The copy shows that the *sulahnama* was signed by the Pleaders for the parties and filed in Court. After reciting the facts of the litigation then pending it goes on to say

now between the parties agreement has been arrived at in this matter that we, the respondents, admit the proprietary title of the appellants and the fact of their claim being within the period of limitation, and the possession of the respondents shall remain on the above-mentioned property for 12 years in lieu of Rs. 1,600 mortgage consideration and after 12 years the appellants shall redeem the mortgage property on payment of the above-mentioned mortgage consideration out of their own pockets etc."

There is an endorsement in the following terms:—

"To-day the Pleaders of parties presented this compromise and in the presence of their respective clients verified and accepted all the terms contained in this deed of compromise, therefore, it is ordered that the deed of compromise may be placed on the record and this suit shall be put up to-morrow at the commencement of the sittings for final decision. Written on the 1st April 1857, signed by the Judge in English characters".

Replying on this copy the first Court decreed the suit. On appeal it was argued *inter alia* that even if the copy were genuine it is not admissible in evidence because the original was not properly stamped. The learned Judge upheld this contention and came to the conclusion that "the original compromise bore a stamp of one rupee only, that the document required a stamp of Rs. 10, and that as the document was insufficiently stamped its copy was not admissible in evidence." He goes on to say "when that document is removed there is no evidence to prove the mortgage alleged by the plaintiff". In the result he allowed the appeal and dismissed the suit. Before us the only question is whether the learned Judge was right in discarding the copy. In my opinion he was not. The copy itself was admitted in evidence by the first Court and although there is no distinct finding by that Court, in so many words, that the document was properly stamped, yet such a finding must be inferred from the fact that the Court relied on the case of *Ramdyal* v. *Dhoobey Jhaunnan Lal* (1), and another case as its authority for holding that the document was admissible in evidence. The headnote in *Ramdyal* v. *Dhoobey Jhaunnan Lal* (1) runs as follows: "A document in the shape of a petition to a Court setting forth an arrangement come to between the parties in a suit, may be received in evidence in support of a fresh suit founded upon the agreement recited in such petition, although only stamped as a petition, it not appearing that the agreement recited was made in writing". As the document was admitted in evidence no further question can arise under section 36 of the Stamp Act of 1899 as to its admissibility on the ground that it was not duly stamped. If, however, it could be shown that the original document of which it was a copy was not duly stamped, it would not be available as secondary evidence of the original. But there is no evidence whatsoever as to what stamp, if any, was affixed to the original. The learned Judge holds that the copy required to be stamped in accordance with Article 20 of Regulation X of 1829. The Article runs as follows:—

"Copy of counter-part of any deed or instrument attested to be a true copy and furnished to a party to the same, for the purpose of being given in evidence for the recovery of any sum of money, property, interest or rights secured thereby: the same duty as prescribed for the original deed by this Regulation".

He considers that the compromise should have been stamped as a mortgage with a ten rupee stamp. Inasmuch as the copy is on a paper with a one rupee engraved stamp he says "it is clear, therefore, that on the original deed of compromise the stamp affixed was of one rupee". Even if Article 20 was applicable to a copy like this, given by a Court, of a document filed in a judicial proceeding. I do not think it at all follows that because the copy bears a particular stamp that the original must have borne a stamp of the same value. The concluding words of the Article are "the same duty as prescribed for the original deed". If they had been "the same duty as paid for the original deed" there might have been some force in the argument. In the absence of any evidence to the contrary, I think, we must presume that the Court acted according to law, and according to section 3 of the said Regulation was satisfied that the document was duly stamped before it was placed on the record.

(1) 3 N. W. R. H .C. R. 14.

The various cases which have been cited by the learned Judge are all distinguishable from this case inasmuch as in every one of them the original document was before the Court and the stamp was patent on the face of it. Here as I have said the original records were destroyed in the mutiny and there is nothing to show how the document was stamped. In my opinion, therefore, there was no evidence on which the learned Judge could come to the conclusion that the original document was not duly stamped. I would, therefore, allow the appeal and setting aside the decree of the lower Court would restore that of the first Court with costs which in this Court would include fees on the higher scale.

GRIFFIN, J.—I agree.

BY THE COURT.—The appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance is restored. The plaintiffs-appellants will have their costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 148 OF 1912.

February 18, 1913.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

Musammat JAI DEI—APPLICANT—APPELLANT

versus

BANWARI LAL—OPPOSITE PARTY—RESPONDENT.

Succession Certificate Act (VII of 1889), *s.* 9—*Hindu widow—Certificate to realize interest only*—Ultra vires—*Security.*

A District Court granted a Hindu widow a Succession Certificate on condition that she should draw interest only and was not to disturb the capital sum.

Held, that the condition was *ultra vires*. All that the Court could do was to require as a condition precedent to the grant of the certificate that the applicant should furnish security under section 9 for rendering an account of the debt and securities received by her and for indemnifying the persons who might be entitled to the whole or part of the assests.

The certificate when granted should include both principal and the interest.

Musammat Shib Dei v. *Ajudhya Pershad*, 9 Ind. Cas. 571, followed.

First civil appeal against an order of the District Judge of Farrukhabad.

Dr. *S. N. Sen*, for the Applicant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Opposite Party.

JUDGMENT.—The appellant, *Musammat* Jai Dei, applied under section 6 of Act VII of 1889 of the Succession Certificate Act in respect of four debts due to her deceased husband. The application was opposed by certain reversioners, who asked the Court to take security from the widow, as there was every likelihood of her wasting the corpus of the property if it reached her hands. On that the District Judge passed the following order:—"The certificate asked for is granted with the condition that the applicant may not disturb the capital sum and shall draw interest only. This will obviate the necessity for security." *Musammat* Jai Dei has come here on appeal and it is urged that the condition imposed by the Court is *ultra vires* and that so much of the order passed is illegal. The case is similar in all respects to the case of *Musammat Shib Dei* v. *Ajudhya Pershad* (1). As in that case, all that the Court could do was to require as a condition precedent to the grant of the certificate that the widow should give security under section 9 for rendering an account of the debts and securities received by her and for indemnifying the persons who may be entitled to the whole or any part of the debt. The certificate as granted by the Judge would only entitle the widow to recover from the debtors the interest on the debts. It is not a question of the securities and interest on securities as defined in section 3 of the Act. We set aside the order of the Court below and direct that Court to re-admit the application and to proceed to enter into and decide as to whether or not there is any necessity to take security from the widow under the circumstances. The parties will be allowed to go into evidence on the point and on that evidence the Court will come to a conclusion. If it comes to the conclusion that security is necessary, it will grant a certificate conditional on her furnishing security. If it comes to the conclusion that security is not necessary, it will grant a certificate unconditionally. The costs of this appeal will abide the result.

Appeal allowed.

(1) 9 Ind. Cas. 571.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEALS NOS. 35 AND 36 OF 1912.

March 7, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

SAMALAPALLI MANGAYYA—DEFENDANT—APPELLANT

versus

SMALAPALLI SRIRAMULU AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 66—Question relating to execution—Dispute between co-defendants—Appeal—Test.

In the execution of a mortgage decree an order passed as between co-defendants that a certain item of property should be brought to sale first falls within the purview of section 47, Civil Procedure Code, and is, consequently, appealable.

The expression "between the parties to the suit" means parties opposed to one another and not necessarily those who are plaintiff and defendant in a suit respectively.

In deciding whether an appeal is competent, the substance of the order should be looked at; the provision of law quoted by the Court passing the order is not decisive.

Appeal against the orders of the Subordinate Judge of Kistna at Ellore, in A. S. No. 528 of 1911 and Mis. A. S. No. 94 of 1911, dated 15th February 1912, preferred against that of the Principal District Munsif of Tanuku, in M. P. Nos. 4036 and 4088 of 1911 respectively (in O. S. No. 554 of 1910), dated 20th November 1911.

Mr. *V. Ramadoss*, for the Appellant.

Messrs. *T. Prakasam* and *E. V. R. Sarma*, for the Respondents.

JUDGMENT.—The question in this case relates to the construction of section 47 of the Civil Procedure Code. The decree under execution is one for sale of four items of property mortgaged to the decree-holder. The 5th defendant in the suit had a subsequent charge on items Nos. 1, 2 and 4, while the 10th defendant had purchased item No. 3 after decree-holder's mortgage. The 5th defendant obtained an order from the executing Court that the 3rd item should be sold first and that items Nos. 1, 2 and 4 should be brought to sale only if the proceeds of the sale of item No. 3 proved to be insufficient to discharge the decree. The order purported to be passed under Order XXI, rule 66, Civil Procedure Code, relating to the settlement of the proclamation of sale. Against that order, the 10th defendant preferred an appeal contending that the first Court's order fell really within the provisions of section 47, Civil Procedure Code. The Subordinate Judge dismissed the appeal on the ground that the order was passed under Order XXI, rule 66. We are of opinion that the dismissal of the appeal cannot be supported. It is hardly necessary to observe that in deciding whether an appeal is competent, the substance of the order should be looked at and that the provision of law quoted by the Court passing the order is not decisive. See *Ram Narain Sahoo* v. *Bandi Pershad* (1). The question, therefore, is—was the first Court's order one relating to the execution of the decree between the parties to the suit? The 10th defendant's complaint was that the 3rd item should not be sold before items Nos. 1, 2 and 4. The question was, therefore, one relating to the mode in which the decree should be executed. It was also one which affected the decree-holder's right in execution although the 5th and 10th defendants were the parties primarily interested in the settlement of the question. Apart from the circumstance, the nature of the decree has to be borne in mind. In a suit for sale on mortgage, the rights of all parties interested in the mortgaged property, including subsequent encumbrances and purchasers, have to be adjusted. If their rights conflict with each other, it is open to the Court to make appropriate provisions in the decree to determine their respective rights. It is unnecessary to consider how far the Court should or may do in any particular case. In the present case, the Court which passed the decree did not determine the respective rights of the 5th and 10th defendants. But in execution, it passed an order which prejudicially affected the 10th defendant. Although the 5th and 10th defendants were both arrayed against each other so far as the question, whether any of the items of the mortgaged properties should be first sold, was concerned. The expression "between the parties to the suit", no doubt, imports between parties opposed, to each other in the suit but does not necessarily mean between parties who are plaintiff and defendant respectively in the suit. In a partition suit, for instance, parties who are co-defendants

(1) 31 C. 737.

are often arrayed against each other. In such a case, a question between them relating to the execution of the decree, would fall within section 47, Civil Procedure Code. The same view must be held in this case also. We reverse the order of the Subordinate Judge and remand the appeal for fresh disposal according to law. The 1st respondent will pay the appellant's costs of this second appeal.

Civil Miscellaneous Second Appeal No. 36 of 1912 follows Civil Miscellaneous Second Appeal No. 35 of 1912.

Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 480 OF 1912

February 17, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerjee.

GOBARDHAN SAHI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

JADUNATH RAI AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Agreement relinquishing certain portion of principal and interest on a mortgage—Receipt—Compulsory registration.

An agreement, by which a mortgagee relinquishes a part of the principal and all interest present and future in consideration of certain services rendered by the mortgagor, is compulsorily registrable.

Such an agreement cannot be regarded as an acknowledgment of payment within the meaning of the exception contained in section 17 (2) clause 11 of the Registration Act.

Second appeal from a decree of the District Judge of Gorakhpur.

The Hon'ble Mr. *Moti Lal Nehru*, for the Appellants.

The Hon'ble Dr. *Sunder Lal* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought to realise the amount of a mortgage, dated the 21st of March 1900, by the sale of the mortgaged property. The defendants pleaded that after the mortgage had been executed the mortgagors rendered certain services to the mortgagee, and that in consideration of those services a certain part of the principal and all interest up to date and all future interest were relinquished by the mortgagee. To prove this agreement a certain document was tendered in evidence. The document was unstamped and unregistered. The difficulty of stamp has been got over by the payment of duty and penalty, but the question of registration remains.

The Court below held that the document required registration and, therefore, was inadmissible in evidence. Section 17 of Act III of 1877, (which was the Registration Act in force at the time of the execution of the document in question) provides that certain documents must be registered. A later section provides that documents which require to be registered cannot be admitted in evidence unless they are registered. Amongst the documents requiring registration are all documents of a non-testamentary nature which purport or operate to create, decree, assign, limit or extinguish whether in present or in future any right, title or interest of a certain value to or in immoveable property. There can be no doubt that prior to the execution of the document in question the mortgagee had a right to realise from the property mortgaged, all principal together with all interest then accrued or that might thereafter accrue due on foot of the mortgage.

It is argued that the document in question comes within the exception mentioned in clause 11 to section 17. That clause exempts from the necessity of registration any endorsement on a mortgage deed acknowledging payment of the whole or any part of the mortgage money and also any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. In our opinion the document in question cannot be said to come within the exceptions mentioned in clause (*v*). The document is clearly an agreement to forego in part the plaintiffs' rights as against the mortgaged property in consideration of services rendered. It cannot, in any sense, be said to be a receipt for the payment of money not extinguishing the mortgage in whole or in part. It clearly does extinguish the mortgage to the extent of a considerable portion of the principal and the whole of the interest.

Under these circumstances we think that the decision of the Court below was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

SEUMAL NIHALCHAND *v.* PURSOMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 40 OF 1910.

May 22, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

SEUMAL NIHALCHAND—APPLICANT

versus

PURSOMAL AND OTHERS—RESPONDENTS.

Revision—Where another remedy available—Compromise—Adjustment—Parties agreeing to abide by the sum named by Pleaders—Award—Reference to arbitration.

Where there is another remedy open to an applicant but of which he did not choose to avail himself, the High Court will not entertain an application for revision.

An agreement by the parties to a suit to abide by a sum to be named by their Pleaders is not a lawful adjustment until that sum is named and the parties inform the Court that they are willing to have a decree for the sum so named.

Muhammad Zahur v. *Cheda Lal*, 14 A. 141; A. W. N. (1892) 3, referred to.

The decision given by the Pleaders is not an award.

Application for revision from the decree of the Subordinate Judge, Hala.

Mr. *Mulchand Thaweredas*, for the Applicant.

Mr. *Isarsing Hazarising*, for the Opponents.

JUDGMENT.

PRATT, J. C.—This is an application for revision of a decree made by the Sub-Judge of Hala.

The suit was for damages for breach of contract. The Sub-Judge recorded statements of plaintiff and defendant to the effect that they would agree to any figure named in Court by their Pleaders and that a decree might be passed for such figure. The Pleaders then named the sum of Rs. 1,100 and costs and the Court made a decree accordingly.

The decree purports to be a consent decree under Order XXIII, rule 3.

The defendant who applies in revision, professes to treat the decree as one in terms of an award under paragraph 16 of the Arbitration Schedule and complains that no notice was given to him of the filing of the award.

This is a purely fictitious grievance. There was no reference to arbitration by the Court under Schedule II paragraph 3 and no written application to refer under Schedule II paragraph 1. The decree was not one under paragraph 16.

No doubt, an award made out of Court may be recorded under Order XXIII, rule 3, if the Court is satisfied that it is a lawful adjustment of the suit. This was decided in *Pragdas* v. *Girdhurdas* (1) and this seems to be good law though doubted in the subsequent case of *Rukhanbai* v. *Adamji Shaik Raijbhai* (2).

But here there was no award at all for there is nothing to suggest that the so-called arbitrators were to perform any judicial function or adjudicate upon the matter in difference between the parties. Moreover, I do not think that the agreement to abide by a sum to be named by the Pleaders was an adjustment of the suit for the reason stated in *Muhammad Zahur* v. *Cheda Lal* (3), *i.e.*, that it was not complete and left something further to be done. I see no difference between this agreement and an agreement that the Court should decide in whose favour the suit was to be decreed by spinning a coin.

It may, of course, be perfectly legitimate for Pleaders to obtain the sort of agreement we have here in order to bring about a settlement—but there is no lawful adjustment until the sum has been named and the parties inform the Court that they are willing to have a decree for that named sum.

The applicant's proper course was to appeal either from the order recording the agreement under Order XLIII, rule 1 (*m*) or from the decree on the ground that it was not a decree passed with the consent of parties to which section 96 (3) applies.

As the applicant had another remedy of which he has not chosen to avail himself we will not interfere in revision.

We reject the application but make no order as to costs.

CROUCH, A. J. C.—I, also, am of opinion that if the applicant has any grievance he has misconceived his remedy and would reject the application.

Application rejected.

(1) 26 B. 76; 3 Bom. L. R. 431.
(2) 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366.
(3) 14 A. 141 A. W. N. (1892) 3.

BADRI PRASAD *v.* ABDUL KARIM.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 183 OF 1912.
February 20, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
BADRI PRASAD AND ANOTHER—APPELLANTS
versus
ABDUL KARIM AND OTHERS—RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 68—*Evidence of scribe—Proof of document—Attesting witness.*

The evidence of the scribe of a mortgage-deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed.

An attesting witness is a witness who has seen the deed executed and has signed it as a witness.

Second appeal from the decree of the District Judge of Shahjahanpur.

Mr. *Muhammad Ishaq*, for the Appellants.

Mr. *Govind Prasad*, for the Respondents.

JUDGMENT.—This was a suit upon a mortgage for Rs. 99 made in December 1884. The claim was decreed by the first Court but was dismissed by the District Judge on appeal on the ground that the mortgage deed had not been proved as required by section 68 of the Evidence Act.

The only witness called to prove the execution of the deed was Ghulam Jilani, the man who wrote out the deed. He deposed that the deed was executed in his presence. The question is, whether he was an attesting witness within the meaning of section 68 of the Evidence Act. He signed his name on the deed in the usual way, but he did so for the purpose of showing, that it had been written out by him, not for the purpose of showing that he was an attesting witness. In fact there can be no doubt that he wrote his name on the deed before the deed was signed by the executant. The appellants rely upon the decision of Burkitt, J., in *Radha Kishen* v. *Fateh Ali Ram* (1), in which it seems to have been held that section 68 had been complied with where the plaintiff had called "the scribe of the deed who though not an attesting witness had affixed his name to the deed and who swore that the deed had been executed in his presence." That decision was cited with approval by Harington, J., in *Raj Narain Ghosh* v. *Abdur Rahim* (2). Burkitt, J., professed to follow the decision of Banerji and Aikman, JJ., in *Muhammad Ali* v. *Jafar Khan* (3). We do not think that those learned Judges intended to hold in that case that a man should be regarded as an attesting witness merely because he had written out the deed and signed his name on it and sworn that the deed was executed in his presence. We think that they intended to hold only that if the writer of a deed signed it with a view to testifying to the fact of the execution he would be an attesting witness although he was not so described on the face of the deed. Unless the report of the case of *Radha Kishen* v. *Fateh Ali Ram* (1) is misleading, we think that Burkitt, J., must have misinterpreted the decision of Banerji and Aikman, JJ.

In *Ranu* v. *Laxmanrao Krishna* (4) it was held, following *Burdett* v. *Spilsbury* (5), that an attesting witness was a witness who had seen the deed executed and who had signed it as a witness. In the recent case of *Shamu Patter* v. *Abdul Kadir Rowthan* (6) their Lordships of the Privy Council quoted the decision in *Burdett* v. *Spilsbury* (5) with approval and in particular approved of the statement of the Lord Chancellor that "the party who sees the Will executed is in fact a witness to it; and if he subscribes as a witness he is then an attesting witness," They held that the word "attested" in section 59 of the Transfer of Property Act was used in that sense. It is evident that the word 'attesting' in section 68 of the Evidence Act is used in the same sense. Ghulam Jilani may have witnessed the execution of the deed now in suit but he did not sign the deed as a witness. We must, therefore, hold that he is not an attesting witness and the production of his evidence was not a compliance with section 68 of the Evidence Act. We think, however, that the case should go back to the lower Appellate Court in order that the plaintiffs may have an opportunity of producing further evidence. Ghulam Jilani stated that one of the attesting witnesses was still alive. The decision of Burkitt, J., justified the plaintiffs in supposing that they had

(1) 20 A. 532; A. W. N. (1898) 148.
(2) 5 C. W. N. 454.
(3) A. W. N. (1897) 143.
(4) 1 Ind. Cas. 464; 33 B. 44; 10 Bom. L. R. 943.
(5) 10 C. & F. 340; 59 R. R. 105; 8 Eng. Rep. 772.
(6) 16 Ind. Cas. 250: 10 A. L. J. 259; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596 (P. C.); 39 I. A. 220.

complied with the law. There is before us an affidavit that the plaintiffs asked the District Judge to give them an opportunity of producing other evidence. We allow the appeal, set aside the decision of the lower Appellate Court and remand the case to that Court in order that it may be disposed of according to law with reference to the above remarks. Costs in this Court to be costs in the cause.

Appeal allowed; Cause remanded.

P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

MADRAS HIGH COURT.

CIVIL APPEAL SUIT No. 108 OF 1911.

February 18, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Tyabji.

KURAM KRISHNAMA CHARIAR—PLAINTIFF—APPELLANT

versus

VEERAVELLI KRISHNAMA CHARIAR—DEFENDANT—RESPONDENT.

Hindu Law—Minor—Power to make Will—Majority Act (IX of 1875)—Probate—Burden of proof of age—Recital in a Will—Evidence Act (I of 1872), ss. 32 (5) (6), 157—Admission register—Admissibility under section 157.

Under Hindu Law a minor is incompetent to perform juristic acts; he cannot make a Will, the law in this respect being the same as for gifts.

The question of the age at which a Hindu can make a Will is governed by the Indian Majority Act.

Where the ground of defence is the minority of the testator, the onus is on the party propounding the Will to prove that the alleged testator was of full age.

The question of onus is not of much importance when the whole of the evidence is before the Court.

The recital in a Will about the age of another person, when that recital is not merely incidental, is admissible in evidence as to the age of that person at that time under section 32, clauses 5 and 6 and illustration (*l*) of the Evidence Act.

The admission register of pupils in a school in which their ages are entered may be used as corroborative evidence under section 157 of the Evidence Act.

Appeal in *forma pauperis* against the decree of the District Court of Chingleput in a Testamentary Original Suit No. 37 of 1909.

Messrs. *T. R. Ramachandra Iyer*, *T. R. Kristnaswamy Iyer*, for the Appellant.

Mr. *S. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—In this case, I propose to deal first with the question of law, that is, can a Hindu minor make a Will?

It was practically conceded by Mr. Ramachandra Iyer that under the Hindu Common Law, a minor cannot make any disposition of property during his life-time. There can, I think, be no question that that is so. It has been so laid down in various authorities. I need only refer to the passage in Colebrook's Digest of Hindu Law to which Mr. Srinivasa Iyengar called our attention this morning, Title II, Chapter 4, section 23, and Narada, Title I, Chapter 2, section 39. If the law is that a Hindu minor cannot make a valid gift during his life-time it is difficult to see on what principle it can be said that he can make a valid disposition of property which is only to take effect after his death. The argument of Mr. Ramachandra Iyer, at any rate, the argument which he advanced yesterday as I understood him, was this: "The Hindu Wills Act and the Succession Act both enact that a Hindu minor cannot make a Will, the question of the capacity of the man who made the Will before us is not governed by either the Hindu Wills Act or the Succession Act.

There is, therefore, no express prohibition and it follows that he can make a Will." It seems to me it is only necessary to state that proposition in order to show—I wont't say its absurdity—but its unsoundness. Not only is there no authority in support of the view that a Hindu minor can make a Will, but all the cases are the other way. I do not propose to discuss them but I would refer to the case of *Mamidi Subbayya* v. *Mamidi Kondayya* (1); the case of *Deheram Bulleya* v. *Somanchi Seetharamiah* (2), the case of *Bhagirathibai* v. *Vishwanath Damodar* (3), the case of *Gulab Bai* v. *Thakor Lal* (4) and the case of *Harduari Lal* v. *Musammat Gomi* (5). These are all authorities which hold that a Hindu minor cannot make a Will. My finding with regard to the question of law is that a Hindu minor cannot make a Will.

Then as to the facts. Before dealing with them it is necessary to determine when would the minority of the man who purported to make this Will have terminated? In my opinion, the Indian Majority Act of 1875 applies to this case. There is a saving clause in section 2 of the Act dealing with capacity and in that saving clause it is provided that "nothing in the Act shall affect the capacity of any person to act in certain matters (namely) marriage, dower, divorce and adoption." The question of the capacity of a person to make a Will is not included in the saving clause. That means—so it seems to me, as a matter of construction—that when a question arises as to the capacity of a person to make a Will on the ground of minority, the question as regards the age at which minority ceases is governed by the Indian Majority Act. The point arose in two reported cases and this was the view there taken. See cases of *Gulab Bai* v. *Thakor Lal* (4) and *Harduari Lal* v. *Musammat Gomi* (5). I think this view is right.

We have had considerable discussion with reference to the question as to on whom the burden of proof lay—on the party propounding the Will or on the party opposing it. Now, if it was necessary for me to express a final opinion in the matter, I should certainly be inclined to hold that, when the defence of minority is raised, the onus is on the party setting up the Will to show that the person who made the Will was of full age when he made it. Speaking for myself, I cannot see why the rule which applies in the case of alleged testamentary incapacity by reason of mental deficiency should not apply where the defence is alleged testamentary incapacity by reason of not being of an age at which the law recognises the power of a man to dispose of his property at his death. With regard to the question of onus, where the Will is impugned on the ground of testamentary incapacity, I think the law is clear. In Tristram and Coote's Probate Practice on page 407 the learned authors say: "Where the defence of incapacity has been pleaded, the burden of proof rests upon those who set up the Will" and the authority of *Smee* v. *Smee* (6) supports the proposition there laid down. The same view is taken in Ameer Ali and Woodroffe's Indian Evidence Act, page 564: and by Sir Lawrence Jenkins in *Bhagirthibai* v. *Vishwanath Damodar* (3) although it does not appear that there had been a full discussion of the question. See too Williams on 'Executors,' 10th Edition, page 12, under the heading "Persons incapable from want of discretion." In Williams on Executors the incapacity from want of discretion, that is the mental deficiency, is placed on the same footing as incapacity on the ground of minority. Further, in the Indian Succession Act, we find that "sound mind and not a minor" are bracketed together. So in view of what I have said, if it is necessary to decide this matter, I should be strongly inclined to hold that once the defence of minority is set up, it is for the party propounding the Will to prove that the alleged testator was a man of full age. With regard to the cases which Mr. Ramachandra Iyer cited, I think they were all cases of contract, and in the case of contract, of course, if the plea of infancy is set up, it is for the party who sets up the plea to promote it. The question of capacity is, as it seems to me, a wholly different matter. However, as I have said, I do not think I need express a final opinion as to this because, where we

(1) 16 M. L. J. 135.
(2) 12 Ind. Cas. 551; (1911) 2 M. W. N. 383.
(3) 7 Bom. L. R. 92.
(4) 17 Ind. Cas. 86; 36 B. 622; 14 Bom. L. R. 748.
(5) 9 Ind. Cas. 1017; 33 A. 525; 8 A. L. J. 385.
(6) (1879) 5 P. D. 84; 49 L. J. P. 8; 28 W. R. 703; 44 J. P. 220.

have the whole of the evidence, it is not a matter of much importance on whom the onus lies. In this connection, I would refer to a recent decision of the Privy Council in *Chaudhri Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das* (7).

Now as to the evidence in this case. The Will by which the deceased sought to leave all his property to his wife—it is stated in the Will "to my wife. . . . . aged about 12 years"—is dated 22nd April 1909, and, if as I hold to be the case, he would not have attained majority until 18 years of age, we have to see whether the evidence shows that he was 18 years of age on the 22nd April 1909. The oral evidence in a case of this sort is not worth much. Then what is the documentary evidence? The plaintiff produced a document which is Exhibit C. in the case, which he says, is the horoscope of the deceased. That is spoken to by his 9th witness. An objection was taken to the evidence of this witness with reference to the horoscope on the ground that the witness was not the writer and that he had no personal knowledge of its correctness. The learned Judge does not say how he dealt with the objection but apparently the document was admitted in evidence. The document states that the deceased was born in November 1890. The Will being in April 1909 that would make him over 18. The man who made the horoscope is not called, and apparently all the witness says with reference to the horoscope is that the deceased man's natural father gave the horoscope to the deceased man's adoptive father and by some means or other, which are not stated, it got into the possession of the witness. The learned Judge seems to think that this horoscope as a piece of evidence is worthless, and I think so too. The witness also states that the deceased was adopted some 10 years ago and that he was in his 12th year at the time of the adoption. So he was 11 at the time of his adoption 10 years ago. That accordingly to this witness would make him 21. That makes him a good deal older than the horoscope. I do not think the oral testimony of this witness in a matter of this sort, unless we have evidence that he had special means of knowledge, is worth much. Then there is evidence on behalf of the defendant. We have Exhibit I, which is relied on by the defendant, and that is a Will which was executed by one Appalachari, the adoptive father of the deceased, on November 4th, 1906. It is spoken to by the 3rd defence witness and he proves the Will of 1906. He says in his evidence that he had seen the boy and that he looked about 13 years of age. Now in the Will of 1906 the boy is described as 13 "my adopted son V. Krishnamachariar aged about 13" and under the Will the boy is the sole legatee. If in 1906 the boy's age was 13, at the date when he purported to make his own Will he would be $15\frac{1}{2}$. The 8th witness for plaintiff says that there was a draft in which the boy's age was given as 16. The draft, however, is not forthcoming, and the 1st witness for the plaintiff does not support the evidence of the 8th witness for the plaintiff in reference to the age being given as 16 in the draft Will of Appalachari in 1906. With regard to the question of admissibility of this document for the purposes of showing the age of the boy when he purported to make a Will, I think it is admissible under section 32 of the Evidence Act. Mr. Ramachandra Iyer called our attention to the case of *Nilmonee Chowdhry* v. *Musammat Zuheerunissa Khanum* (8). In that case it was held that incidental recital in a Will was not evidence of age. That case was wholly different. In this case it is not an incidental statement contained in a recital, but the words are used for the purpose of describing the adopted son of the testator, who under the testator's Will was to be the sole beneficiary. I think the statement is admissible under section 32, clauses 5 and 6 of the Evidence Act and under illustration (*l*) to that section as an authority in support of this view. I may refer to the cases of *Oriental Government Security Life Assurance Company Ld.*, v. *Narasimha Chari* (9), *Ramchandra Dutt* v. *Jogeswar Narain Deo* (10), *Subramaniam Chetty* v. *Doraisinga Tevar* (11),

(7) 17 Ind. Cas. 396; 17 C. W. N. 49; 12 M. L. T. 392; 15 O. C. 278; (1912) M. W. N. 1052; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68.

(8) 8 W. R. 371.

(9) 25 M. 183 at p. 207; 11 M. L. J. 379.

(10) 20 C. 758.

(11) 16 Ind. Cas. 943; 24 M. L. J. 49; (1913) M. W. N. 365.

the authorities to which Mr. Srinivasa Aiyangar called our attention this morning. The suggestion was that it was in the interest of the testator to understate the boy's age and there is some evidence that the boy's conduct was unsatisfactory and it was, therefore, desirable to understate his age so that he should not dispose of the property until he attained (comparatively speaking) years of discretion, and there was also a proviso to the Will that the boy was not to deal with the property which his adoptive father bequeathed to him for 10th years after his minority ceased, excepting by permission of his adoptive father. There is some evidence that it was pointed out to Appalachari that this provision in the Will would not stand and it was suggested that, therefore, it was to his interests to understate the age of the boy. This is nothing more than a conjecture. The Judge suggests that the explanation is an after-thought, and I think he was right.

Then as regards the 2nd document Exhibit II, which is relied upon by the defence. That is spoken to by the defence witness No. 2, who is a schoolmaster, and Exhibit II is the register which was kept by the witness, which he calls an "Admission register" of the pupils in his school. He says that when the deceased was admitted to his school in October 1905 his age was given as 13. First he said that "Krishnamachariar gave his age himself," then he said he could not say who gave him the age "the father or guardian generally does. The entry in Exhibit II is in my writing." Apparently it was suggested in the Court below that it has been the practice of boys in this country to understate their ages and that this had some connection with the rule that boys were not allowed to go up for the Matriculation Examination till they were 15. But if that be so, and if the alleged practice is connected with the rule, it seems to me, to the interest of boys, not to understate their age, but to overstate their age. However this might be, it is a pure matter of conjecture. There is no evidence of any such practice and, of course, we cannot give serious consideration to a suggestion of that character unsupported by evidence. Now what does Exhibit II show? At the most to my mind it is corroborative evidence under section 157 of the Evidence Act of the statement made by the witness in the box that when the boy entered his school he stated, or somebody stated, that his age was 13, and that the witness made an entry in his register in accordance with this statement. Even assuming that it is corroborative evidence, to my mind, it is not evidence to which much weight can attach, and I do not think, speaking for myself, that it carries the case much further. According to the evidence of this witness, the age of the deceased at the time he purported to make a Will was 16½. The third document on which the defence relies, is Exhibit III, which is a certified copy of the death certificate of the deceased. The register is a public document kept under the provisions of the Madras Act III of 1899 and the certified copy is evidence—see sections 35 and 82 of the Act. In the certified copy, the age of the deceased at the time of his death is given as 16 and the party who gave the information is stated to be the man who was called as the 9th witness for the plaintiff, one Rangachari (Raghavachari). Now the way this document came to be evidence in this case is a little curious. It is the defendant's document and as far as I can see, none of the defence witnesses speak to it. It was not formally put in by the defence in the course of the hearing; but it was marked apparently as having been put in on the 18th August 1910. On that day the 9th witness for the plaintiff was called, a considerable time after the case for the plaintiff and the defendant had been closed. It would seem that the defendant's Vakil when he was cross-examining his witness, had this document before him. Otherwise it would be difficult to understand why he put the questions which he did to the witness in cross-examination. He asked him if he signed his name as Mr. V. Rangachari and asked him if he told the village Munsif about the death of the boy. He also asked him whether he ever signed himself as Mr. Rangachari in documents. But for some reason or other, it is difficult to know why he refrained from putting this certified copy of the death certificate of the deceased to the witness and from asking him in so many words if he did not give the information to the village Munsif which the entry purports to show

that this witness gave. The document is not admissible in evidence under section 145 as it was never put to the witness. But it seems to me, as a certified copy of a public document it is evidence. When the boy died he was stated to be 16. It is, moreover, important to observe that the man who kept the register was called as the witness for the plaintiff. The plaintiff's case before us now is that the original entry in the original register was tampered with and that the age was altered from 18 or 19 to 16. That is the suggestion before us. But when the plaintiff had the witness in the box who was responsible for keeping the register he did not venture to ask him whether the original entry had been tampered with. All that there was before the District Judge was the certified copy. On the plaintiff's application an order was made for the production of the original register. That order was made a year ago and the original register saw the light for the first time, so far as a Court of Justice is concerned to-day before us. Looking at that register, it is fairly obvious that there has been something in the nature of an alteration of the figure which now appears as 16. I think the register shows that there has been an alteration in the next line. We are asked to hold that this original register was originally, so far as I understand, kept back by the defendant because, if it had been produced it would either have shown that the age in the original register was 18 or 19 or that the figure 16 had been substituted for another figure. Speaking for myself on such flimsy material as this I am certainly not inclined to hold that there has been a conspiracy to which I suppose the plaintiff's 4th witness must have been a party for the alteration of a public document.

Taking the evidence as a whole—although it may possibly leave room for doubt—my view is that it has been shown that the deceased was not a major when he made the Will which has been propounded. This being the conclusion at which I have arrived I hold, as a matter of law, that the Will is ineffective. I think the Judge was right and that the appeal must be dismissed with costs. The appellant will pay the Court-fees due to Government which he would have paid if he had not been allowed to appeal as a pauper.

TYABJI, J.—The authorities on pure Hindu Law unaffected by the legislative enactments of British India, laid down that if a Hindu "boy or one who possesses no independence, transacts anything, it is declared an invalid transaction by persons acquainted with the law". Narada, Chapter I, 39 (Sacred Books of the East Vol, XXXIII, page 52). Similarly in Colebrooke's Hindu Law Books(3rd Edition)1864, Madras Volume I, page 453, Book II, Chapter IV, section II, Article 53; it is stated from 'Narada':—"What has been given by men agitated with fear, anger, lust or the pain of an incurable disease, or as a bribe or in jest or by mistake, or through any fraudulent practice, must be considered as ungiven."

So must anything given by a minor, an idiot, a slave or other person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed. See also *Ibid*, Book 1, Chapter V, Title 187 (Volume I, page 201 of the same Edition) where it is laid down on the authority of Katyayana, that: "On the death of a father *his debt* shall in no case be paid by his sons incapable, from non-age, of conducting their own affairs; but at their full age of *fifteen years*, they shall pay it in proportion to their shares; otherwise they shall dwell hereafter in a region of horror."

As a consequence of this rule of Hindu Law, *viz.*, that, until a Hindu attains full age, he shall be incompetent to perform juristic acts; it has been held that in British India a Hindu cannot make a Will unless he has attained majority under the Indian Majority Act, section 3. *Golab Bai* v. *Thakorlal* (4), *Deheram Bulleya* v. *Somanchi Seetharamiah* (2), *Harduari Lal* v. *Gomi* (5) and *Mamidi Subbayya* v. *Mamidi Kondayya* (1). The reasoning on which the decisions laying down this proposition of law have generally proceeded is that for making a gift, the attainment of majority as defined in the Indian Majority Act is necessary, and that the Hindu Law of Wills is an extension of the Law of Gifts, and that, consequently, a Hindu who is not competent to make a gift is not competent to make a Will. Hence in the case of a Hindu, the age of competence to make a Will must be the same as the age of competence to make a gift. It has been argued before us, however, that though the Hindu Law of Wills may have originally been an extension

of the Law of Gifts, the age of competence in regard to the two matters might yet become differentiated inasmuch as even if we accept that the Hindu Law of Gifts has, in British India, been altered by the operation of the Legislative enactments referring thereto, still the Hindu Law of Succession (of which the Law of Wills forms a part) is specifically required to be enforced in British India and there is nothing in the Legislative enactments referring to the Law of Wills which alters the original Hindu Law in that respect, assuming, of course, that we are dealing with a case such as the present case to which the Hindu Wills Act does not apply. Hence it is argued that the age of testamentary competence under Hindu Law, as applicable in British India, must be determined irrespectively of all Legislative enactments and purely in accordance with the rules of Hindu Law. In support of this argument, the Indian Majority Act, the Indian Contract Act, section 11, the Transfer of Property Act, section 7, the Trusts Act, section 10 and similar provisions in the Succession Act and the Hindu Wills Act have been referred to and it has been pointed out to us that there is an absence of any specific legislative provision fixing the age at which testamentary competence is attained by a Hindu whose Will is not governed by the Hindu Wills Act, and that there is no section laying down that testamentary capacity is, in such a case, to be subject to the provisions of section 3 of the Indian Majority Act. It has been further contended that the provisions of the Indian Majority Act cannot affect any branch of the substantive law but that the true effect of the Indian Majority Act is merely to explain how the other Legislative enactments of British India must be interpreted—in other words, that the Indian Majority Act must be taken merely as providing a definition of the words 'majority' and 'minority.' The argument was founded on the following considerations: section 3 of the Indian Majority Act, which has the appearance of being the operative section of the Act (section 2 being rather in the nature of a saving clause) does no more than state that a person shall be deemed to have attained majority at 18 or 21 years; again there is an absence of any express legislative provision to the effect that the attainment of majority is necessary for competence to perform all juristic acts (except such juristic acts as refer to matters specified in section 2 of the Indian Majority Act), and at the same time we have the fact that the Legislature has deemed it necessary to enact the sections which lay down that in regard to transactions such as contracts and trusts, attainment of majority is necessary for giving them validity.

It seems to me, however, that in passing the Indian Majority Act, it could not have been the intention of the Legislature merely to provide definitions of the terms 'majority' and 'minority.' Had that been the case, section 2 of the said Act would not have provided that nothing contained in the said enactment shall affect the capacity of any person to act in the matters referred to—that such a provision was considered necessary, clearly indicates that the enactment was intended to affect the capacity to act in regard to all other matters notwithstanding that the act contains no affirmative provision to the effect that in all matters not saved by section 2, a person shall be deemed to have the capacity to act only when he attains majority under section 3. Again, had the Act merely provided definition of terms, section 11 of the Contract Act would not have been affected by those definitions, unless there had been some statutory provision that majority for the purposes of the transactions governed by the Indian Contract Act shall be determined in accordance with the Indian Majority Act, and this is not done either by any amendment of the Contract Act, (the Majority Act having been passed after the Contract Act) or by any provision contained in the General Clauses Act. On the Indian Majority Act being enacted, it was evidently assumed that "the law to which he (*viz.*, the person contracting) is subject" referred to in the Contract Act, section 11 became the law as laid down in the Indian Majority Act. Now it has never been questioned that on the passing of the Indian Majority Act section 11 of the Contract Act, became subject to the latter Act, and it seems to me to be clear that if this was so, the Indian Majority Act must be taken equally to have altered the Hindu Law of the age of capacity to act in all matters except in those matters which are specifically excepted in section 2 of the Indian Majority Act.

If this is so then it follows that even where the Hindu Wills Act does not apply, it is necessary for a Hindu to attain majority under the Indian Majority Act, section 3, before he can validly make a Will.

I should have had little to add to what has fallen from the learned Chief Justice as regards the facts of this particular case, had I not felt more doubt about the effect of the documents on which the respondent relies. Considering the manner in which Exhibit III was produced before the Court, the late stage at which it was produced, and that it was not put to the plaintiff's 9th witness, although his cross-examination was evidently based entirely on Exhibit III; taking into consideration all these matters and bearing in mind that the document as it comes before us has the appearance of being tampered with, it seems to me that Exhibit III ought to have very little weight as a piece of evidence.

In my view of this case, however, this circumstance ought not to affect our decision and I have come to the same conclusion as the learned Chief Justice as to the result of this appeal, because I think that it is for the applicant in Probate proceedings to prove that the testator was competent to make the Will which is propounded, and it seems to me to be clear that before a person can be considered to be competent to make a Will, it must be shown that he is under no disability from unsoundness of mind but also (if and in so far as proof of the fact is necessary under the circumstances of the case) that he is under no disability from minority. There is a dictum of Sir Lawrence Jenkins in *Baghirathi Bai* v. *Viswanath Damodar* (3) which would have been of great assistance to us in coming to the same conclusion had it not been expressed in a case where the question of minority was not directly concerned and had it not appeared that that learned Judge had neither cited to him nor considered any authority on this particular point which has the appearance of being referred to incidentally. But even with this qualification, it shows that Sir Lawrence Jenkins considered the attainment of the age of the majority to be on the same footing for the purposes of proving the Will, as possession of a sound mind. Various text-books entitled to considerable weight on the subject of Probate Pratice in England have been cited to us and they also proceed on the basis that minority is considered in England in the same light as unsoundness of mind for the purpose of deciding whether the testator was competent to make a valid Will. Thus, in Tristram and Coote on "Probate Practice", (14th Edition), at pages 407 and 408, it is laid down that if the defence of incapacity has been pleaded, then the burden of proof rests upon those who set up the Will, and a reference is later on made by the same authors to the Wills Act in England which permits the plea of minority to be raised in order to establish want of capacity in the testator. (*Ibid*) 435. Now these passages show, that, in the opinion of the learned authors, though as a general rule the propounder of a Will is not required or expected to give positive evidence of the testator having attained majority, yet it is in the power of those who contest the validity of a Will to challenge the propounder thereof to prove in all strictness every ingredient making up competence to make a Will, including the fact that the testator had attained majority. The authority cited by the learned authors as the basis of this proposition [see *Smee* v. *Smee* (6)] seems to me to support it and I think that the proposition is grounded on principles which are applicable under the law in British India, no less than England. See also Williams on Executors, 10th Edition, Vol. I, page 8 *et seq*, page 12 and the Encyclopædia of the Laws of England, Vol. XI, page 80 and compare as regards the onus of proof in such a case, *Woomesh Chunder Biswas* v. *Rashmohini Dassi* (12), *Oriental Government Security Life Assurance Company Ld.* v. *Narasimha Chari* (9), *Chaudhri Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das* (7). Looked at from this standpoint, we cannot hold that the Will in question has been proved or that Probate of the Will ought to be granted to the applicant. I, therefore, agree that this appeal should be dismissed with costs.

Appeal dismissed.

(12) 21 C. 279.

KHUDA BAKHSH *v.* AHMAD KHAN.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 654 OF 1911.
March 3, 1913.
Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

KHUDA BAKHSH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
AHMAD KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Awans *of Talagang Tahsil, Attock District—Unequal distribution of ancestral land by father among his sons not proved—Burden of proof—Instances.*

Notwithstanding that *Awans* have a somewhat larger power of alienation than is usual in the Punjab, yet an *Awan* of Talagang Tahsil, Attock District, is not competent to distribute ancestral land unequally among his sons. The person alleging his competency to do so must prove it.

Mere assertions of a power in the absence of instances are useless to prove a custom.

Second appeal from the decree of the Divisional Judge, Attock, at Campbellpur, dated the 4th March 1911, reversing that of the District Judge, Attock, at Campbellpur, dated the 18th November 1910.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *Bhagat Ram Puri*, for the Respondents.

JUDGMENT.—Aziz Khan, an *Awan* of the Talagang Tahsil has ten sons by two wives. He first gave about 500 *bigahs* to Mahomed Khan in 1877. On 3rd December 1905 he gifted 6/7th of 6,063 *kanals* to six other sons, keeping 1/7th for himself. He then gave 1,755 *kanals* to the three remaining sons. Last of all, on 20th February 1909, he gave the remaining 1/7th of the 6,063 *kanals* to Fatteh Khan and Khuda Bakhsh under the pretence of a sale. This is a suit by five brothers of Fatteh Khan and Khuda Bakhsh attacking the alienation of 20th February 1909. The first Court dismissed the suit, but the Divisional Judge accepted the plaintiffs' appeal and decreed the suit, holding that defendants had failed to prove that an *Awan* of the Talagang Tahsil was competent to distribute his land unequally among his sons.

The defendants have preferred a further appeal to this Court.

The first three grounds of appeal have been framed under a misapprehension. Talagang is not part of the Rawalpindi District. It is now part of the Attock District and was formerly part of the Jhelum District.

Counsel cites *Khuda Bakhsh* v. *Waham Ali* (1), but it may be remarked (though this does not appear from the judgment of this Court) that in this case the son was born *after* the alienation in question so that the case is not one of an alienation by the father in presence of a son. It may also be noted that of the three rulings relied on in *Khuda Bakhsh* v. *Waham Ali* (1), the three earlier ones are not cases of alienations in presence of sons but of alienations by sonless proprietors, while in *Khuda Yar* v. *Fatteh* (2) the right of the son to object was not decided as the son assented to the gift, and the contest was between the nephews of the donor and the daughter's sons.

Then Counsel refers us to an order passed by Major Montgomery, Settlement Officer, in 1876, but this again was a case of an alienation by a sonless proprietor. No less than 119 leading men were consulted in this case, and all declared that a father could give away his property to his daughters even in the presence of sons, but nine out of the 119 were cautious enough to add that the power had never been exercised. This is in accordance with the *Wajib-ul-arz* of the village in the present case, which says that even in the presence of sons a man *can* gift lands to daughters, *but that no one has ever yet done so*. Where a power is merely asserted but has never been exercised it seems to us impossible to say that a custom exists.

There is an extract from the vernacular *Riwaj-i-am* of the Jhelum District placed on the record, which seems very ambiguous. It first states that a man can freely gift self-acquired land, and then goes on to say that he can gift a share of ancestral land if there are sons, but then continues, "if there are no sons, relations cannot veto such a gift, only sons can do so." We can only conclude that there has been a slip in the earlier portion of this extract, and that the correct version is that in the *absence* of sons a man may gift ancestral land. The extract goes on to say that a father may give a larger share to a favourite son.

We note that in Talbot's Customary Law of the Jhelum District we read on page 59 that ancestral property may not be given

(1) 10 Ind. Cas. 36; 88 P. R. 1911; 116 P. W. R 1911; 144 P. L. R. 1911.
(2) 8 P. R. 1905; 64 P. L. R. 1906.

without the consent of the collaterals in the 4th degree, and on page 39 that a father can gift a larger share to a favourite son, or a smaller share to a disobedient son, but that the difference must not be large.

Then a judgment of this Court, dated 8th May 1899 is referred to, but this does not help us as it is a case of contest between a daughter and collaterals in the 5th degree.

As to the mutation mentioned in the last paragraph of page 5 of the paper-book this seems to have been a case of one son getting a larger share with the consent of his brother. In any case one single instance is not enough to prove a custom. Several other reported rulings have also been referred to, but as they do not relate to *Awans* of Talagang we do not think it necessary to discuss them.

There can be no doubt that *Awans* have somewhat larger powers of alienation than is usual in the Punjab, but we find that the defendants have failed to prove that an *Awan* of Talagang may distribute the ancestral land unequally among his sons, and, therefore, this appeal must fail.

Mere assertions of a power are, we repeat, useless in the absence of instances to prove a custom.

As to the argument advanced before the learned Divisional Judge that the residue of the estate may be gifted at will, we note that this argument has not been repeated in this Court, and that we fail to see how if a man has not the power to alienate his land he can alienate the last remaining portion of it.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 294 OF 1910.

February 8, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

ISHAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BUDHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Sikh Jats *of Tahsil Shakargarh, Gurdaspur District—Repudiation of woman by husband—Woman free to marry again—Marriage legal without* chadarandazi—*Legitimacy of off-spring.*

Among *Sikh Jats* of Chak Kotla, Tahsil Shakargarh, District Gurdaspur, a woman expelled and repudiated by her husband, is according to custom free to re-marry. She may become the lawful wife of another man without even the ceremony of *chadarandazi*, and the off-spring of such a union would be regarded as legitimate.

Lachu v. *Dal Singh*, 33 P. R. 1896, referred to.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 26th January 1910, confirming that of the District Judge, Amritsar, dated the 16th August 1909, dismissing the claim.

Bhagat *Gobind Das* and Bhai *Kharak Singh*, for the Appellants.

Pandit *Rambhaj Datta*, for the Respondents.

JUDGMENT.—The plaintiffs in this suit are the reversioners of Kalu, and sue for possession of his house and land. The defendants are *Musammat* Budhi and Mallu who claim to be widow and son of Kalu. According to plaintiffs *Musammat* Budhi was mistress of Kalu and could not rank as his wife because her first husband, Ganda Singh, of Chak Kotla, Tahsil Shakargarh, District Gurdaspur, is still alive and has never repudiated her so as to make it possible for her to contract a fresh union. The defendants' version is that Ganda Singh turned *Musammat* Budhi out of his house and refused to have anything more to do with her and so after living for three or four years in her parents' house she married Kalu by *chadarandazi*. As to Mallu the plaintiffs have produced evidence to show that he is not the son of *Musammat* Budhi at all but is the son of Kalu by another woman.

The first Court held that *Musammat* Budhi had been expelled by Ganda Singh and had re-married Kalu and that her marriage was valid and that the suit must, therefore, be dismissed, but the lower Court held, so it appears, that Mallu was not Kalu's legitimate son because he was born before the *chadarandazi* (apparently the District Judge wrote "after the *chadarandazi*" by a slip for "*before*").

The plaintiffs appealed to the Divisional Judge and Mallu also appealed against the finding of the District Judge that he was illegitimate.

The learned Divisional Judge upheld the first Court's decision as to *Musammat* Budhi being widow of Kalu and also held that as the union of *Musammat* Budhi with Kalu would have constituted a legal marriage even had no ceremony of *chadarandazi* been performed the mere fact of Mallu's being

born before the ceremony was immaterial, and that Mallu must be regarded as the legitimate son of Kalu.

The plaintiffs have preferred a further appeal to this Court.

The first question to consider is whether *Musammat* Budhi eloped from her husband, Ganda Singh, or was expelled and repudiated by him. Ganda Singh and the other witnesses of his village give evidence in plaintiffs' favour on this point, while the defendants produce Narain Singh, *lambardar*, and Kesar Singh, *ala lambardar*, of the village where *Musammat* Budhi's parents lived, and their evidence is that *Musammat* Budhi was turned away by Ganda Singh, and that they and others went as a deputation to Kotla to ask Ganda Singh to take her back and that he refused. The only discrepancy that can be pointed out in the evidence of these two witnesses is that they differ as to whether Ganda Singh was asked for a written deed of divorce. We consider this evidence far superior to that of the Kotla witnesses produced by the plaintiffs, who are obviously incorrect in saying that *Musammat* Budhi left Ganda Singh's house only six or seven years ago, for there can be no doubt that the girl who died at Chahal in 1897 was the child whom *Musammat* Budhi took with her when she was turned out of Ganda Singh's house. The copy of extract from the death register shows that a girl named Kisso died at Chahal on 21st May 1897. The age is given as seven and the father's name is entered as Kalu. Counsel wished to argue that this entry might refer to another Kalu or to the daughter of Kalu by another woman, but Ishar Singh, plaintiff, when asked by us at once admitted that this entry referred to the daughter of Ganda Singh. The Kotla witnesses produced by plaintiffs say the girl was about two years old when *Musammat* Budhi left their village and so, as the learned Divisional Judge points out, *Musammat* Budhi must have left Kotla in or about 1892, and the evidence of the plaintiffs' witnesses who pretend that she left much later, and that her son by Ganda Singh who remained in Kotla with his father was only 16 or 17 at the time of their giving evidence (*i. e*, in 1909) is quite incorrect. The above extract from the Chahal death register coupled with Ishar Singh's admission also makes it clear that *Musammat* Budhi accompanied Kalu to Chahal and leaves no doubt that Mallu, who was born in Chahal on 6th September 1896, is the son of Kalu by *Musammat* Budhi, and not, as some of plaintiffs' witnesses pretend, by another woman. We disbelieve entirely the story of an elopement, and of Ganda Singh searching for his wife. We find it proved that *Musammat* Budhi was expelled and repudiated by Ganda Singh and we think that by custom this left her free to marry again. For plaintiffs it is urged that there is no evidence in this case proving a custom whereby a woman so repudiated is free to marry again, and it is urged that such re-unions are immoral and should not be recognized. But we cannot force standards of morality observed by highly civilized communities upon Punjab villagers. The ruling, *Lachu* v. *Dal Singh* (1), which relates to *jats* of the Gurdaspur District, seems to us distinctly in defendants' favour, even though the parties in that case belonged to another *gôt* and resided in another Tahsil of the Gurdaspur District. (The custom to be considered is, of course, that observed by Ganda Singh, not that binding on Kalu, for the question is whether *Musammat* Budhi was freed from her union to Ganda Singh). Another point which is strongly in favour of *Musammat* Budhi is that at mutation the plaintiffs raised no objection as to her being widow of Kalu, and merely objected that Mallu was illegitimate having been born prior to the *chadarandazi*. One of the plaintiffs is brother to Kalu and we have no doubt that the plaintiffs knew very well the history of *Musammat* Budhi at time of mutation. That there was a *chadarandazi* is, no doubt, true, but we are of opinion that Mallu was born before this *chadarandazi*; for *Musammat* Budhi clearly admitted this at the time of mutation, still we are of opinion that the fact of Mallu's being born prior to the *chadarandazi* is immaterial, for we fully agree with the learned Divisional Judge that *Musammat* Budhi would have been regarded as the lawful wife of Kalu, even had no ceremony of *chadarandazi* ever taken place. There are several rulings of this Court in support of this view (see rulings quoted on pages 122-124 of B. Kureshi's Customary law).

That marriage by *chadarandazi* is not per-

(1) 33 P. R. 1896.

missible at all among Hindu *Jats* (*vide* ground 8 of appeal) has not been argued before us.

Then it is urged that as the plaintiffs' suit was dismissed by the first Court, Mallu had no right of appeal to the Divisional Judge. But this is going outside the grounds of the present appeal; moreover, we note that it was open to the defendants in the Divisional Judge's Court to support the decision of the first Court on any grounds decided against them. It may be noted that the Divisional Judge treated Mallu's grounds of appeal as cross-objections.

We uphold the decision of the lower Courts dismissing the suit, and dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL No. 144 OF 1909.

February 24, 1913.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Miller, and Mr. Justice Sadasiva Aiyar.

NATESA AIYAR AND ANOTHER—APPELLANTS

versus

APPAVU PADAYACHI AND ANOTHER RESPONDENTS.

Vendor and purchaser—Advance—Time essence of contract—Contract Act (IX of 1872), ss. 55, 64, 65, 74—Return of deposit—Earnest money.

Per *White, C J. and Miller, J.*—(*Sadasiva Aiyar, J., dissentiente.*)—Where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase-money at the essential time, cannot recover the deposit.

Where the deposit bears a small reasonable proportion to the price, it can be regarded as security which is liable to forfeiture if a stipulation as regards forfeiture exists.

Section 65 or 74 of the Contract Act does not apply to such deposits.

White, C. J.—If the purchaser repudiates the contract, the vendor may retain the deposit. Where time is not of the essence of the contract, if the vendor rescinds after the agreed date, it is for the purchaser to show that he was ready and willing to perform the contract, within a reasonable time after the agreed date. If time is not of the essence of the contract, failure to perform on the agreed date does not in itself amount to repudiation but express intimation by the purchaser that he repudiates his contract is surely not necessary. And if the party in default fails to fulfil his contract on the agreed date, the onus is on him to show that he did not intend to repudiate.

Sadasiva Aiyar, J.—As regards the enunciation of the general universal principles of the Law of Contracts, the Contract Act was intended to be as exhaustive as possible. Stipulations for forfeiture of deposit money are governed by the Contract Act.

In a breach of contract, the distinction between penalty and liquidated damages has been abolished by the Contract Act and Courts have full power to do equitable justice between the parties.

Money received by a vendor under a rescinded contract of sale (properly rescinded by the vendor) should be returned to the purchaser leaving the rescinding vendor to recover damages from the purchaser for his breach of the contract.

Appeal under section 15 of the Letters Patent against the judgment of Mr. Justice Sankaran Nair in Appeal Suit No. 131 of 1907 reported as 3 Ind. Cas. 941; 33 M. 375, 6 M. L T. 334; 20 M. L. J. 230, preferred against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 19 of 1906.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. R. Ramachandrier*, for the Respondents.

JUDGMENT.

WHITE, C. J.—The contract we have to consider, no doubt, differs in some respects from the ordinary vendor and purchaser contract which was before the Courts in most of the cases which were discussed in the course of the argument in this appeal. The consideration for the contract in question was a sum of Rs. 41,000, of which Rs. 4,000, is stated to have been received by the vendor on the date of the agreement, Rs. 20,000 was to remain on mortgage, and the balance was to be paid on a specified date. If the purchaser failed to carry out the contract, he was to forfeit the Rs. 4,000 advance. If the vendor failed to carry out the contract, he was to refund the advance and pay Rs. 4,000. There was a further provision that the vendor should execute the sale-deed before the agreed date either in favour of the purchaser or in favour of the purchaser's nominees. In pursuance of this the vendor, before the agreed date, sold some of the lands to a nominee of the purchaser.

I do not think the fact that there was a reciprocal agreement by which Rs. 4,000 was to be forfeited to the vendor if the purchaser was in default, and Rs. 4,000 was to be paid by the vendor (besides refunding the advance) if the vendor was in default, or the fact that there was part performance of the contract before the agreed date, makes any difference for the

purpose of the question we have to decide, *viz.*, whether, in the events which have happened, the vendor is entitled to retain the Rs. 4,000.

As a matter of fact, the vendor has been able to sell the unsold portion of the land, or part of it, for more than the amount provided for in the agreement. This, again, in my opinion, does not affect the question we have to decide.

I agree that the question must be determined with reference to the provisions of the Indian Contract Act and that if they are in conflict with the English Law as laid down in the English authorities, we must follow the statute.

I think, however, it may safely be premised, that in a question such as this, it was not the intention of the Legislature to depart from what was understood to be the English Law at the time the Indian Contract Act was passed. It is also to be observed, as Wallis, J., points out that though several cases as to the right to recover deposits have been decided in India since the Contract Act was passed, in none of these has it been suggested that under the provisions of that enactment the law of India differed from that of England with reference to this question.

In the contract before us, we have an express agreement that, in default by the purchaser, the Rs. 4,000 was to be forfeited. Unless, therefore, the defaulting party can obtain relief on grounds of equity, or under some statutory enactment, he is bound by his bargain. In *Howe* v. *Smith* (1), Fry, L. J., said: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." The learned Lord Justice was dealing with a case where there was no express agreement. Here we have an express agreement, and the observations, as it seems to me, apply *a fortiori*. If time was of the essence of the contract into which the parties entered (and, in the opinoin of Wallis, J. and of the Subordinate Judge, it was) it seems to me clear that (unless the plaintiff can establish that the provisions of the Contract Act give him a right to recover, and I will deal with this later) effect should be given to the intention of the parties as expressed in the agreement.

There is, so far as I know, no reported case, English or Indian, since *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (2) (where the deposit was half the purchase price) of a vendor and purchaser contract in which it has been held that, notwithstanding an express agreement, the deposit is to be forfeited on default by the purchaser, it has been held that the deposit can be recovered back. In *Betts* v. *Burch* (3) there was no deposit.

But, so far as the English Law is concerned, as is pointed out in the judgments in *Howe* v. *Smith* (1) since the Judicature Acts where the question whether time is of the essence of the contract arises, all contracts must be governed by the Rules of Equity. I deal with this case, therefore, on the footing that the purchaser would have been entitled to fulfil his contract within a reasonable time after the agreed date.

In the case of *Howe* v. *Smith* (1), it was held that the purchaser was not entitled to a return of the deposit. Then, there was no express agreement that the deposit should be forfeited, and the question was considered on the footing that time was not of the essence of the contract. Here we have an express agreement as to the forfeiture. In his judgment in *Howe* v. *Smith* (1), Bowen, L. J., said (page 97) "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because, of course, persons may make ex-

(1) (1884) 27 Ch. D. 89 at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(2) (1873) 8 Ch. 1022; 43 L. J. Ch. 261; 21 W. R. 898.

(3) (1884) 4 H. & N. 506; 1 F. & F. 485; 28 L. J. Ex. 267; 7 W. R. 546.

actly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made. If any authority were wanted to prove that in each case it is a question of construction (I do not think it is wanted) it would be found in *Palmer* v. *Temple* (4), the case to which Lord Justice Cotton has referred, and which—whatever may be the value of the case as an authority on the construction of the contract in that case, as to which I agree with everything that has fallen from Lord Justice Cotton—adopts the principle that in each case we must consider what was the bargain. At page 520 there is this observation: 'The ground on which we rest this opinion is, that, in the absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument.'" Again, on page 99: "We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract, but to entitle the other side to say he has repudiated and no longer stands by it." The question of the return of a deposit came before Eve, J., in *Hall* v. *Burnell* (5), on a motion by the plaintiff (the vendor) that the agreement of sale should be rescinded and the deposit forfeited to the vendor. Here, again, there was no agreement for the forfeiture of the deposit. The learned Judge observes (page 555) that the decision in *Howe* v. *Smith* (1) negatives the purchaser's right to recover the deposit in a case where he has repudiated the contract and establishes the right of the vendor in such circumstances to retain it. He also observes (page 556) that *Howe* v. *Smith* (1) establishes that there is nothing inconsistent in a vendor being given relief by way of rescission and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit.

The learned Judge points out that in *Jackson* v. *De Kadich* (6), Farwell, J., had declined to make an order for a return of the deposit on the ground that a claim for rescission was inconsistent with a claim for damages under the contract and that in *Howe* v. *Smith* (1) there was no rescission. Eve, J., then proceeds to point out that there had in fact been rescission in *Howe* v. *Smith* (1) since the vendor had resold the property under his absolute title and not under a clause in the contract authorising him to sell on the purchaser's default, and that he had justifiably elected to treat the contract as rescinded. It may, I think, be put thus: If the purchaser repudiates the contract, the vendor may retain the deposit. If where time is not of the essence of the contract the vendor rescinds after the agreed date, it is for the purchaser to show that he was ready and willing to perform the contract within a reasonable time after the agreed date. If time is not of the essence of the contract, failure to perform on the agreed date does not in itself amount to repudiation, but express intimation by the purchaser that he repudiates his contract is surely not necessary. And if the party in default fails to fulfil his contract on the agreed date, I think the onus is on him to show he does not intend to repudiate. In the present case, some days before the agreed date, the vendor gave the purchaser express notice that he was not prepared to give him an extension of time (Exhibit V) and on the day of the agreed date or the day after the vendor gave the purchaser express notice that the purchaser had forfeited the deposit and that the vendor was going to sell the land to third parties. The purchaser made no offer, did not ask for an extension of time and did not answer the letter. The letter to Ramasawmi Aiyar (Exhibit VI) to which the Subordinate Judge refers cannot be treated as a notice to the vendor. Sankaran Nair, J., observes in his judgment, that the Subordinate Judge finds that the purchaser's conduct shows his willingness to carry out the contract after May 24th. I do not find any such finding though I may have overlooked it. But assuming it to be the case, this seems to me to be immaterial since it is not suggested that his readiness and willingness was intimated to the vendor. I think, on the facts of this case, the vendor was

(4) (1839) 1 P. & D. 379; 9 A. & E. 508; 8 L. J.(N.S.) Q. B. 179; 48 R. R. 568; 112 Eng. Rep. 1304.

(5) (1911) 2 Ch. 551; 105 L. T. 409; 55 S. J. 757; 81 L. J. Ch. 46.

(6) (1904) W. N. 168.

entitled on May 25th to elect to rescind. He did so elect and he gave the purchaser express notice he had so elected. Afterwards he re-sold the lands under his absolute title. The Subordinate Judge held and Wallis and Sankaran Nair, JJ., agreed with him that the subsequent sales were not under the original agreement.

In *Howe* v. *Smith* (1) Fry, L. J., observes (p. 103) that the effect of section 25 of the Judicature Act is "that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day." But he goes on to observe: "and the inquiry, therefore, arises whether the purchaser in the present case could aver and prove such readiness and willingness within a reasonable time." So far as I can see, the purchaser neither averred nor proved his readiness and willingness within a reasonable time, and I do not think he is relieved from this obligation because he had received express notice from the vendor that the latter intended to hold him to his bargain. Then as to the Contract Act I do not think section 64 helps the purchaser.

If the question had been *res integra*, I should have been inclined to hold that this section only applies where the contract is voidable under the law (*e. g.*, as falling within section 19 or 19 (*a*), Indian Contract Act) or where the contract itself in terms gives an option to avoid to one of the parties. However, the decisions would seem to be the other way.

I do not think the section applies to the case of a deposit made to secure the performance of a contract. It has been suggested that illustration (*c*) to section 65, Indian Contract Act, ought to have found a place as an illustration to section 64. Assume this to be so, it is clear the "benefit" in the illustration was a benefit under the contract. Here the benefit of having some security that the purchaser would fulfil his contract was ancillary to the contract for the sale of the land. I do not think it was "thereunder" within the meaning of the section, and I do not think the rescission of what may be called the main contract by the vendor involves the rescission of the ancillary contract, that, in default by the purchaser, the vendor should be entitled to retain the deposit.

I also think that section 74, Indian Contract Act, does not apply. The sum of Rs. 4,000 is named in the contract as an "advance," not as the amount to be paid in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to me to be the right view, it is paid partly by way of part payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the section, this, as was pointed out by Miller, J., in the course of the argument, is not a question of the amount of compensation which the vendor is entitled to *receive* by reason of the breach, but a question whether the vendee is entitled, under the contract, to recover an amount which has been already paid.

If we examine the illustration to section 74, Indian Contract Act, it seems to me the present case comes nearer to illustrations (*c*) and (*d*) where the contract can be enforced according to its terms than to the other illustrations where the stipulation is by way of penalty.

There are two or three Indian decisions I should like to refer to. In *Bishan Chand* v. *Radha Kishan Das* (7) and *Balvania Appaji Whatekar* v. *Bira* (8), both cases in which there was no express agreement for the forfeiture of the deposit, the course in this country held, following the English Rule, that the deposit could not be recovered. The case reported as *Srinivasa* v. *Rathnasubapathi Pillai* (9) was not a case of vendor and purchaser but a case where a contract provided that a deposit made by a contractor who had agreed to do certain work should be forfeited if he had failed to do the work. There the stipulation as to

(7) 19 A. 489 ; A. W. N. (1897) 123.
(8) 23 B. 56.
(9) 16 M. 474 3 M. L. J. 124.

the deposit was treated as a stipulation by way of penalty and it was held that the plaintiff's assignee was entitled to recover the difference between the amount of the deposit and the damages sustained by the defendants.

In *Manian Patter* v. *The Madras Railway Company* (10) the Court held that, where the instrument referred to a sum deposited as security for performance, the bargain of the parties should be carried out except where the forfeiture is relieved against on terms which the Court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. These two decisions might perhaps be reconciled on the ground that, in the former case, the "deposit" having regard to the value of the contract was proportionately larger than in the latter case. But I doubt if this distinction on the facts can be drawn as regards the latter case. The proposition as to the *reasonableness* of the sum deposited as security is in accordance with the passage in Sedgwick on Damages which the learned Judges cite. If the question of reasonableness is a matter which can be taken into account, I am certainly prepared to hold that a 10 per cent. deposit, as in this case, on the purchased price (I do not overlook the fact that Rs. 20,000 was to remain on mortgage), is reasonable. In the case of *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (2) where it was held the vendor could not retain the deposit the deposit was half the purchase-money. There, as Wallis, J., points out, the amount was so large as to take it out of the ordinary class of deposits. There is certainly nothing extraordinary in a 10 per cent. deposit under an agreement for the sale of land.

I agree with Wallis, J., and I think this appeal should be allowed.

MILLER, J.—I am of the same opinion. On the facts, I agree with Wallis, J., that the sum of the Rs. 4,000 for which the plaintiff is suing can be regarded as a deposit by way of guarantee or security for the performance of the contract of sale, and (agreeing with Wallis, J., and the Subordinate Judge) that of that contract time was of the essence.

On those facts I do not see how to avoid the conclusion that the plaintiff on his failure to be ready with the purchase-money at the essential time, must be held to have abandoned the contract, having put it out of his power to perform it. That brings the case within the English authorities among which *Howe* v. *Smith* (1) is conspicuous, and if we follow those cases the present suit must fail.

The weight of authority both in this country and in England is against the contention that the plaintiff is entitled to claim the return of the deposit as having been paid in pursuance of a penal stipulation: that is clear from the judgments of both the learned Judges who heard the appeal and it is needless for me to discuss the authorities.

There may be cases where the Courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as a security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. This is the rule which was accepted in *Manian Patter* v. *The Madras Railway Company* (10), as being in accordance with the English cases, and it is a rule which I am prepared to accept, as being obviously calculated to do justice. Here I do not think it was seriously contended that the sum of Rs. 4,000 was excessive or unreasonable as a security for performance of the contract, and the fact that the vendor was able after breach of the contract by the vendee to effect a sale on terms even better than those contained in the broken contract is not evidence sufficient to support an inference that the deposit was unreasonable in amount. Unless then we are prevented by something in the Indian Contract Act from following these authorities I am of opinion that the appeal must be allowed. For the reason

(10) 29 M. 118; 16 M. L. J. 37.

given by Wallis, J., I do not think section 74 is applicable to this suit, and the only other section which need be considered is section 64—the second sentence of that section. I agree with Wallis, J., that that section does not apply to the circumstances of this case.

It is as a forfeited security for the performance of the contract and not as part payment of the price that the defendant seeks to retain the deposit, and it will not be denied that a benefit which he has obtained by reason of a breach of the contract is not a benefit 'under' the contract.

Sankaran Nair, J., takes the view that there is only one contract and the stipulation with regard to the deposit is a part of the consideration, and, consequently, as I understand the learned Judge, the defendant, when he rescinded the contract, rescinded with it the stipulation, the benefit which he has received under the stipulation is, therefore, a benefit received 'under' the rescinded contract. Wallis, J., on the other hand, holds that the stipulation may be regarded as collateral to the contract of sale, and thus, as I understand him, it is not rescinded with the rescission of the contract of sale and, therefore, section 64 cannot apply. This view seems to me to be the better.

Let us assume that the stipulation represents an agreement as to the damages payable under section 74 of the Contract Act: in that case it seems to me it would be unreasonable to hold that with the rescission of the contract, that agreement is also rescinded; but if it is not rescinded section 64 cannot apply to it. And if in that case it would be held, as I think it necessarily would be held, that the stipulation is not rescinded with what I may call the main contract, there is no reason why the same conclusion should not be reached when the stipulation relates to a security for the performance of the contract.

Both stand on the same footing: both are stipulations which depend for their operation not upon the fulfilment of the main contract but on its breach, and the provisions of section 64 are, it seems to me, inapplicable to them.

Sankaran Nair, J., is of opinion that the stipulation, if it is not an integral part of the contract of sale, must fail for want of consideration, but that difficulty, I venture to think, will arise only if the deposit is regarded solely as a part-payment: if it is a security placed in the hands of the vendor for the purpose of binding the bargain, there seems to be no want of consideration.

I agree also with Wallis, J., that we cannot regard the deposit as the amount of damages agreed upon by the parties. It is very difficult to my mind to believe that the vendor would have limited his demand for damages to the sum of Rs. 4,000—in the circumstances of the case, and there is nothing in the language of the contract to compel us to hold that he did so. On the contrary the contract rather shows that that was not the intention.

I am, for these reasons, of opinion, that the second part of section 64 is not applicable to the case and that being so I find nothing in the Contract Act to prevent our following the authority of *Howe* v. *Smith* (1) which as has been pointed out by Eve, J., in *Hall* v. *Burnell* (5) permits a vendor to rescind the contract as well as at the same time to retain the deposit.

I would, therefore, allow the appeal and dismiss the suit.

SADASIVA AIYAR, J.—I have the misfortune to differ from the judgment of the majority of the Bench in the case.

The Indian Contract Act was the result of the labours of several years' deliberation. It was drafted in England by the Indian Law Commission, it was revised and elaborated by the Legislative Department in India (which even borrowed certain provisions from the New York Draft Code) and it was lastly considered and revised with great care by that eminent jurist, Sir James Fitzjames Stephen, who was the then Law Member of the Governor-General's Council. It was enacted "in order to define and amend certain parts of the law relating to contracts." Though there might be some portions of the law of contract not covered by the Act, I do not think that so far as the general principles are concerned, the learned Legislator would have failed to indicate them with sufficient clearness and fullness for the guidance of Indian Courts. (The Indian Evidence Act, which also we owe to the same eminent jurist has been universally praised for its

thorough grasp of the principles of the Law relating to evidence and for the exhaustive and clear manner in which such principles have been applied in the enactment of the rules of evidence embodied in the Act). Pollock mentions the case of Damdupat in the Bombay Presidency and in the town of Calcutta in connection with the case of loans contracted by Hindus. He also refers to the provisions as to the awarding of interest as damages under the Hindu Law in Bombay [*Saunadanappa* v. *Shivbasawa* (11), and then remarks: "Such cases are very few and the native law of contract may, for all practical purposes, be regarded as having been superseded by the Indian Contract Act," etc.,] Shephard, J., in his Contract Act, refers to some special and subsidiary portions of the law of contracts such as that of the Law of Master and Servant, Consignor and Carrier, the law regulating Promissory-notes and Bills of Exchange, the Law of Contracts specially affecting land, the law as to specific performance and some few similar technical matters as intentionally omitted from the direct scope of the Act, some of these matters being afterwards embodied in enactments like the Negotiable Instruments Act and the Transfer of Property Act. But as regards the enunciation of the *general* and *universal* principles of the Law of Contracts, I think that the Contract Act was intended to be as exhaustive as possible.

I am, therefore, naturally reluctant to hold that the Indian Contract Act contains no provisions applicable to the very common cases where a vendor and a purchaser agree that the earnest money deposited with the vendor should be treated as part of the purchase-money, if the sale is completed by the purchaser, but should be forfeited to the vendor if the purchaser makes default in completing the purchase. After going through the Contract Act, I think that the provisions of sections 39, 55, 64, 65, 73, 74 and 75 of the Act, when read together, indicate in sufficient fullness and clearness the principles applicable to the decision of the questions now in dispute, relating to the rights and duties of a vendor who rightly rescinds a contract of purchase and with whom a portion of the purchase-money agreed upon had been deposited with a stipulation for its forfeiture for the purchaser's default. The rule enacted by section 39 of the Contract Act gives a right to the vendor to rescind the contract if the purchaser has "disabled himself from performing the contract." The result of applying section 55 is that, if time is of the essence of the contract and if the purchaser fails to pay the balance of the purchase-money within the time agreed upon for the completion of the purchase, the vendor might rescind the contract and the vendor will "be entitled to compensation from the purchaser for the losses occasioned" to the vendor by the purchaser's failure. Under section 64, it seems to me that the vendor who properly rescinds the contract according to section 55 on account of the purchaser's failure, should "if he (the vendor) have received any benefit thereunder" (that is, from the contract of sale and purchase) "restore such benefit to" the purchaser. Section 65 indicates that when a contract of sale becomes void (which might happen by the vendor lawfully rescinding it) the vendor, if he has received any advantage under the contract, is bound to restore it or to make compensation for that benefit to the purchaser. Illustration (*c*) to this section is very instructive. It is as follows:—"*A*, a singer, contracts with *B*., the manager of a theatre, to sing at his threatre for two nights in every week during the next two months, and *B*. engages to pay her a hundred rupees for each night's performance. On the sixth night, *A*. wilfully absents herself from the theatre, and *B*., in consequence, rescinds the contract. *B*. must pay *A*. for the five nights on which she had sung." Section 73 merely confirms the right given by section 55 to the vendor to claim compensation from the purchaser for the loss occasioned by the latter's failure. Thus the obligation to restore the benefit received or to make compensation for it is laid down absolutely, *even where A. has made wilful default*. If *B*. substained any loss by *A*.'s wilful default, he is, of course, entitled to make a cross-claim for it from *A*. under sections 55 and 73 but this cannot affect the absolute obligation laid on *B*. to restore the benefit received by him from *A*. under the rescinded contract.

(11) 31 B. 354; 9 Bom. L. R. 439.

NATESA AIYAR *v.* APPAVU PADAYACHI.

Section 74 is a very important section. It treats of stipulations by way of penalty. We know how Courts in India followed too closely the English decisions which made refined distinctions between penalty and liquidated damages and which treated a provision for enhanced interest from date of bond as a penalty but not a provision for enhanced interest from date of default. The amendment of section 74 and the new illustrations added to it did away with all these distinctions imported into India from England and treated all stipulations in a contract "by way of penalty" on the same footing to be relieved by Courts according to justice, equity and good conscience, directing, however, the Courts to award "reasonable compensation" against the party guilty of the breach of contract, not exceeding the amount named as penalty or (as the case may be), the penalty stipulated for (if the penalty is any stipution other than a sum named as to be paid for breach). [I have had occasion recently to consider this section 74 at length in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (12) and again in the Full Bench reference made in that appeal.] The very use of the expression "forfeit the deposit", the agreement of sale in this case uses the word 'forfeit', conveys to my mind the notion of a "stipulation by way of penalty" referred to in section 74. A man forfeits a thing as punishment or penalty for a fault, and hence every stipulation for forfeiture must be a stipulation by way of penalty. This view seems to me to be materially strengthened by the exception clause attached to section 74 and the illustration (*c*) which relates to that exception. It is clear from the illustration that when *A.* "forfeits" his recognizance in Rs. 500 to appear in Court, he must pay the whole 'penalty' of Rs. 500. In short, I find myself unable to dissociate in my mind the idea of a stipulation by way of forfeiture from the idea of a stipulation by way of 'penalty' or of "liquidated damages," if we retain in our mind the distinction between penalty and liquidated damages made in the English decisions. Section 75 of the Contract Act confirms the provision in sections 55 and 73 entitling the vendor to recover compensation from the purchaser for the latter's breach of contract.

On the facts of this case, I agree that the plaintiff (purchaser) did commit breach of contract by not paying the balance of purchase-money within the stipulated period. I differ (with respect) from the opinion of Sankaran Nair, J., (if such be his opinion, as I am not quite sure) that, even when time is of the essence of the contract and the stipulated time is allowed by the purchaser to expire, the vendor cannot rescind the contract unless the purchaser had also "no intention of performing the contract or repudiates it." Observations tending to that effect in *Howe* v. *Smith* (1) cannot affect the law as laid down in the Indian Contract Act. As remarked by Pollock in the preface to this book on the Contract Act: "In many on the arguments and some of the judgments in the reports of the Indian High Courts, there appears, if I mistake not, a tendency to follow the English authorities too literally, (though in any case) these are not positively binding on Indian Courts." As to the allowing of a further "reasonable time after the stipulated date" before the vendor could rescind the contract (a doctrine also evolved from loose expressions used in some of the English decisions), I do not see how, when time is of the essence of the contract and the vendor, therefore, has the legal right to rescind the contract on the expiry of the stipulatd time without the purchaser having performed his promise, a further reasonable time could be allowed so as to deprive the vendor of his legal right to rescind the contract as soon as the purchaser's breach of the latter's promise takes place.

Granting then (as I must) that the vendor rescinded the contract properly in this case, what are the respective rights and liabilities of the parties consequent on such rescission? The English Courts have, in many cases, treated these stipulations for forfeiture of deposit money as standing on a different footing altogether from stipulations for penalty and stipulations for liquidated damages but in other cases they have treated such stipulations as standing on the footing of stipulations for liquidated damages. I shall refer to only a few of these cases. In *Wallis* v. *Smith* (13) Jessel, M. R., held that in such cases "the bargian of the parties is to

(12) 18 Ind. Cas. 417; 24 M.L.J. 135; 13 M.L.T. 20.

(13) (1882) 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W.R. 214.

be carried out." In an English case, a learned Judge is reported to have gone so far as to say: "There is no breach of contract at all. You have taken your chance with respect to your deposit and you are not entitled to have that deposit back." The position that "there is no breach of contract at all" shows how widely the principles of the Indian Contract Act by which Indian Courts are bound differ from the technicial considerations which have guided the English Judges in some of the English cases. Surely there has been a clear breach of contract under the Contract Act and the bargain between the parties not a mere game of chance in which one party has lost his deposit according to the rules of the game as agreed upon.

But against these cases is the case of *In re Dagenham (Thames) Dock Company, Ex parte Hulse* (2) where it was held that a stipulation that half the purchase-money (paid in advance) should be forfeited was a penalty and should be relieved against. I do not see how, on principle, a deposit to be forfeited should be treated as a penalty if it is 50 per cent. of the purchase-money, but it should be treated as money to be retained by the vendor according to the bargain between the parties, if it is of a less proportion than half. If once you admit that the reasonableness of the sum agreed upon to be forfeited for breach can be considered in arriving at the conclusion whether the stipulation is to be treated as a penalty or not, I think it is impossible to treat such stipulations on any other footing than the footing of stipulations for penalty (if the amount is harsh or unconscionable) or stipulation for liquidated damages (if the amount is a reasonable one). In *Wallis* v. *Smith* (13) itself, Fry, J., in the original trial held that the deposit money must be treated as *liquidated damages* if it was a reasonable amount. So also in Sedgwick on Damages, 7th Edition, Vol. I, page 593 [quoted in *Manian Patter* v. *The Madras Railway Co*, (10)] it is said that the forfeiture will not be interfered with *if reasonable in amount*. As I said, the introduction of the idea of the reasonableness or otherwise of the sum is consistent (at least to my mind) only with the principle that the amount is considered as reasonable compensation for the damages sustained by the vendor owing to the purchaser's breach of contract.

The distinction between penalty and liquidated damages has been abolished by the Indian Contract Act, section 74, and the Court has got full power to do equitable justice between the parties. Where the probable damages sustained are uncertain, the Court will usually give the whole deposit money as compensation if it is a reasonable sum. In the English Courts, this reasonable sum is, in some cases, styled liquidated damages and it was so held in *Palmer* v. *Temple* (4) and *Wallis* v. *Smith* (13) (see Fry, J.'s judgment in the original trial). In cases (as in this case) where it is proved as a fact that no damages at all have been sustained, the Court would, if the defendant claims it, give a nominal amount as compensation out of the stipulated sum, because it has been held that some compensation should be given, if claimed under section 74 of the Contract Act. [See *Annamalai Chetty* v. *Veerabadram Chetty* (14)]. That the sum to be forfeited is even under the English decisions, "damages" due to the vendor is clear from the fact that, when the vendor finds that he has sustained damages beyond the forfeited amount, he could admittedly sue *only for the balance* and cannot sue for the whole amount of damages excluding altogether the forfeited amount from consideration. Usually, the earnest or deposit money is a very small proportion of the price fixed. The probable damages consequent on the breach by the purchaser are uncertain in most cases as the vendor rarely cares to sell the land at once to other purchasers. Courts would, therefore, be fully justified in treating the whole deposit amount (or *Acharapanam* in Tamil) as reasonable compensation in most cases. But this fact (as I think) should not make us forget the principle that the deposit money is a stipulated (that is, agreed upon) penalty and that the provisions of section 74 of the Contract Act are, therefore, applicable to it and must govern it. Even according to *Howe* v. *Smith* (1), earnest money is intended to create by the *fear* of its forfeiture a motive in the purchaser to fulfil the con-

(14) 26 M. 111.

tract. Just as the word 'forfeiture' inevitably raises the idea of 'penalty' in my mind, the word 'fear' raises the very same idea. Whatever may be the view of the other High Courts, the case of *Srinivāsa* v. *Rathnasabapathi* (9), decided by this Court, treats such stipulations as stipulations by way of penalty.

As I said in the beginning, I find it difficult to hold that no principle was laid down by any of the sections of the Indian Contract Act which could be applied to stipulations for forfeiture of deposit money except the general principle that the bargain between the parties must be strictly enforced. Sections 64 and 65 of the Contract Act are worded quite generally and their Lordships of the Privy Council did not hesitate to hold that section 65 of the Contract Act applied to the fact of the case of *Bassu Kuar* v. *Dhum Singh* (15), where an agreement became wholly ineffectual as one party to it properly threw it up altogether on account of the other party not admitting the existence of 'other unwritten' terms alleged by the former. I must confess that I have been unable to follow the arguments advanced by the appellants' learned Vakil to the effect that sections 64 and 65 of the Contract Act could not be applied because the deposit money retained by the defendant was not a 'benefit' or 'advantage' received under the contract of sale. One of the terms of the contract of sale was that the deposit money was to be treated as part of the purchase-money under the contract, having been expressly paid as such. It, no doubt, contained another term that the deposit money was to be treated as forfeited for the defendant's benefit if the plaintiff failed to fulfil his promise to pay the remainder of the purchase-money within a stipulated time. But the advantage which accrues to the vendor of retaining the deposit money by such failure of the purchaser is clearly an advantage derived under the terms of the original contract. The contract might contain some provisions which might be called "main provisions" and others which might be called "ancillary provisions", and this provision about the retaining of the deposit money by the vendor might be an ancillary provision, but the benefit derived from this provision is, it is clear to my mind, a benefit derived under the contract. Again Sedgwick, who is relied on in the case of *Manian Patter* v. *The Madras Railway Co.* (10), heads his Chapter 12 (in which section 414 occurs) as a Chapter on "Liquidated Damages" and begins section 414 as follows:—"Deposit to be forfeited on default—the forfeiture, if reasonable in amount, will to be enforced as *liquidated damages.*" To my mind, it is impossible to put it on any other footing but that of liquidated damages and, as the Contract Act does away with the distinction between penalty and liquidated damages, it must come under a stipulation by way of penalty.

It is, therefore, clear to mind, that just as in the case of *Bassu Kuar* v. *Dhum Singh* (15) the book-debt amount retained by the vendor-debtor as part of the purchase-money was treated as a benefit which the said vendor got under the contract and which he must give up under section 65 of the Contract Act on the contract having become ineffectual, so the defendant in this case was bound to refund the benefit of the deposit money on the contract becoming ineffectual, his only right against the plaintiff being to make a counter-claim under sections 55, 73 and 75 of the Contract Act for compensation for the damages, if any, caused to him by the plaintiffs' breach and, where no actual damages have been really sustained (as in this case), to make a counter-claim for some compensation out of the stipulated penalty under section 74 of the Contract Act. That the provisions of section 65 of the Contract Act as to restitution of benefits is distinctly wider than the rules laid down in English decision is admitted by Pollock in the last paragraph of his commentaries to section 65 of the Contract Act. I am also not disposed to limit the wide provisions of section 74 of the Contract Act (especially after the Legislature was obliged to amend it, owing to the unfortunate introduction, by Indian Courts, of the "artificial and more or less arbitrary rules of construction" concernrd with penalty and liquidated damages laid down by English decisions), I am not disposed to limit the wide provisions of section 74 by drawing a further distinction between a 'penalty' and a 'deposit' paid with a condition of forfeiture, or a distinction between a

(15) 11 A. 47; 15 I. A. 211.

deposit of a reasonable proportion of the purchase-money, and a deposit of an unreasonable proportion of the purchase-money, or a distinction between what is called "liquidated satisfaction" in an English case on *Societe Generale De Paris and G. Colladon* v. *Jnet Walker* (16) and "damages" or "penalty" on the other and so on and so forth. (There seems to me to be no magic in the word "liquidated" or in the word "deposit"). Suppose that in this case two alternative states of facts were proved:

(*a*) that the plaintiff had paid all but Rs. 1,000 of the purchase-money of Rs. 41,000 before the due date;

(*b*) that the plaintiff had paid only the Rs. 4,000 first deposited and not a single pie of the remaining Rs. 37,000.

In either case, the whole Rs. 4,000 should be forfeited according to the terms of Exhibit A. and I cannot conceive that such a provision is not a penalty.

Having read sections 39, 64, 65 and 75 of the Contract Act together my mind is clear that the framers of the Contract Act, intended that money received by a vendor under a rescinded contract of sale (rescinded property by the vendor) should be returned to the purchaser, leaving full liberty to the rescinding vendor to recover damages from the purchaser for the latter's breach of contract. We have got the authority of Mr. Stokes for saying that the illustrations (*b*) and (*c*) to section 65 of the Contract Act properly belong to section 64 of that Act. It is further very significant that the very same set of facts is mentioned in the illustration (*a*) to section 39, illustration (*c*) to section 65 and the illustration to section 75. I shall here set down the three illustrations to the three sections together, and they make it almost conclusive to my mind that the obligation of the vendor to return the deposit money was intended to be quite independent of his right to recover damages sustained by him by the purchaser's default, though, of course, the said obligation and the said right can be put in issue and dealt with in the same suit. The three illustrations to the three sections are:

A., a singer, enters into a contract with *B.* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B.* engages to pay her Rs. 100 for each night's performance. On the 6th night *A.* wilfully absents herself from the theatre. *B.* is at liberty to put an end to the contract. [Illustration (*a*) to section 39.]

A., a singer, contracts with *B.*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B.*, engages to pay her Rs. 100 for each night's performance. On the sixth night, *A.* wilfully absents herself from the theatre and *B.* in consequence, rescinds the contract. *B.* must pay *A.* for the five nights, on which she had sung. (Illustration (*c*) to section 65.)

A., a singer, contracts with *B.*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and *B.* engages to pay her Rs. 100 for each night's performance. On the sixth night *A.* wilfully absents herself from the theatre and *B.* in consequence, rescinds the contract. *B.* is entitled to claim compensation for the damages which he has sustained through the non-fulfilment of the contract. (Illustration to section 75).

For the above reasons, I hold that the conclusion of Sankaran Nair, J., is right and I would affirm his decision and dismiss this appeal.

BY THE COURT.—The result is the appeal is allowed and the suit is dismissed with costs throughout.

Appeal allowed.

(16) (1886) 11 App. Cas. 20 at p. 34; 54 L. T. 389; 34 W. R. 662; 55 L. J. Q. B. 169.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 188 OF 1912.

April 1, 1913.

Present:—Justice Sir Frederick Robertson, KT.

THE FIRM MURLI DHAR-KANSHI RAM—PLAINTIFF—PETITIONER

versus

NARAIN DAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3, O. VII, r. 11, O. VI, r. 18—Plaintiff not complying with order to file agreement to arbitrate under section 20 of the second Schedule—Suit not to be dismissed.

A plaint was rejected on the ground that the plaint-

iff had no right to bring a suit without filing an agreement to arbitrate under clause 20 of the second Schedule of the Civil Procedure Code:

Held, that neither Order XVII, rule 3, nor Order VII, rule 11, nor Order VI, rule 18, of the Code of Civil Procedure applied.

Order XVII, rule 3, applies only to cases where time has been granted to a party on his own application to do anything which falls within the purview of the rule.

Under Order VI, rule 18, the Court has no power to reject the plaint or to dismiss the suit, but must proceed to try the suit on the original plaint.

Petition under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Amritsar, dated the 28th day of November 1911, dismissing the suit.

Mr. *Girdhari Lal Maheshwary*, for the Petitioner.

Lala *Hukam Chand*, for Mr. *Nihal Chand* for the Respondent.

JUDGMENT.—It is quite clear that the order of the lower Court cannot be maintained. The hand-writing of the Judge, Small Cause Court, is so hopelessly illegible that I had great difficulty in making up my mind as to the rule and order under which the action of the lower Court really purports to have been taken. I think from the vernacular record it is clear that rule 11, Order VII, was really intended and it is perfectly clear that Order XVII, rule 3, has no application whatever to this case. It appears that the plaint was presented before the first Court who held that the plaintiff had no right to bring a suit in the present case without filing an agreement to arbitrate under section 20 of the second Schedule of the Civil Procedure Code. In this he was, as the learned Counsel for the respondent admits, clearly wrong. It was urged by the learned Counsel for the respondent that the order might have been passed under Order VII, rule 11. But as I have already pointed out the only possible justification for that would be on a point on which the learned Judge has been shown to be clearly wrong. Consequently the plaint could not have been rejected under Order VII, rule 11, nor does Order VI, rule 18 apply. Under Order VI, rule 18, the Court has no power to reject the plaint or to dismiss the suit but must proceed to try the suit on the original plaint. Rule 3, Order XVII, clearly does not apply to this case for no time had been granted to the plaintiff on his own application to do anything which falls within the purview of Order XVII, rule 3. It is contended by the learned Counsel for the respondent that the case is one in which it is clear that the Small Cause Court had no jurisdiction. With that point I have nothing to do except to point out that if this be so the proper course for the Small Cause Court to pursue is not to dismiss the suit, but to return the plaint to be presented in the proper Court.

I accordingly set aside the judgment and the decree of the lower Courts and return the case for disposal according to law.

Case remanded.

PUNJAB CHIEF COURT.

CIVIL REVISION APPLICATION No. 134 OF 1911.

April 23, 1913.

Present:—Mr. Justice Scott-Smith.

Khwaja ALTAF-UL-RAHMAN AND OTHERS —PLAINTIFFS—PETITIONERS

versus

AGHA JAN—DEFENDANT—RESPONDENT.

Parties to suit—Suit for rent—Tenant mentioning third party to whom he had paid rent—Third party should be brought on the record.

The defendant took a shop on rent from the owner and with the latter's consent agreed to pay rent to the plaintiff, the lessee thereof. The plaintiff sued for rent due. Defendant alleged that he had paid rent to one *P.* at the request of the owner. The Court declined to make *P.* a party.

Held, that the Court should have made *P.* a party and have decided once for all whether he or plaintiffs were entitled to the rent.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Delhi, dated the 10th December 1910, rejecting the application of the plaintiffs for review of his judgment, dated the 1st August 1910, decreeing the claim in part.

Mr. *Pestonji Dadabhai*, for the Petitioners.

Babu *M. N. Mukerji*, for the Respondent.

JUDGMENT.—The shop for the rent of which plaintiffs sue belonged to one *Sheikh* Karim Ullah who rented it to defendant. After his death his representatives, or some of them, leased it and other shops to plaintiffs for five years on 17th April 1909.

Plaintiffs sent a notice to defendant who after inquiring from the owners agreed to pay them rent. Subsequently, he says, he

paid rent to Parmeshri Das also at the request of the owners.

Plaintiffs sued defendant for rent and enhanced rent. The Judge Small Cause Court declined to make Parmeshri Das a party and to inquire into the question of title as between him and plaintiffs.

Parmeshri Das says he bought the shop from the owners on 9th April 1910 and the lower Court has accordingly given plaintiffs a decree for rent due up to 8th April 1910 only. They have come up here on the revision side.

I think the lower Court should have made Parmeshri Das a party and have decided once for all whether he or plaintiffs were entitled to the rent. The lower Court, having ignored Parmeshri Das' application to be made a party, should not have then dismissed plaintiff's claim for rent accruing after 8th April 1910 on the ground that defendant said he had paid it to Parmeshri Das. There is no proof of such payment.

I accept the application and setting aside the order of the Judge, Small Cause Court, remand the case for re-decision after impleading Parmeshri Das. As petitioners strenuously opposed the latter being made a party I direct that they pay respondent his costs in this Court.

Application accepted.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 25 OF 1910.

October 30, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

VADLAMAUNATI BALA TRIPURA SUNDARAMMA—PLAINTIFF—APPELLANT

versus

DADA SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage suit—Costs.

In a mortgage suit, a mortgagee is ordinarily entitled to his costs unless he is guilty of grave misconduct.

Appeal against the decree of the District Court of Kistna, in Original Suit No. 5 of 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *T. Ramachandra Row*, for the Respondents.

JUDGMENT.—The mortgagee (appellant) is ordinarily entitled to his costs unless he was guilty of grave misconduct *Kuppuswami Chetty* v. *Zemindar of Kalahasti* (1). In this case, the lower Court not only refused costs to the mortgagee but directed her to pay the costs of the mortgagors even though it found that the defendant's plea in paragraph 10 of their written statement that plaintiff (mortgagee) was "not entitled to ask for possession in this suit" was unsustainable, for the Court did decree possession of the mortgaged lands to plaintiff, such possession having been the alternative relief prayed for in the plaint. The defendant's alleged offer to put plaintiff in possession was never sought to be proved. The defendant's allegation that plaintiff's agent asked them to take possession of the lands in *fasli* 1314 which had been admittedly in possession of plaintiff as usufructuary mortgagee till then is held by the lower Court to be not proved and yet the lower Court comes to the curious conclusion that the defendants having taken such possession was not wrongful even though the mortgage document does not give them any right to take such possession if the mortgagee fails to lease out the lands to others. I think the lower Court's discretion as to costs (which discretion, I admit, is a very large discretion not to be lightly interfered with) has been exercised almost arbitrarily in this case, especially when the lower Court found that plaintiff was entitled under the mortgage to very nearly the amount claimed by her as due under it. I modify the lower Court's decree by directing defendants to pay half of plaintiff's costs in both Courts and by directing defendants to bear their own costs.

Decree modified.

(1) 27 M. 341.

Musammat KARM JAN *v.* ABDUL JABBA.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1143 OF 1912.
April 21, 1913.

Present:—Justice Sir Frederick Robertson, KT.

Musammat KARM JAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ABDUL JABBAR—PLAINTIFF—RESPONDENT.

Restitution of conjugal rights—Strained relations between husband and wife—Apprehension of breach of peace—Decree not to be passed.

It is very incorrect for a Court in India to pass a decree for the custody of a woman's person when the relations between the parties are of such a condition that it is obvious that a breach of the peace is likely to occur.

Second appeal from the decree of the Divisional Judge, Attock Division, at Campbellpur, dated the 9th April 1912, reversing that of the District Judge, Attock, at Campbellpur, dated the 22nd December 1911, dismissing plaintiff's claim.

Mr. *Bhagat Ram Puri*, for the Appellants.

Mr. *Pestonji Dadabhai*, for the Respondent.

JUDGMENT.—The present suit is a suit by Abdul Jabbar against *Musammat* Karm Jan, his wife, and is a reply to the suit brought by *Musammat* Karm Jan against the plaintiff for possession of land conveyed to her in dower by Gulab Khan, father of Abdul Jabbar. The suit in respect of dower was instituted by *Musammat* Karm Jan in August 1910, and that by Abdul Jabbar against *Musammat* Karm Jan in July 1911. The lower Appellate Court has apparently come to the conclusion that in the quarrels which have occurred between Abdul Jabbar and his wife *Musammat* Karm Jan, *Musammat* Karm Jan has herself been partially or largely to blame; and he attributes the strained relations between husband and wife to the pernicious influence of the wife's mother. Now, however, this may be it is perfectly clear that relations are very much strained, and the Magisterial authorities have considered it necessary to take security from both sides and it is in respect of the present action quite immaterial which of the parties was originally to blame. It is obviously very incorrect, indeed, for one of the Courts in this country to pass a decree for the custody of a woman's person when the relations between the parties are of such a condition that it is obvious that a breach of the peace is likely to occur. It must be remembered that a woman is not a mere chattel and that she is not to be handed over to her husband at the risk of injury, even though that risk be due to her own bad temper, where there is a reasonable ground to apprehend that violence may result. It is now purely discretionary to pass such decrees. To my mind it is obvious that in this case it is not a proper decree to be passed. I accordingly accept the appeal, set aside the judgment and decree of the lower Appellate Court and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

GANESH BAB NAIK *v.* VITHAL VAMAN MAHALYA.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 53 OF 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

GANESH BAB NAIK—PLAINTIFF

versus

VITHAL VAMAN MAHALYA—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, rr. 89, 92—Sale in execution—Setting aside sale—Deposit within thirty days—Notice when to be served—"Decree-holder", meaning of—Rateable distribution, application for—Amount specified in sale proclamation.

Although the deposit required by rule 89, Order XXI, Civil Procedure Code, 1908, must be made within 30 days from the date of sale, it is not necessary that the notice required to be given under rule 92 should be given within 30 days of the date of sale. Once notice has been given to all parties of an application under rule 89, the Court has full authority to set aside the sale.

The word "decree-holder" in rule 89 means that person alone for the satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale-proceeds under section 73 of the Code.

Rule 89, clause (2), provides for a deposit for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered.

Ali Gauhar Khan v. *Bansidhar*, 15 A. 407; A. W. N. (1893)173, *Hari Sundari Dasya* v. *Shashi Bala Dasya*, 1 C. W. N. 195, *Roshan Lall* v. *Ram Lall Mullick*, 30 C. 262; 7 C.W.N. 341, *Bejoy Singh Dudhuria* v. *Hukum Chand*, 29 C. 548, relied upon.

Second appeal from the decision of the acting District Judge of Kanara, in Appeal No. 36 of 1911, confirming that passed by

the Subordinate Judge of Honavar, in Darkhast No. 97 of 1909.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *P. M. Vinekar*, for Respondent No. 1.

Mr. *G. P. Murdeshvar*, for Respondent No. 2.

JUDGMENT.—The first point in this appeal is a preliminary point taken by the auction-purchaser that he was a necessary party to the application of the judgment-debtor under Order XXI, rule 89, and that the application is bad as he was not made a party to it within thirty days. The contention is based upon the decision of the Allahabad High Court in *Ali Gauhar Khan* v. *Bansidhar* (1). The point, however, is now provided for by the Civil Procedure Code of 1908, Order XXI, rule 92, which says that where in the case of an application under rule 89 the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale, provided that no order shall be made unless notice of the application has been given to all persons affected thereby. That cannot mean that notice must be given within thirty days of the date of sale, and the learned District Judge has, we think, exercised a right discretion directing that the auction-purchaser should be made a party to the proceedings in the appeal before him under Order XLI, rule 20. Once notice has been given of the application under rule 89 to all persons, the Court has full authority to set aside the sale. Those conditions now exist and we, therefore, have to consider whether the sale should be set aside.

An application was made by the judgment-creditor in the suit of Vithal Waman against Ganesh Babnaik for attachment and sale of certain specified immoveable property. The order for sale was dated the 4th of September 1909, the attachment having been six months previous. Subsequently, the judgment-debtor applied that the proceedings should be sent to the Collector for execution of the decree. That can be done under section 68 of the Civil Procedure Code, which provides for the transfer to the Collector of the execution of decrees in cases in which a Court has ordered any immoveable property to be sold or the execution of any particular kind of decrees of the execution of decrees ordering the sale of any particular kind of interest in immoveable property. The proceedings in this case related to the first class of cases specified in section 68 as a particular immoveable property had been ordered to be sold. The Collector proceeded with the sale but before the auction took place he received from the Court intimation of applications made by other decree-holders against the same judgment-debtor for rateable distribution under section 73. The decrees were not sent to him for execution but the *darkhasts* or applications for rateable distribution were sent to him for information. On receipt of those *darkhasts* he inserted references thereto in his proclamasion of sale and the property was, subsequently, sold. Then within thirty days the judgment-debtor applied to have the sale set aside under rule 89 on depositing in Court for payment to the purchaser a sum equal to five per cent. of the purchase-money and for payment to the decree-holder Vithal Vaman, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, namely Rs. 240-11-11. Although the result of this deposit will be to satisfy the judgment-debt of the creditor, he comes forward and objects to the application on the ground that the deposit is insufficient, because, he says, it is necessary that an amount should be deposited sufficient to satisfy not only his decree, but also the claims of those decree-holders whose applications for rateable distribution have been brought to the notice of the Collector before the sale. It has been held in Calcutta in *Hari Sundari Dasya* v. *Shashi Bala Dasaya* (2) and in *Roshun Lall* v. *Ram Lall Mullick* (3) that 'the decree-holder' in section 310A, clause (*b*), means, that person alone for satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale-proceeds under section 295 or the present section 73.

The Legislature in enacting the new Code has adhered to the words of section 310A which had been interpreted in this manner by the Calcutta Court. And not only is there that indication of the Legislative approval of the view of the Calcutta Court, but in rule 90

(1) 15 A. 407 A. W. N. (1893) 173.

(2) 1 C. W. N. 195.

(3) 30 C. 262; 7 C. W. N. 41.

of the same order we find that the Legislature has thought it necessary when it intended to refer to persons entitled to share in rateable distribution of assets, to do so specifically and not to include them in the term 'decree-holder' according to the decisions in *Bejoy Singh Dudhuria* v. *Hukum Chand* (4) and *Ajudhia Prasad* v. *Nand Lal Singh* (5). This is a strong indication that the term 'decree-holder' in rule 89 ought not to be construed in the extended sense in which the judgment-creditor in this case for some reason, which is obscure, has argued it should be construed. It is, moreover, to be observed that rule 89, clause (*b*), provides for a deposit for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The only amount which answers to that description is the amount of the decree of Vithal Waman for Rs. 240-11-11. The persons who claim rateable distribution are not before the Court, but the objection which they might have put forward has been argued on behalf of the judgment-creditor.

We set aside the order of the acting District Judge and pass an order setting aside the sale as provided by Order XXI, rule 89.

The judgment-creditor must pay the costs throughout. But the order as to costs against the second respondent only applies to the costs of the Appellate Court. Costs against the 1st respondent costs throughout.

Order set aside.

(4) 29 C. 548.
(5) 15 A. 318; A. W. N. (1893) 119.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1511 OF 1912.
April 4, 1913.
Present:—Mr. Justice Rattigan.
FAKIR CHAND AND OTHERS—DEFENDANTS—APPELLANTS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE MANAGER, NORTH-WESTERN RAILWAY—PLAINTIFF, *Babu* IMAM DIN—DEFENDANT—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 30, 31, 115—*Misdelivery not non-delivery—Loss of goods by carrier—Applicability of Art.* 115.

The words 'against a carrier for *losing* or injuring goods' in Article 30, Schedule I, Indian Limitation Act IX of 1908, obviously suggest not a mere loss of the goods to the owner, which might be caused by misdelivery, but an actual losing of goods by the carrier himself.

Misdelivery or delivery to a wrong person in breach of agreement cannot be regarded as non-delivery of goods within the meaning of Article 31, Schedule I of the Limitation Act. The case of misdelivery falls within the purview of Article 115 of the Act.

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 9th July 1912, reversing that of the Munsif, 1st class, Jullundur, dated the 27th February 1912, dismissing plaintiff's claim.

K. Dalip Singh, for the Appellants.

Mr. *Broadway*, for the Plaintiff-Respondent.

JUDGMENT.—In this case it appears that one Imam Din sent orders for supplies of coal dust to the firm of Trigu Nath Brothers, and that the latter between the 11th and 30th December 1908, despatched 12 wagons of such coal dust to Imam Din at Guraia in the Jullundur District. The Company forwarded the railway receipts to the "Peoples Bank" and apparently instructed the Railway Authorities that the coal dust was not to be delivered unless and until the railway receipts were produced. Imam Din, instead of paying the bank the amount due to the Coal Company and so obtaining the railway receipts, requested the Station Master at Guraia to deliver the coal dust to the firm of Faqir Chand-Basan Mal, taking indemnity bonds from the latter. This was accordingly done. The Coal Company not having been paid for the goods and having discovered that the goods had been delivered without production of the railway receipts and contrary to their express instructions, on the 29th August 1910 served notice on the North-Western Railway claiming compensation for the goods. The railway, acting no doubt under legal advice, paid the Coal Company's claim on the 10th March 1911, and on the 8th June 1911 the Secretary of State, through the Manager of the North-Western Railway, brought the present suit in which he claims to recover the amount paid to the Coal Company from the firm of Faqir Chand-Basan Mal, and also claims a decree against Imam Din. The suit against the firm of Faqir Chand is based on indemnity bonds given by that firm, whereas the claim

against Imam Din is founded upon the principle that the plaintiff has been compelled to pay a sum of money which was legally recoverable from the defendant. The sole defence to the present claim is that the Secretary of State cannot claim to recover from any of the defendants, because, at the time when he paid the claim preferred by the Coal Company, that claim had become barred by time either under Article 30 or 31 of the Indian Limitation Act, and that, consequently, the Railway was under no legal liability to pay the Coal Company.

The case for the appellants has been argued with great ability by Mr. Dalip Singh and everything that could be urged in their favour has been put forward by him with clearness and conciseness. I am, however, satisfied that the appeal must fail, as I do not think that under either Articles 30 or 31 the claim of the Coal Company was barred at the time when the railway paid them the amount which they demanded. Article 30 provides that the period of limitation against a carrier for compensation for "losing or injuring" goods is one year from the date when the "loss or injury" occurs. In deciding as to the meaning to be ascribed to the words "losing" and "loss," I consider I cannot do better than follow the elaborate and closely reasoned judgment of Chatterjee, J., in *Changa Mal* v. *The Bengal North-Western Railway Company* (1). In that case, it is true, the learned Judge was discussing the meaning of the word "loss" as used in section 77 of the Indian Railways Act, 1890, but I see no reason why his definition of that term as used in that Act should not apply with equal force in construing the words of Article 30. The learned Judge, after reference to many authorities, points out that "loss" as used in the section cited means "loss by the carrier" and "not loss to the owner" and that a negligent *misdelivery* of goods by a Railway Company to a person other than the owner is not such a loss. In my opinion, the wording of Article 30 is even more strongly in support of that view, for the words are "against a carrier for *losing* or injuring goods" and these words obviously suggest not a mere loss of the goods to the owner, which might be caused by misdelivery, but an actual losing of goods by the carrier himself.

As regards Article 31 I agree with the learned Divisional Judge that a misdelivery or delivery to a wrong person in breach of agreement, cannot be regarded as non-delivery of the goods. By a somewhat curious irony of fate, the Coal Company, in the present case, are contending for a construction of Article 31 which would give the carrier the privilege of claiming the bar of limitation under that Article in respect of certain acts which do not in express terms fall thereunder and would appear to come within the purview of Article 115, whereas the carrier is here contending that in respect of such acts he is unable to claim the privilege of the shorter period of limitation. The Article must, however, obviously be construed strictly and a carrier cannot claim exemption under it, unless the case falls within the precise terms of the article, and I cannot hold that "non-delivery" also includes "misdelivery." In my opinion, the case of misdelivery falls within the purview of Article 115 of the Act, and as a result the claim preferred by the Coal Company against the Railway was legally enforceable at the time when it was advanced.

I hold, therefore, that the plaintiff's claim has been rightly decreed and I accordingly dismiss the present appeal with costs.

Appeal dismissed.

(1) 6 P. R. 1897.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 248 OF 1911.

March 12, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

P. SIVANNA AND ANOTHER—APPELLANTS

versus

VENKATAKRISANAMURTHI AND ANOTHER—RESPONDENTS.

Charge or mortgage—Mere covenant not to alienate property.

A mere covenant not to alienate property is insufficient to create a charge.

Where a compromise decree set forth that "until the said amount of Rs. 13,000 is paid, the items 17, 18, 19, 20, 21, immoveables of A schedule should not be dealt with by the first and second defendants in any manner":

Held, that the stipulation amounting only to a cove-

nant not to create any interest in it in favour of others was insufficient to create a charge.

Appeal against an order of the District Court of Bellary, in E. A. No. 234 of 1911, in E. P. No. 9 of 1911, in O. S. No. 25 of 1909, dated 14th September 1911.

Mr. *S. Swaminathan*, for the Appellants.

Mr. *T. V. Seshagiri Iyer*, for the Respondents.

JUDGMENT.—The question in this case relates to the construction of a clause in a compromise decree. The compromise provides that the 1st and 2nd defendants should pay to the plaintiffs a sum of Rs. 13,000. Then comes the clause in question 'until the said amount of Rs. 13,000 is paid the items 17, 18, 19, 20, 21 these imoveables of A Schedule should not be dealt with by the 1st and 2nd defendants in any manner.' The question raised is whether this clause creates a charge on the property which the 1st and 2nd defendants agreed not to alienate till the payment of the debt. It is true, as contended by Mr. Seshagiri Iyer, that no particlar form of words is needed to create a charge, provided the language of the instrument manifests an intention that certain particular property should be made security for the debt, that is, that an interest in the property should be created in favour of the creditor to secure due payment of the debt. The promise contained in the compromise not to alienate the property to third persons till the payment of the plaintiffs' debt is only a covenant not to create any interest in it in favour of others; there is no expression of an intention to create an interest in the plaintiff's favour. It is quite possible that a debtor, if he is unwilling to create any charge over his property, may enter into a covenant not to charge it in favour of others while declining to create a charge in favour of a particular creditor. *Rajkumar Ramgopal Narain Singh* v. *Ram Dutt Chowdry* (1) was cited on behalf of the respondents, but the language in the instrument construed there was stronger than that of the compromise here. The Court laid special stress on a clause providing that any alienation made by the debtor should be regarded as nominal and intended to defraud the creditor. The case was distinguished on this ground in *Gunoo Singh* v. *Latafut Hossain* (2) where a mere covenant not to alienate was regarded as insufficient to create a charge. We must hold that the decree did not create a charge upon the properties sought to be attached by the decree-holder; and that the application for attachment should be allowed. We set aside the order of the lower Court and remand the petition for disposal according to law. Costs will abide the result.

Order set aside.

(1) 5 B. L. R. 264; 13 W. R. (F. B.) 82.

(2) 3 C. 336; 1 C. L. R. 91.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL NO. 215 OF 1911.

April 2, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

Lala KISHORE CHAND AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

ISHAR SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 67—Not re-enacting second paragraph of section 327 of the old Code, effect of—Rule made under the paragraph inoperative—Sanction of Commissioner of Division to sale of an agricultural land in execution unnecessary.

From the date on which the new Code of Civil Procedure of 1908, came into force, the sanction of the Commissioner of a Division is no longer required as a condition precedent to the sale of agricultural land in execution of a decree for money.

Miscellaneous appeal from the order of the District Judge, Ferozepore District, dated the 11th November 1910, dismissing decree-holder's petition, for sale of certain land, situate at *Mauza* Badhni in execution of his decree.

Mr. *Ganpat Rai*, for the Appellants.

JUDGMENT.—This appeal arises out of execution proceedings. In execution of his decree, dated the 13th July 1897, for about Rs. 7,200 against the predecessor in-interest of the respondents. The appellant had a plot of agricultural land belonging to the latter attached and on the matter being referred to the Commissioner, through the Collector, in

1904, sanction was given by the Commissioner to the auction sale of two-thirds share of the land, the remaining one-third share being set apart for the maintenance of the judgment-debtor and his family. The sale realised some Rs. 2,200. The decree was not satisfied, and the amount still due to the decree-holder in 1909 was a little over Rs. 1,300. The decree-holder again applied for execution of the decree by attachment and sale of the remaining one-third share of the judgment-debtor's land; the papers were sent to the Collector as before, but he could not see his way to recommend the sale of that one-third share with the result that on the 18th February 1909 the Commissioner refused to sanction the sale. Subsequently, the decree-holder moved the Court again for the sale of the same share in execution of his decree; and again on the 22nd June 1910 the Commissioner declined to grant sanction to the proposed sale.

On the 11th November 1910 the decree-holder made an application to the District Judge asking for the same one-third share of the land to be sold in execution, but the District Judge rejected the application on the ground that, in view of the repeated refusals of the Commissioner to sanction the sale on previous occasions, the only course left open to the decree-holder was to get the produce of the land attached every year the sale of the land in execution being out of the question.

The decree-holder has appealed to this Court, and his Counsel has contended that since the second clause of section 327 of the Civil Procedure Code, 1882, under which the Punjab Government had issued its notification No. 1297-S, dated the 10th of September 1885, prohibiting the sale of agricultural land in execution of a decree of a Civil Court without the previous sanction of the Commissioner of the Division in which the land was situate, had not been re-enacted in the new Civil Procedure Code the sanction of the Commissioner to the auction sale of such land was no longer necessary; and it is accordingly urged that the District Judge should have ordered the attachment and sale of the one-third share of the land in question in spite of the refusal of the Commissioner to sanction the sale on former occasions. We think that this contention is correct and must prevail. Section 67 of the present Civil Procedure Code re-enacts only the first paragraph of section 327 of the old Code and has omitted the second paragraph of that section under which the special rule uthorising the Commissioner to sanction sales of agricultural land in execution of the decree of a Civil Court had been framed. It is clear, therefore, that from the date on which the new Civil Procedure Code came into force the special rule in question became inoperative and the sanction of the Commissioner of the Division is no longer required as a condition precedent to the sale of agricultural land in execution of a decree for money, [See also *Girdhari Ram* v. *Mehr Khan* (1).]

We accordingly set aside the order of the District Judge and send the case back to him for disposal according to law. The respondents will pay the appellant's costs in both Courts.

Order set aside.

Case remanded.

(1) 7 Ind. Cas. 495; 4 P. R. 1910 Rev.; 117 P. L. R. 1910.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 162 OF 1910.

December 17, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

JUSAB THARIA—DEFENDANT—APPELLANT

versus

G. S. MORRISON—PLAINTIFF—RESPONDENT.

Defamation—Slander—Statement made to official superior not intended for Court of justice—Privilege—Qualified or absolute.

The only privilege which can be claimed in respect of a slanderous statement made to the official superior of the slandered person, which is not intended to be made in a Court of justice or at any step or stage of a judicial proceeding, is *qualified* and *not absolute* privilege.

Watson v. *M 'Ewan*, (1905) A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489, distinguished.

First appeal from the decision of the Judge of the Zanzibar Court.

FACTS.—The defendant, a Government contractor, complained to the official superior of the plaintiff that the latter had taken a bribe.

The lower Court gave plaintiff a decree for Rs. 1,000 as damages for slander. The defendant appealed.

FATEH CHAND *v.* *Musammat* MENGHI BAI.

Mr. *Coyajee*, (with him Mr. *T. R. Desai*,) for the Appellant.

Mr. *L. A. Shah*, acting Government Pleader, for the the Respondent.

JUDGMENT.—This is an appeal from a decision of the learned Judge at Zanzibar who has awarded plaintiff the sum of Rs. 1,000 as damages for slander. The learned Judge has written an extremely careful judgment, and the only point upon which Counsel for the appellant feels himself able to attack that judgment is in regard to the question of privilege. It is admittedly not possible to challenge the Judge's findings, if he is right in his view that the only privilege, which the defendant enjoyed in respect of the statement made to Crawley, was a qualified privilege. Counsel, however, contends that in the circumstances of the case the privilege should be regarded as absolute. Now the first answer to that is that that was a case which was never taken in the trial Court, where the utmost that the defence claimed was a qualified privilege. But the contention on its merits also must fail. It is sought to establish the absolute privilege by reference to the decision in *Watson* v. *M'Ewan* (1), the case which the learned Judge below himself cited and considered. The judgment of Lord Halsbury in that case admittedly carries the law as far as it has ever been carried, but his Lordship is careful to restrict the absolute privilege to cases where the statement has been made by an intended witness to his Solicitor in a "proof" of the evidence which the speaker subsequently intends to give in a Court of justice; and the reason for the thing, as his Lordship explains, is that if the witness is to enjoy complete immunity for the statement made in the witness-box, the same considerations of public policy require that similar immunity should be extended to statement occuring in the witness's proof. There is, however, nothing on the record before us to bring the present case within the scope of those observations. There is nothing to show that the statement made by the defendant to Crawley was at that time intended to be made in a Court of justice, or was made at any step or stage of a judicial proceeding. On the contrary the witness Crawley says:—"I had nothing to do with the criminal charges against Morrison or with their investigation." It appears, therefore, that the statements made to Crawley were independent of the criminal prosecution or of any witness's evidence in that prosecution.

This is the only point which has been raised for the appellant, and we think that on the record before us it cannot be substantiated. We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1306 OF 1911.

March 30, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

FATEH CHAND—DEFENDANT—APPELLANT

versus

Musammat MENGHI BAI—PLAINTIFF, BHAI NEBAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1), r. 7 (1)—Suit dismissed in default—Application for restoration not made within time—Review competent—Objections to the granting of review taken in appeal from the final decree limited by the Code—Declaratory decree creating lien not executed—Lien not extinguished—Order in execution proceedings binding on parties—Burden of proof that decree cannot be executed.

Under Order XLVII, rule 7 (1), Civil Procedure Code, 1908, an objection to a subordinate Court granting an application for review can be taken in an appeal from the final decree in the suit only upon one of the three grounds specified in the said sub-rule.

Rule 1, sub-rule 1, of Order XLVII is wide enough to enable a Court to entertain an application for review of an order of dismissal for default, even in cases where no application for restoration of the suit is made within the prescribed period of limitation.

Nur Muhammad v. *Dina*, 15 P. R. 1897, distinguished.

A judicial hypothec or a lien created by a decree, which is substantially a declaratory decree, does not cease to exist, merely because an application was not made for execution of the said decree in accordance with the provisions of Article 179 of the second Schedule of the Limitation Act, 1877.

An order passed in the course of execution proceedings is binding on the parties to the proceedings.

The onus of showing that a decree cannot be executed lies on the person alleging it.

FATEH CHAND *v.* *Musammat* MENGHI BAI.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 19th August 1911, reversing that of the District Judge, Multan, dated the 21st May 1910, dismissing plaintiffs' claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

The Hon'ble K. B. Mr. *Muhammad Shafi*, for the Respondents.

JUDGMENT.—This appeal is connected with Civil Revisions Nos. 2637 and 2688 of 1911 and they can all be conveniently disposed of in one judgment.

For a better understanding of the facts of the litigation which has given rise to this appeal and the connected petitions for revision it is necessary to refer to the judgment of this Court in Civil Appeal No. 1038 of 1907 (*Musammat Menghi Bai and others*, defendants-appellants *v. Fateh Chand*, plaintiff-respondent) which was decided on the 23rd March 1911. The following extract from that judgment contains the essential facts:—

"Nebhan Das and his son Ghansham Das traded as bankers. Finding themselves in financial difficulties they called together their creditors, one of whom was Fateh Chand, on the 2nd of May 1901, and attempted to effect a settlement with them. This attempt failed and on 8th of May 1901 Nebhan Das and Gansham Das went off to Shikarpur. On the 10th May an agreement to refer to arbitration was drawn up between them and *Musammat* Menghi Bai, wife of Nebhan Das, and *Musammat* Pewand Bai, her mother. The arbitrator, Tara Chand, gave his award the same day awarding a sum of Rs. 12,000 as due by Nebhan Das and Ghansham Das to *Musammat* Menghi Bai and declaring that certain factories should be hypothecated to her as security for her debt. On the 11th of May an application was made to the Court of the District Judge, Shikarpur, for the award to be filed. Nebhan Das and Ghansham Das appeared in Court and the award was filed and decree passed in accordance with it on the same day. On the 21st May 1901 Fateh Chand brought a suit against Nebhan Das and Ghansham Das in the Court of the District Judge at Multan and in June 1901 he brought a second suit against them. Having got decrees he attempted to proceed against the factories but was confronted with the decree of the Shikarpur Court. The summary proceedings having been decided against him, Fateh Chand has now lodged this suit asking for a decree to set aside the decree of the Shikarpur Court as obtained by fraud and to declare that the factories are liable to attachment and sale in execution of his decrees. The first Court has found that the plaintiff has failed to prove that the Shikarpur decree was obtained by fraud. The learned Divisional Judge holds that the decree was fraudulent and has decreed the present claim. *Musammat* Menghi Bai appeals to this Court. This case has been pending for several years chiefly owing to the fact that the appeal to the Divisional Judge was at first returned by him on the ground that appeal lay to the Chief Court. The appeal from the order of the Divisional Judge was then presented to this Court, which held that appeal lay to the Divisional Court. The appeal was then presented for the second time in the Court of the Divisional Judge."

After a full discussion of the various points raised in the case on both sides this Court came to the conclusion that the then plaintiff, Fateh Chand, had failed to prove that the decree of the Shikarpur Court, dated the 11th May 1901, had been obtained by *Musammat* Menghi Bai by fraud; and in accordance with that finding the decree of the District Judge dismissing the suit of Fateh Chand, was restored. Fateh Chand's suit which terminated in the decree of this Court, dated the 23rd March 1911, was instituted on the 5th November 1901; and the litigation between the parties occupied a period of about ten years, because, as explained in the judgment of this Court, owing to a mistaken idea as to the jurisdictional value of the suit, the appeal from the decree of the District Judge was at first presented to this Court and was then returned for presentation in the Divisional Court and in the end a further appeal was preferred to this Court again.

To explain matters a little more fully, it is necessary to state that the execution proceedings in respect of the decree obtained by Fateh Chand against Nebhan Das and Ghansham Das on the 29th October 1901, which were started soon after the date of the decree, continued after the institution of his suit on 5th

November 1901, and the proprietary rights of the judgment-debtors in the two factories situate in Taraf Daira, Tahsil Multan, were placed under attachment. On the 4th July 1901, *Musammat* Menghi Bai had also made an application for execution of the Shikarpur decree of the 11th May 1901 by attachment of the factories in question, and the two decree-holders, Fateh Chand and *Musammat* Menghi Bai came into conflict with each other in the course of the execution proceedings. On the 17th February 1902 the District Judge of Multan made an order to the effect that the above mentioned factories be sold by auction in execution of Fateh Chand's decree subject to the right, title and interest of *Musammat* Menghi Bai under her decree of the 11th May 1901. Accordingly, on the 12th March 1902, Fateh Chand amended the plaint which he had already filed on the 5th November 1901 setting out the facts connected with the execution of his own decree and that of *Musammat* Menghi Bai, respectively, and praying for a declaration that the decree of the 11th May 1901 was collusive and fraudulent and as such void against Fateh Chand. The proceedings in the suit were protracted, and ended, as we have seen, in the decree of this Court dated the 23rd March 1911. Meanwhile, out of the execution proceedings connected with the two decrees referred to above there arose several suits which can be conveniently specified in this place:

(1) Suit No. 116 of 1905 instituted on the 21st December 1905 in the Court of the District Judge, Multan, (Lala Tikan Lal), by *Musammat* Menghi Bai against Fateh Chand, decree-holder, and Nebhan Das and Ghansham Das, judgment-debtors. This suit was for a declaration to the effect that the plaintiff was the owner of and was entitled to get the share of the profits for the years 1904 and 1905 in respect of the factory known as Nebhan Das Gansham Das, situated at Multan, out of the pool of 21 (twenty-one) cotton factories at Multan, and that the said profits were not liable to be attached and sold in execution of the decree of Fateh Chand against Nebhan Das and Ghansham Das.

(2) Suit No. 124 of 1907 instituted on the 1st October 1907 in the Court of the District Judge, Multan, (Mr. Spencer), by Dukh Banjhan Lal (who had been appointed Receiver by the District Judge in June 1907 in the course of execution proceedings arising out of Fateh Chand's decree of the 29th October 1901) against the proprietors of the firm of Volkart Brothers, Multan, and *Musammat* Menghi Bai for recovery of Rs. 3,200 on account of profits of the above-mentioned factories, together with interest, alleged to have accrued from the 9th November 1903 to the end of June 1904.

(3) Suit No. 126 of 1908, and (4) Suit No. 127 of 1908 instituted on the 8th June 1908 in the Court of the District Judge, Multan, (Mr. Spencer), by *Musammat* Menghi Bai against the same three defendants as mentioned above. Suit No. 126 was for a declaration that the profits of the factory known as that of Nebhan Das and Ghansham Das, situate at Taraf Daira, for the years 1903 and 1904 were not liable to be attached and sold in execution of Fateh Chand's decree against the other defendants and that the said profits belonged to the plaintiff. Suit No. 127 was for a declaration that the above mentioned factory, and the 1/8th share of the factory called Choth Ram factory, were liable to be attached and sold in execution of the decree of Fateh Chand against the other two defendants subject to the plaintiff's charge of Rs. 12,000 as declared by the decree of the 11th May 1901.

The Suit of 1905 was dismissed by the District Judge (Lala Tikan Lal) on the 15th June 1907, simply and solely on the ground that, as the decree of the Shikarpur Court, dated the 11th May 1901, on which the rights of *Musammat* Menghi Bai were based, had been held to be a fraudulent one, and as such void as against Fateh Chand, by the Divisional Judge, Multan, in his judgment dated the 6th June 1907, the suit must necessarily fail. Similarly, the two Suits of 1908 were also dismissed by Mr. Spencer, District Judge, on the 21st May 1910 on precisely the same ground. From the decrees of the District Judge in these three suits appeals were preferred to the Divisional Court, and the learned Divisional Judge disposed of all the appeals together

in his judgment dated the 19th August 1911 holding that, since the Chief Court had in its judgment of the 23rd March 1911 in the case between the same parties, held that the Shikarpur decree dated the 11th May 1901, was not fraudulent, and was not, therefore, void as against Fateh Chand, *Musammat* Menghi Bai was entitled to the declaration prayed for in each of her three suits. The Divisional Judge accordingly granted her the declarations prayed for; and from the decree thus passed in her favour three separate further appeals have been instituted in this Court, *namely*, Appeals, Nos. 1306, 1307 and 1309 of 1911.

The suit of Dukh Banjhan Lal, No. 124 of 1907, was dismissed by the District Judge against all the defendants including *Musammat* Menghi Bai, and the decree of the District Judge was upheld on appeal by the Divisional Judge in a separate judgment dated the 19th August 1911. From the decree of the Divisional Judge in that case a further appeal has also been preferred to this Court by Dukh Banjhan Lal—Appeal No. 1308 of 1911.

Appeals Nos. 1307, 1308 and 1309 arise out of three suits regarding the profits of the two factories at Taraf Daira, originally owned by Nebhan Das and Ghansham Das, and they will be disposed of together in a separate judgment.

For our present purposes, we are concerned with Appeal No. 1306 of 1911, which relates to the alleged lien of *Musammat* Menghi Bai to the extent of Rs. 12,000 on the two factories of Nebhan Das and Ghansham Das, and with Civil Revisions Nos. 2687 and 2633 of 1911 which are connected with the said appeal. The first question for decision which is common to the appeal and to the two petitions for revision is this: Suits Nos. 126 and 127 of 1908, in both of which *Musammat* Menghi Bai was plaintiff, were fixed for hearing on the 1st October 1908, but on that date neither *Musammut* Menghi Bai nor her Pleader appeared in Court. In Suit No. 126 Fateh Chand and Dukh Banjhan Lal, defendants, were present; and in Suit No. 127 Fateh Chand, defendant No. 1, alone was present from among the defendants. Both the suits were accordingly dismissed by the District Judge in default of prosecution. These orders of dismissal were passed under section 102, Civil Procedure Code, 1882. No application for the restoration of either of the two suits was made within the prescribed period of limitation by or on behalf of *Musammat* Menghi Bai, but on the 22nd December 1908 an application for review in respect of each order of dismissal was made by *Musammat* Menghi Bai's Pleader, and after issuing notice to the other side the District Judge set aside the order of dismissal in each Suit and restored it to the pending file on the 23rd April 1909. An appeal by Fateh Chand was preferred in each case to the Divisional Court from the order accepting the application for review; but the Divisional Judge by his order dated the 19th August 1911, held that no appeal lay to him from the orders in question. Meanwhile the District Judge proceeded with each suit and dismissed it on the merits on the 21st May 1910. The two petitions for revision above referred to impugn the order of the District Judge, dated 23rd April 1909, as having been passed without jurisdiction, and the first ground of appeal in Appeal No. 1306 and Appeal No. 1307 also raises the same point. It has been urged by Pandit Sheo Narain on behalf of Fateh Chand that the application for review filed by *Musammat* Menghi Bai in conncetion with the orders of dismissal for default in each suit (printed at page 3 of the paper-book in Civil Revision No. 2687) discloses no valid ground for setting aside the orders in question, and that, since the period of limitation for making an application under section 103, Civil Procedure Code, 1882, to set aside the order of dismissal had expired, no application for review could be entertained by the District Judge in respect of the said orders. In support of this contention reliance has been placed on *Nur Muhammad* v. *Dina* (1), *Inder Singh* v. *Ram Singh* (2) and *Koilash Mondol* v. *Nabadwip Chandar Kar* (3). It is unnecessary for us to discuss at any length the applicablity of these rulings to the present case, as we think that under Order XLVII, rule 7 (1), Civil Procedure Code an objection to

(1) 15 P. R. 1897.
(2) 1 Ind. Cas. 900; 33 P. R. 1909 44 P. L. R. 1909; 31 P. W. R. 1909.
(3) 2 C. W. N. 318.

the granting of an application for review by a subordinate Court can be taken in the appeal from its final decree in the suit only upon one of the three grounds specified in the said sub-rule and admittedly in the present case no such ground exists. Even if the aforesaid provisions do not govern a case of this kind, we are quite clear that rule 1, sub-rule 1, of Order XLVII, is so wide in its terms that the District Judge was competent under that rule to entertain the application for review in question, and his order granting the application for review was, in our opinion, *ultra vires*. *Nur Muhammad* v. *Dina* (1), on which great stress has been laid by Pandit Sheo Narain, does not lay down that, under circumstances similar to those of the present case, the Court has no jurisdiction to entertain an application for review, what was held there was that in that case the application for review had been improperly entertained. So far as the question of jurisdiction is concerned, we concur in the view of the law as laid down in *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (4). We accordingly hold that the District Judge was perfectly competent to entertain the application for review made by *Musammat* Menghi Bai in each of the two suits pending in his Court; and if he thought that there was sufficient cause for reviewing his order of dismissal for default he had power to set that order aside. The first ground of appeal in Appeals Nos. 1306 and 1307 is, therefore, untenable and is overruled. It follows that the petitions for revision, Nos. 2687 and 2688 of 1911 also fail, and they are accordingly dismissed with costs.

As regards the second ground of appeal in Appeal No. 1303, it has been argued that the Shikarpur decree having been passed in 1901 and not having been kept alive by applications for its execuion being made in accordance with law within the prescribed period of limitation, could not be enforced at the time when the decree-holder, *Musammat* Menghi Bai, instituted the different suits out of which the connected appeals have arisen, and that, therefore, the said suits must be dismissed. To this argument the reply is two-fold. In the first place it seems to us that the decree of the Shikarpur Court in favour of *Musammat* Menghi Bai is substantially a declaratory one, inasmuch as it creates a judicial hypothec or a lien in her favour on the property of the judgment-debtors, Nebhan Das and Ghansham Das, to the extent of Rs. 12,000, and it, is difficult to see how that lien would cease to exist if an application for execution of the said decree has not been made in accordance with the provisions of Article 179 of the second Schedule of the Limitation Act, 1377. In the second place, the order of Mr. Parker, the District Judge, dated the 4th January 1912, which was passed in the course of execution proceedings to which Fateh Chand was a party decides that the decree of the 11th May 1901 has been kept alive by successive applications for execution being made by the decree-holder and by regular acknowledgments by the judgment-debtors which are valid under the Limitation Act, and Pandit Sheo Narain has not shown us how his client is not bound by that order, or how that order is incorrect, the onus of showing that the decree in question cannot be executed now and, therefore, the lien of *Musammat* Menghi Bai on the factories in dispute is at an end being clearly on his client. We accordingly hold that the second ground of appeal is also untenable and we, therefore, overrule it.

The result is that this Appeal (No. 1306) fails, and it is accordingly dismissed with costs.

Appeal dismissed.

(4) 26 C. 598.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 325 OF 1912.

January 16, 1913.

Present:—Mr. Justice Davar.

JEHANGIR MUNCHERJI LALI—PLAINTIFF

versus

B. B. & C. I. RAILWAY COMPANY—DEFENDANTS.

Negligence—Contributory negligence—Damages—Accident caused by negligence of both parties—Railway Company—Passenger projecting arm out of window—Injury by contact with open door of another carriage—Notice of caution.

JEHANGIR MUNCHERJI LALI *v.* B. B. & C. I. RY. CO.

The plaintiff was a passenger by one of the Railway trains owned by the defendant and occupied a seat in a second class compartment of the train. He sat in a corner seat with his arm projecting about four inches out of the open window. While passing a stationary train at a station, the plaintiff's projecting arm came into contact with the open door of one of the carriages of the stationary train and was fractured. Plaintiff sued the Railway Company for damages, for the injury sustained by him alleging negligence on the part of the Company.

It was found that the rails were so laid as not in any way to infringe the Government Regulations as to the standard minimum distances between two parallel lines. The carriages were also well within the Government maximum dimensions as to the width of the carriages.

In the compartment, in which the plaintiff was travelling, a precautionary notice in fairly large type was exhibited.

Held, (1) that the plaintiff was guilty of negligence which directly contributed to the injury and that such negligence formed a material part of the effective cause thereof;

(2) that plaintiff was not entitled to any damages.

In order that a plea of contributory negligence may be successful, it must be shown either that there was negligence on the part of the plaintiff, which contributed to the accident, and that the defendant could not, by using ordinary care, have avoided the accident, or that, notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary care, have avoided the accident.

If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything.

Mr. *Jinnah*, (with him Mr. *Raikes*), for the plaintiff.

Mr. *Davar*, (with him Mr. *Campbell*), for the defendants.

JUDGMENT.—The plaintiff, Jehangir Muncherji Lali, a share and stock-broker, in the afternoon of the 4th of November 1911, purchased a second class ticket for Udwada at the Church Gate Station and got into one of the defendants' trains, known as the Surat Excursion Train, which left that station at about 2-30 P. M. on that day. He formed one of a party of seven who were proceeding to Udwada for religious purposes. He got into one of the second class compartments of carriage No. 3078 and took a corner seat in that compartment with his back to the engine on the side away from the platform and next to the window opening on the side where parallel rails run and are used by trains coming up to Bombay. His train proceeded as far as the Andheri station and while it was passing that station at a fair speed, his left arm which, in his plaint he states, was out of the open window projecting not more than four inches, was injured and fractured by an open door of a stationary train on the up-line of that station. He sustained serious injuries, and the train in which he was travelling was stopped by some one pulling the chain. It then proceeded as far as Borivli station where he was taken out of the train and sent back to Bombay. His friends took him to Dr. Masina's Hospital where he was treated for his injuries. The injured arm was found to be fractured and although it is now set right, there is no doubt that the plaintiff's injury was serious and he must have gone through much physical suffering and pain and lost his business for some time. In March 1912, he filed this suit claiming Rs. 30,000 as damages, which he alleges, he sustained by reason of permanant injury to his arm and the other consequences flowing from that injury which he atributes to the negligence of the defendant-Company.

The defendants by their written statement, in the first instance, denied negligence and further pleaded that even if there was negligence on their part, they were absolved from all liability in that the plaintiff in projecting his arm from the carriage window was guilty of contributory negligence.

Some time before the suit came on for hearing, an application was made to me by the defendant Company to try the issues of negligence and contributory negligence as preliminary issue, but the application was not entertained. Soon after my refusal to have the suit put down for the trial of prelimimary issues, it appears that the legal advisers of the defendant-Company considered their position with care and on the 15th of August 1912 they wrote to the plaintiff's attorneys informing them that the Company had decided not to continue the defence of the suit on the ground that they had not been guilty of negligence, and that they accordingly withdrew their plea of non-liability for negligence as raised in paragraph 2 of their written statement, but would defend the suit on the plea of contributory negligence raised in paragraph 3 of their written statement. It seems to me that in adopting this course the defendant-Company have acted most wisely and have by their conduct in this respect saved much cost to the parties and much time of the Court. At the hearing it was agreed between Counsel

that the issue as to contributory negligence should be first tried. If the issue was decided against the plaintiff, the suit would be at an end. If decided in his favour, the suit would then, it was understood, proceed on the other issue as to the nature of the injuries and the quantum of damages.

The only question, therefore, at present before me for consideration is whether the plaintiff has been guilty of such contributory negligence as would in law deprive him of his right to recover damages from the defendants. Most of the material facts necessary for the determination of this question are facts which are either admitted or not disputed, and it is necessary here shortly to recapitulate them before discussing the question at issue between the parties.

It seems that before Surat Excursion Train reached the Andheri station, it was preceded by a local train which was in charge of a guard Ardeshir Burjorji Darukhanawala. That train was running between Colaba and Andheri. It arrived at the down platform of the Andheri station at 3-23 P.M. and after discharging its passengers, it proceeded towards the Borivli side of the station, changed lines and was drawn up on the up lines on the inside of the up platform and was stationary there when the Surat Excursion Train ran past it. The engine at that time had not changed ends and was on the Borivli side of the stationary train when the Surat Excursion Train went past. When this local train left Colaba, its composition consisted first of the engine, then a fourwheeled third class carriage with a brake compartment, another four-wheeled third class carriage and seven bogey carriages, the last of such bogey having a brake compartment for the guard. When after changing lines it was standing at the Andheri up platfrom the Surat Excursion passed the stationary local train in this order. It first passed the seven bogeys, then the four-wheeled third class carriage, then another four wheeld third class carriage with brake compartment, and lastly the engine. After the Excursion Train had gone past, it was discovered that the door on the railside of the four-wheeled third class carriage which was at the Borivli end and which counting the engine would be the third vehicle in the stationary train, was open and could not be shut, bolted or locked. A porter on duty drew the attention of the guard and the station-master to this fact. They found that the weather-frame over that door had been broken and pieces of broken wood belonging to that weather-frame were lying on the track, a little in front of the broken frame towards the Borivli side. As it was time for the local train to start again for Bombay, the door was tied up by a piece of rope, the broken pieces of the weather-frame were put in the brake, and the train left the Andheri station for its return journey to Bombay. It appears that this open door of the four-wheeled third class carriage caused injuries to three persons in the Excursion Train, one of whom was the plaintiff. The plaintiff had his arm fractured and he became unconscious for a time, the alarm signal was given, the train was brought to a stand-still, other passengars in the train rendered assistance by administering brandy and applying ice over the injured arm. The train was re-started and stopped at Borivli, when the plaintiff was taken out of the carriage and brought back to Bombay by his friends and taken to Dr. Masina's Hospital, where the injured arm was immediately attended to.

These are the facts about which there is absolutely no dispute. The only fact on which there was some semblance of disagreement was as to the existence of precautionary notice in the compartment in which the plaintiff travelled, and it seems to me, after having heard the evidence on both sides that there really is no dispute on this point There is no doubt that previous to 1910 the defendant-Company in their second and third class carriages put up a cautionary notice in four different languages, the English portion of which ran as follows :—

"Passengers are cautioned against leaning out or hanging their feet out of the carriage windows while the train is in motion and also against alighting before the train stops".

About the end of 1910 this form of notice was discontinued and another form was printed in three languages, the English part of which ran as follows:—

"*Caution.*

Do not open the doors or put any portion of the person out of the window while the train is in motion. Do not spit in the carriage."

The defendant-Company contends that these notices are fixed up, protected by a glass, in a frame in all second and third class compartments of their carriages and they maintained that the notice in the latter form, as I have set out above, was in the compartment in which the plaintiff travelled on the day of the accident. On the very elaborate evidence that the defendants have called before me I have no doubt whatever in my mind that the precautionary notice in the form of Exhibit No. 1 was fixed up in that compartment in which the plaintiff travelled on the day he sustained the injuries he complains of. The plaintiff himself is not in a position to state that the notice was not there. He is not prepared to go further than to say that he did not see it and that if it *was* there it did not attract his attention. I have no doubt whatever that it was there, and if the plaintiff did not see it, the defendant-Company is not responsible for that. The notice is printed in fairly large black type on white surface and is affixed to the panel of the partition immediately over the hat-rack and a man of ordinary intelligence and observant habits would have his attention attracted to it. The plaintiff is a man of intelligence and education, and, if he had cared to look, he would have found this notice in his compartment printed in three languages, with two of which he is perfectly familiar. That he did not see the notice is possible but it does not follow from that that the notice was not there. An attempt was made to show that other second class carriages had no such notices fixed up in them. I think the confusion on this point has arisen from the fact that the defendant-Company when pressed for second class accommodation, as they often are, use their first class carriages as second by putting a plate denoting that the carriage is second class instead of being the first class carriage which it really is, and as for some reason, which I cannot understand, they do not put any of these notices in their first class carriages, it is possible that when these first class carriages are sed as second, no such notices are to be found therein. The Court, however, is not concerned with other carriages. What it has to find is whether a notice in the form Exhibit No. 1 was in the compartment in which the plaintiff travelled on the 4th of November 1911 and on the evidence I find that such a notice was therein its usual place.

The Court has before it in the first place the admitted negligence of the defendant-Company in leaving one of its carriages' doors wide open on the side of its parallel lines over which another train, full of passengers, was passing at a fairly high rate of speed. The Court has also the admission of the plaintiff that his arm was extruding from the window of his carriage to the extent of not more than four inches. That admission is deliberately made in the plaint and although the learned Counsel who appeared for the plaintiff tried to minimise the importance of the admission, the fact remains that the plaintiff was sitting cornerwise in his end-seat reading a newspaper with his left arm resting on the window-sill and extruding therefrom. Of course, it is not possible for him to say with any exactitude how much of his arm was out, but taking the ordinary habits of passengers, it is not unfair to him to assume that his side was flush with the panel below the window-sill which measures five inches in width and that all that portion of his arm over and above the five inches from the arm-pit must have been outside the carriage-window. It may be four inches. It may be a fraction of an inch less and it may possibly be more than four inches out of the window. It was, however, sufficiently out to enable the wide open door of one of the carriages of the stationary train to come in contact with his elbow and inflict serious injury fracturing the bone. With these two admitted facts, we have the proved fact that the defendants had put up a notice which was bound to attract the attention of a prudent and observant passenger warning him against putting any portion of his person out of the window. The defendant-Company contends that on these facts alone, and without considering anything more, I ought to hold that the plaintiff was guilty of such contributory negligence as is sufficient to disentitle him to recover any damages from them. In support of their contention both the learned Counsel who appeared for the defendant-

Company placed great reliance on a very elaborate and carefully considered judgment of my brother Beaman in the case of *Dullabhji Sanghani* v. *Great Indian Peninsula Railway Co.* (1).

It was most insistently argued before me that the rule of law laid down there was a correct enunciation of the law on this subject and should be followed in all cases where the facts were similar. It is quite true that the facts in those two cases are very similar indeed to the facts in this case. In that judgment brother Beaman has discussed most of the leading cases on the subject of negligence and contributory negligence and the judgment is one which requires to be most carefully considered, when another Judge of the same Court is called upon to pronounce his decision in another case where the facts are most similar, if not almost identical. No one is more conscious than myself that it is desirable that there should be uniformity in judgments of the same Court as far as possible. Under the circumstances, I have most carefully read and considered the whole of this judgment, and although I am in complete accord with much that is in it, I feel constrained to say that I am unable to follow the rigid and inflexible rule of law which, the learned Judge says, must be applied without any deviation or relation in all cases of this kind.

The two prominent conclusions of that judgment are, *first* that it is a rule of law that "a passenger must travel inside and not outside his compartment and, therefore, if he does travel outside he does so entirely at his own risk and the Company cannot be held liable for any injury he suffers in consequeuce," and, *secondly*, that "a passenger who gets injured owing to putting any part of his person outside his carriage is guilty of contributory negligence." The learned Judge would not, under any circumstances, allow this rule to be varied or relaxed for he says:—"I cannot allow, if the principle is sound, that a passenger is in better case if he puts half an inch of his person only outside his carriage than if he puts a yard of himself outside." I have gone through many of the cases relied on by the learned Judge. I have carefully considered the reasoning on which the conclusions I have referred to above are based, but I regret to say I am not able to persuade myself to come to the conclusion that any such hard and fast rule such as is laid down can be deduced from the authorities that govern the law on this subject. Even Bevan, in whose work most of these cases, and particularly the American cases, are elaborately discussed, and who seems to favour this view, does not go the length to which brother Beaman has felt himself impelled to go. For, after discussing a case that is most favourable to the conclusions I have referred to, he guards himself by saying:—"The case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of the window will be disentitled to recover in the event of injury happening to him through doing so."

As I have observed above, a most careful study of the judgment in question and the cases therein discussed does not carry to my mind the conviction, that when the Railway Companies contract to carry passengers they do so on the express or implied condition that no portion of a passenger's person should extrude out of the inside limits of their carriages and that even if their finger tips are out, or if any portion of their person is out by a fraction of an inch, the Railway Companies would be relieved from all liability even if the negligence on their part was most gross and culpable. I could conceive dozens of cases in which the extrusion of a portion of the passenger's person outside the carrige would be so small,and the negligence of the Railway Company so gross, that no Court would refuse to grant compensation to the passenger merely on the ground that an insignificant part of his person was outside the door or the window of a Railway carriage.

It seems to me that by far the safest course for the Court to adopt in cases of this kind is to form in the first instance a correct idea as to what in law is considered contributory negligence sufficient to prevent an injured plaintiff from recovering, and then to apply those principles to the facts of each particular case and ascertain whether the plaintiff is himself guilty of that negligence which in law is styled 'contributory negligence' and whether that of itself is such as would disen-

(1) 5 Ind. Cas. 676; 34 B. 427; 12 Bom. L.R. 73;

title the plaintiff from recovering damages in respect of the injuries sustained by him.

The whole law on the subject of negligence and contributory negligence is most admirably summed up in Halsbury's Laws of England Vol. XXI, under the head of Negligence and the sub-head thereof dealing with Contributory Negligence. As a result of a very careful consideration of all the authorities on the subject, the law of Contributory Negligence is summed up at page 445 and 446 in the following terms:—

"In an action for injuries arising from negligence it is a defence if the defendant proves that the plaintiff, by some negligence on his own part, directly contributed to the injury in the sense that it formed a material part of the effective cause thereof. When this is proved the plaintiff's negligence is said to be contributory.....In order that a plea of contributory negligence may be successful, it must be shown either that there was negligence on the part of the plaintiff which contributed to the accident and that the defendant could not, by using ordinary care, have avoided the accident, or that, notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary care, have avoided the accident. Where, therefore, the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was the real direct and effective cause of the misfortune."

Taking this to be the correct enunciation of the law of contributory negligence, it is now for the Court to consider whether the action of the plaintiff in leaving a portion of his arm protruding out of the carriage-window was such contributory negligence as would preclude him from recovering damages from the defendant-Company. While declining to recognize the contention that the contractual relations between a Railway Company and its passengers impose upon a passenger an inflexible duty to keep every portion of his body within the inside limits of the compartment in which he is travelling, and assuming that the Railway Company when issuing its tickets merely contract to convey such passengers from the starting point to their destination in the ordinary way in which the general public travel in railway carriages, the questions for the Court to consider are, whether the plaintiff had a knowledge of any existing or possible danger in putting his arm out of the carriage-window and whether, if he had not positive knowledge, the defendant-Company had done all that was reasonably possible to give to its passengers cautionary notice of the existence of such danger, and whether as a prudent and reasonable man a passenger should not have known that there was risk and danger in extruding protions of his body outside his carriage-window and whether the fact, that the arm of the plaintiff was at the time of the accident outside of the carriage, did not form a material part of the effective cause of the accident. Having regard to the facts admitted by the plaintiff himself and the facts in regard to which there is no dispute, the decision on the question in this suit, which after all is a question of fact, presents no difficulty. I will consider these acts from the points of view that are most favourable to the plaintiff's case, because the plaintiff is an injured party and has, all throughout the hearing, commanded the sympathy of the Court. Assuming that the mere fact of his putting his arm out of the window is not an act of negligence and that he did exactly what many thousands of railway passengers in India are constantly doing, the Court has to consider the action of the plaintiff during the few moments preceding the happening of this mishap. It seems to me that the consideration of the plaintiff's conduct during those few moments has a most important bearing on the question involved in this issue.

The plaintiff states that he was reading the life of some statesman, who had risen from the ranks, in the Liverpool Courier. I do not know if the plaintiff takes any very keen interest in English politics or whether he has any political aspirations of his own. But he seems to have been so engrossed in the reading of that newspaper that he was completely oblivious of circumstances which, I think, a man of ordinary prudence and intelligence ought to have immediately noticed. When his train entered the Andheri Station and commenced to cross the stationary train, naturally the light on his newspaper must have been considerably diminished. It is within the knowledge of us all that when two trains running on parallel lines cross each other, there is an influx

of draught in the carriages, there is a great deal of noise and clatter, and the windows on the side where the trains pass each other necessarily have considerable diminution of light. When both the trains are in motion the draught of air and the noise and clatter is undoubtedly greater than when one of the trains is stationary. The ordinary instinct of passenger occupying a corner-seat, the moment he becomes conscious that another train is passing on his side of the carriage, is to draw in his arm or his head within the carriage, if before that moment he had them out of the window. It is action based on instinct of self-preservation and is dictated by an innate conviction not based on any sustained thought at the moment but based again on the instinct in a human being that when another train is running upon parallel lines, there would be danger to the part of the person of a passenger if that part is allowed to remain outside the carriage-window. If one made a careful observation of the action of passengers occupying corner-seats on the side of a parallel line, he would observe that almost invariably and without exception the passenger draws in and leans towards the inside of his compartment when another train passes his train on the parallel lines. This is the result of instinct instilled not necessarily in men gifted with any high degree of intelligence or prudence, but is the instinct of almost every human being who is not grossly plethoric and culpably careless. In the case of the plaintiff in this case, his action in allowing his arm to remain outside of the carriage-window till the accident happened is, to my mind, most un-understandable and I regret to have to come to the conclusion that it is indicative of gross carelessness and absolute indifference and apathy to all possibilities of danger to his person. It must be remembered that before the accident happened, the carriage in which he was travelling had crossed seven long bogey carriages of the stationary train. Each one of these carriages is about sixty-two feet long and the distances between each of these carriages taken up by the buffers must be about two or three feet. His carriage passed the stationary train to a distance of nearly four hundred and fifty feet before the the open door struck his elbow. The noise, the clatter, the diminution of light, the access of draught, must necessarily have conveyed to the plaintiff's mind that he was passing another train. He told the Court that, in spite of all this, he never moved from the position he had assumed, and continued to allow his arm to hang out of the carriage-window till it was struck by the swinging open door of the other train.

Under these circumstances, can the Court come to any other conclusion but that the plaintiff was most grossly careless and indifferent to danger? It is not possible to conceive that after his train entered the Andheri Station, he did not realize that he was passing another train. That he should have continued to keep his arm hanging out of the window is a very clear and unmistakeable indication of indifference and carelessness about his personal safety. A man possessed of the most ordinary prudence and of intelligence, not necessarily of a high order, would have immediately withdrawn his arm as soon as he found that he was passing another train on an adjacent line. It is true that in the first instance the Railway Company was guilty of an act of negligence. The door was left open and was swinging about. It was not possible for them to have done anything to avoid the accident to the plaintiff or to avert the consequences of their negligence. None of its servants was congnizant of the fact that the door was left open. In all probability when the train was shunted the door was closed but was not either bolted or locked and the draught created by the passing train may have forced it wide open. The evidence in the case shows conclusively that the defendant-Company in constructing their carriages have been well within the Government maximum standard dimensions as to the width of their carriages. It also shows that the rails are so laid as not in any way to infringe the Government Regulations as to the standard minimum distances between the two parallel lines. The evidence, however, shows that nothing would have happened to the plaintiff if his arm had been either inside the carriage or even on the window-sill, if it had not extruded beyond the limits of that sill. The door was an inanimate object and once left open it was a source of danger to passengers in passing trains if any part of their body came in contract with it. The plaintiff

had the last chance of avoiding the accident. Although he might have been justified in travelling with his arm outside the window when on the open track, when he entered the railway station and when he found, as he must have found, that he was passing another train on adjacent lines, he ought, as a man of ordinary prudence, to have drawn in his arm. He had in that compartment a notice warning him against putting any portion of his body outside the carriage. He had ample time while he was passing seven successive long bogeys to realize that his arm ought not to be out. His conduct in leaving it out was distinguished by callous indifference to danger which in his case seems to me, as I have observed, above un-understandable. It cannot possibly be said that it was not such negligence on his part as directly contributed to the injury. I am constrained to hold that in leaving his arm out while passing the stationary train and continuing to allow it to hang out of the window during the whole time that he passed seven bogey carriages until he came to the eighth carriage from the door of which he received the injuries he complains of, he was guilty of negligence which directly contributed to the injury and that such negligence formed a material part of the effective cause thereof.

In *The Bernina* No. 2 (2) Lord Justice Lindley, in the course of his judgment, at page 88, makes the following observatians :—

"*Tuff* v. *Warman* (3) in the Exchequer Chamber, and *Radley* v. *London and North Western Railway Company* (4) in the House of Lords, show the true grounds on which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by *A.* against *B.* for injury directly caused to *A.* by the want of care of *A.* and *B.* will not lie. As Pollock Chief Baron pointed out in *Greenland* v. *Chaplin* (5) the Jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party."

After a little further discussion, Lord Justice Lindley, in referring to cases where both parties are guilty of negligence, goes on to observe :—

"Why in such a case the damages should not be apportioned I do not profess to understand. However, as already stated, the law on the point is settled and not open to judicial discussion."

Taking this to be the settled law, I must hold that in this case on the proved and admitted facts, the plaintiff was guilty of contributory negligence and is not entitled to recover damages from the defendant-Company.

I must find the first issue in favour of the defendants. It must not be taken that my finding is in exact accord with the wording of that issue. I have attempted to set out in my judgment the exact nature of that portion of the plaintiff's conduct preceding the accident which I hold to be negligence on his part, and it by no means follows that the injury caused to the plaintiff was *directly* the result of his negligence or the result of his negligence alone. It was the result of the combined negligence of the plaintiff and the defendants. It follows, therefore, that the plaintiff's suit must be dismissed.

I have come to this conclusion with much regret. It is not for me to comment on the extreme want of generosity on the part of the defendant-Company in dealing with people who suffer undoubted injuries, the primary cause of which is their negligence. They are entitled to stand upon their rights and to have cases decided in strict conformity with the law. This, however, is, undoubtely, one of those cases where costs ought not and will not follow the result. The plaintiff has, undoubtedly, suffered grievous harm to his person. He must have gone through much mental distress and

(2) (1887) 12 P. D. 58 at p. 88; 6 Asp. M. C. 65; 56 L. J. Adm. 17 at p. 32; 55 L. T. 781.
(3) (1858) 5 C. B. (N. S.) 573; 27 L. J. C. P. 322; 5 Jur. (N. S.) 222; 6 W. R. 693; 116 R. R. 774.
(4) (1876) 1 App. Cas. 754; 46 L. J. Ex. 573; 35 L. T. 637; 25 W. R. 147.
(5) (1850) 5 Ex. Rep. 243; 19 L. J. Ex. 293; 82 R. R. 655.

bodily pains during the time he was confined to the Hospital and during his convalescence. He must have incurred large expenses in having his arm set right. It is possible that some permanent defect may remain behind for some time. He has placed his case before the Court with much candour and truthfulness. He must have expended a substantial sum of money in the conduct of the case before the Court. This is a case of grievous hardship to him and under the circumstances, although the Railway Company has met the plaintiff in a spirit of great fairness so far as the conduct of this case is concerned and although its servants were most attentive and considerate to the plaintiff when he sustained the injuries, I do not think this is a case in which the defendants ought to have their costs of the suit from the plaintiff. Both parties were guilty of negligence, the combined action of both caused the accident. The defendant-Company has sustained no loss or damage as the result of the negligence on the part of the plaintiff, whereas the plaintiff has, undoubtedly, sustained damage as the result of the defendant's negligence; and under the circumstances, I think it would be no hardship on the defendant-Company, even though it wins this case, to leave it to bear its own costs.

The suit will stand dismissed, each party bearing its own costs.

Attorneys for the Plaintiff: Messrs. *Captain & Vaidya.*

Attorneys for the Defendants: Messrs. *Crawford, Brown & Co.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 336 OF 1909.

April 30, 1912.

Present: —Mr. Justice Shah Din and Mr. Justice Scott-Smith.

N. J. JAMASJEE BOGA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DUNI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenancy—Rent not to be raised so long as tenant kept the property—Not a permanent tenancy entitling tenant to keep the property, so long as he liked—Transfer of Property Act (IV of 1882), s. 105—Principle applicable—Pleadings—Court not at liberty to go beyond.

The defendants offered to take certain shops from the plaintiffs on lease, on the condition that the rent proposed should not be raised so long as the defendants kept them; the plaintiffs agreed by letter to rent the shops to the defendant on the proposed rent *per* month, to be paid regularly monthly. The plaintiffs themselves were lessees of the shop for a fixed term of twenty years. The defendant did not take the shops for agricultural or manufacturing purposes, and pleaded that he was entitled on the agreement to keep the shops as long as he liked:

Held, that the plaintiff did not let out the shops to the defendant upon an agreement that the latter should occupy them for as long as he liked or for the period of the plaintiffs' own term of lease.

The principle embodied in section 105 of the Transfer of Property Act, 1882, applied to the case, and the Courts were bound to presume that the tenancy was from month to month. The plaintiffs consequently had a right to eject the defendants after serving them with a valid notice to quit.

Ganga Singh v. *Musammat Shib Devi*, 33 P. R. 1898, referred to.

According to the pleadings of the parties the Court was not at liberty to fix a reasonable term of tenancy.

Second appeal from the order of the Additional Divisional Judge, Lahore Division, dated the 28th January 1909, reversing that of the Subordinate Judge, 1st class, Lahore, dated the 6th January 1908, dismissing plaintiff's claim.

Mr. *C. Bevin Petman*, for the Appellants.

Mr. *Beechey*, and Lala *Lajpat Rai*, for Respondents Nos. 1 to 4.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiffs-appellants against the defendants-respondents for possession, by ejectment of the latter, of four shops known as the Punjab Ice Factory situate on Maclagan Road, Lahore, and for recovery of Rs. 450 alleged to be due on account of arrears of rent of the said shops. The pleadings of the parties and the issues which arose out of those pleadings are fully set forth in the judgment of the Subordinate Judge. For the purposes of the present appeal it is only necessary to refer here to the first issue which runs as follows: —

"Whether it was agreed upon between the parties on the 1st November 1904 that the defendants were at liberty to remain in occupation of the shops in question as long as they liked and that the rent would never

be charged at a higher rate than Rs. 150 per month."

It is common ground on both sides that the contract of lease in respect of the shops in dispute was entered into orally on the 1st November 1904 between plaintiff No. 1, as representing the landlords, and defendant No. 1, who was acting for and on behalf of himself and defendants Nos. 2 to 4. The proprietors of the shops appear to be third parties who by deed dated the 18th February 1904 gave a lease of the compound in which the shops stand to the plaintiffs for a fixed term of 20 years; and as stated above, the plaintiffs sub-let their shops to defendants Nos. 1 to 4 on the 1st November 1904. Defendant No. 5 is a sub-lessee under defendants Nos. 1 to 4, and he has been impleaded as a defendant because he is in actual possession of the premises, but he has all along expressed his willingness to give up possession if a decree is passed in favour of the plaintiffs against his landlords.

The principal dispute between the parties is as to whether the shops in question were leased by the plaintiffs to the contesting defendants on a monthly tenancy, or whether they were let out to them for the unexpired portion of the term (*i.e.*, for a period of a little over 19 years) for which the plaintiffs themselves were entitled to occupy the shops under the deed of the 18th February 1904. Both plaintiff No. 1 Seth Nasserwanjee Jamasjee, and defendant No. 1 Duni Chand, between whom the terms of the lease were verbally settled, have been examined as witnesses in the case, and each supports the position taken up by his own side. Seth Nasserwanjee says that no definite period of lease was fixed and that the tenancy was understood to be a monthly one; while Duni Chand states that the contract was to the effect that the lease was to last as long as the tenants chose to occupy the premises on condition that they paid Rs. 150 a month as rent. There are two letters on the record which possess considerable importance in connection with the matter in dispute between the parties. The first letter Exhibit No. 1, is dated the 1st November 1904 and is addressed by the defendants to plaintiff No. 1. It runs as follows:—

"Dear Sir,

"We are prepared to take the four shop-rooms, which are being built by you at Lahore in your Ice Factory compound at a monthly rental of Rs. 150 provided the rent, shall not be raised so long as we keep them as verbally settled from any date it is completed and made over to us."

"A reply at an early date will highly oblige."

It is admitted that Exhibit No, 1 is the original draft letter which was submitted by Duni Chand to Seth Nasserwanjee and that the latter made certain alterations in the draft and then accepted it as an offer from the defendants to take the shops in dispute on lease on the terms specified therein. Exhibit E which is on the record is a fair copy of this letter. Exhibit No. 2 dated the 2nd November 1904 is the letter which Seth Nasserwanjee sent to defendant No. 1 in answer to Exhibit No. 1 aforesaid;

"Dear Sir,

"I have the honour to own receipt of your letter of yesterday's date and as stated therein I agree to rent the four shop-rooms which are being built in my Lahore Ice Factory compound to you at Rs. 150 *per* month from the date they are completed. Rent to be paid regularly monthly. No man will be allowed to live in those rooms, they are to be used for business purpose only."

In view of the terms of the above two letters both the Courts below have held that the plaintiffs did not let out the shops to the defendants upon an agreement that the latter shall occupy them as long as they liked on payment of Rs. 150 as monthly rent or for the period for which the plaintiffs themselves were entitled to keep possession of the shops under their own deed of lease dated the 18th February 1904. In this concurrent finding we entirely agree. It is clear that the words "so long as we keep them" as used in Exhibit No. 1 do not refer to the duration of the alleged period of lease but to the agreement between the parties that the monthly rent as settled between them, namely Rs. 150 shall not be enhanced so long as the defendants remain in occupation of the shops. If, then, the tenancy was not one for a fixed term or for a period depending upon the will and pleasure of the defendants, the question for decision is whether the plaintiffs can treat the defendants as monthly tenants and can eject them after issuing to them a valid notice to quit. The Subordinate

Judge was of opinion that the fact that the plaintiffs permitted the defendants to fit up the shops at their own expense in such a manner as to show an intention on their part to occupy them for a substantially long period is sufficient to prove that the defendants were not monthly tenants merely, but that they had a right to remain in possession of the shops for some years. Upon this view of the case the Subordinate Judge fixed the period of lease at five years and granted the plaintiffs a decree to the effect that the defendants shall vacate the premises in question on the 15th January 1910. The claim of the plaintiffs as to arrears of rent was dismissed. The Divisional Judge agreed with the Subordinate Judge in holding that the defendants were not monthly tenants and that it had been "intended that the tenancy at Rs. 150 per mensem should continue for some time though there was no regular fixed period." The learned Judge was, however, of opinion that when the first Court found that the defendants were not proved to be monthly tenants it should, in view of the grounds on which the plaintiffs' claim was based, have dismissed the suit *simpliciter* as, according to the pleadings of the parties the Court was not at liberty to fix a reasonable term of tenancy, the defendants having asserted their right to hold on indefinitely, while plaintiffs having as distinctly alleged that defendants were only monthly tenants and were liable to be ejected upon a valid notice to quit. The plaintiffs' suit has been dismissed by the Divisional Judge accordingly.

In our opinion the view taken by the Divisional Judge is erroneous. As we have said above, we agree with both the Courts below that the principal plea advanced by the defendants, namely, that according to the agreement between the parties they were entitled to occupy the shops as long as they liked, had not been established, and that being so, the principle embodied in section 106 of the Transfer of Property Act applies to this case. That section runs as follows:—

"In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy."

In this case admittedly the lease of the shops in question was not for agricultural or manufacturing purposes, and since no contract or usage to the contrary has, in our opinion, been established, the lease in dispute must be deemed to be one from month to month, terminable, on the part of the lessors, by 15 days' notice expiring with the end of a month of the tenancy. The decision of this Court in *Ganga Singh* v. *Musammat Shib Devi* (1) is in point. We cannot attach any importance to the alleged fact that soon after the commencement of the lease the defendants incurred considerable expense in fitting up the shops for the purposes of their business without any protest being made by the plaintiffs, from which it is sought to be inferred that the intention of the parties must have been that the lease was to last at least for a number of years. The alleged fitting up of the shops by the defendants is quite consistent with the tenancy being one from month to month; for without any definite agreement being arrived at between the plaintiffs and the defendants as to the duration of the lease, on the one hand, the defendants may well have thought that as they had offered a very reasonable rent for the shops, the plaintiffs would very likely not eject them so long as they continued to pay the rent regularly, while, on the other hand, the plaintiffs may also have been satisfied with the amount of rent paid and with their business relations with the defendants and had no present intention of ejecting them for some time. Mutual confidence between landlord and tenant very often results in security of tenancy, and in such cases, though in point of law the tenancy may be a monthly one, it is for all practical purposes as good as a tenancy for a fixed term of years. In the present case, the facts disclosed by the evidence are insufficient to establish a contract as alleged by the defendants, and the Courts are, therefore, bound to presume that the lease was one from month to month. We hold, therefore, that

(1) 33 P. R. 1898.

the defendants occupied the shops in dispute as monthly tenants and that the plaintiffs had a right to eject them after serving them with a valid notice to quit. It is not disputed that assuming the defendants to be monthly tenants, the notice which was served upon them by the plaintiffs before the institution of the suit was a valid one.

We may note in this place that the plaintiffs did not appeal from the decree of the Subordinate Judge which was to the effect that the defendants were entitled to occupy the shops till the 15th January 1910, that is to say, for a term of five years commencing from the 16th January 1905, when possession of the shops was delivered to them by the plaintiffs. The period of lease as fixed by the Subordinate Judge expired during the pendency of the appeal in this Court and in view of our findings as recorded above, the plaintiffs are entitled to eject the defendants immediately. We accordingly accept this appeal, and reversing the decree of the lower Appellate Court, we grant the plaintiffs a decree for possession of the shops in dispute. Under all the circumstances of the case we think that the parties should bear their own costs throughout and we direct accordingly.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 90 OF 1911.

March 7, 1913.

Present:—Mr. Justice Bakewell.

K. HYDER SAHIB AND OTHERS—PETITIONERS

versus

N. GIRIA CHETTIAR—RESPONDENT.

Award—Miscalculation—Intention of arbitrators—Jurisdiction of Court—Correction of award—Limitation—Civil Procedure Code (Act V of 1908), Sch. II, paras. 12, 14, 15, 16.

An application to set aside an award falls within clause 15 of the 2nd Schedule of the Code of Civil Procedure and does not include proceedings under clauses 12 and 14.

The Court is bound to correct any obvious mistakes or slips in an award in the same manner in which mistakes in decrees are corrected.

No specific provision is made in the Limitation Act for applications to correct an award.

The award in accordance with which a Court has to pronounce judgment is that which contains the real intention of the parties.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Coimbatore, dated 8th December 1910, in I. A. No. 675 of 1910 (in O. S. No. 35 of 1908.)

Mr. *J. L. Rosario*, for the Petitioners.

Mr. *T. M. Krishna Swamy Iyer*, for the Respondents.

JUDGMENT.—It is alleged that arbitrators through a slip made a miscalculation of the amount due from the defendant, since they took a railway maund to be 80 lbs. instead of 82-2/7. The defendant brought the matter before the Court in a lengthy petition, which sets out several objections to the award, and prays that it may be corrected or remitted to the arbitrators. The learned District Judge held that the application was in effect to set aside the award and that it was barred under Article 158 of the Limitation Act. I think that an application to set aside an award is one falling within rule 15 of the 2nd Schedule of the Code of Civil Procedure, and does not include proceedings under rules 12 and 14. I think that the Court is bound to correct any obvious mistakes or slips in an award which are brought to its notice, in the same manner in which it will correct mistakes in its decrees, and that it is not necessary that any formal application should be made by a party for this purpose. It is possibly for this reason that no specific provision is made by the Limitation Act, for applications to correct an award.

The award in accordance with which the Court has to pronounce judgment under rule 16, is that which contains the real intention of the arbitrators, and the Court should, I think, have taken into consideration any facts which go to show that the award does not actually embody their intention.

I think, therefore, that the learned District Judge omitted to exercise a jurisdiction vested in him and that the case must be remitted to him to determine whether a mistake has been made in the award.

No order is made as to costs.

Case remitted.

EMPEROR *v.* MAHABIR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 132 OF 1912.

August 2, 1912.

Present:—Mr. Lindsay, J. C.,
Mr. Rafique, A. J. C.,
and Pandit Kanhaiya Lal, A. J. C.

EMPEROR—PROSECUTOR
versus
MAHABIR—ACCUSED.

Penal Code (Act XLV of 1860*)*, *ss.* 34, 299, 300, 302 —*Assault causing death—Joint and several responsibility of assailant—Evidence as to who struck fatal blow —Common intention not inferred from fatal blow by one of several assailants—Persons causing bodily injury, guilt of—Common intention—Premeditated and unpremeditated acts, difference between.*

Per *Rafique, A. J. C.*—There are usually three classes of cases of fatal assault where the question of the joint responsibility of several assailants arises *viz.*, (1) where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (2) where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow and there is evidence of the latter's guilt; and (3) where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow.

In the first case, all the assailants are responsible for the fatal assault; in the second case, the person who is shown by the evidence to have dealt the fatal blow is alone responsible, and in the third case none of the assailants is responsible for the fatal blow.

Queen v. *Gour Chunder Das*, 24 W. R. Cr. 5; *Queen-Empress* v. *Duma Baidya*, 19 M. 483; *Emperor* v. *Bhola Singh*, 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130, relied upon.

The dealing of one fatal stroke by one of several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked.

Per *Kanhaiya Lal, A. J. C.*—Where persons go with the intention to prosecute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose.

But a distinction has to be drawn between unpremeditated acts done by a particular individual, which go beyond the object and intention of the original offence, and premeditated acts of the parties as shown by their conduct during the affair.

Per *Lindsay, J. C.*, dissenting.—Where the acts of a combination of persons proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused persons taking part in such combination is guilty of murder.

Appeal against an order of the Sessions Judge, Rae Bareli, dated the 20th January 1912.

The *Government Pleader*, for the Crown.
Dr. *Nazir-ud-din Hasan*, for the Prisoner.

JUDGMENT.

RAFIQUE, A. J. C. This is a case in which one Mahabir was committed to the Court of Session at Rae Bareli on the charge of murder but was acquitted of that charge and convicted of the minor offence of culpable homicide not amounting to murder.

The learned Judge sentenced Mahabir to five years' rigorous imprisonment.

Mahabir does not challenge his conviction or sentence by appeal or otherwise. The Crown is, however, dissatisfied with the order of the learned Sessions Judge of Rae Bareli and has preferred this appeal on the ground that the charge of murder has on the evidence in the case been brought home to Mahabir.

The story for the prosecution is that Gajadhar, the brother-in-law of Mahabir, had been giving trouble to the Police and evading arrest for some time. About the first week of August last, the Police gave peremptory orders to Kali, the *chaukidar* in whose circle Gajadhar lived, to find and arrest the latter. Kali had a brother Pancham who, in his anxiety to help his brother and save him from the displeasure of his superior officers, went out in the morning of the 10th of August 1911, in search of Gajadhar. Pancham went to the neighbouring villages and made a search for Gajadhar but did not find him. Gajadhar had also come to know that a strenuous effort was being made for his arrest. He attributed the activity of the Police to the hostility of the *chaukidar* and his brother Pancham towards him. Gajadhar knew that with the Police and the *chaukidar* of the village against him, he could not escape arrest for long. He, therefore, determined to punish Kali and Pancham for turning against him before they could effect his arrest. He knew that Pancham was already out in search of him and would return to the village a few hours after on failing to find him in the neighbouring villages. Gajadhar and his brother-in-law Mahabir arming themselves with *lathis* lay in wait for Pancham behind a bush outside the village. Before long they saw Pancham returning home followed by a beggar woman called *Musammat* Hubia. When Pancham got abreast of the bush

EMPEROR *v.* MAHABIR.

Gajadhar and Mahabir rushed out and attacked him with *lathis*. They felled him to the ground. Gajadhar continued beating him while on the ground with the butt-end of his *lathi*. But Mahabir exchanged his *lathi* for a shoe and beat him with it. In the meantime, *Musammat* Hubia raised an alarm and ran towards the village shouting for her life. Kali heard the alarm and ran to his brother's help. He found Pancham on the ground being beaten by Gajadhar and Mahabir. On seeing Kali, Gajadhar and Mahabir took to their heels. Some other persons came up also after Kali. Pancham was found unconscious. He died soon after. A report was made by Kali to the Police which led to the arrest and the *challan* of Mahabir. Gajadhar could not be found. He has absconded.

The prosecution examined five witnesses to prove the assault on Pancham, *viz.*, *Musammat* Hubia, Kali, *Musammat* Jhamni, Jia Lal and Punni. The last three were working in the fields close by the bush where the assault took place. All the five witnesses depose to having seen the assault on Pancham. *Musammat* Hubia saw the beginning of the assault and Kali came on the scene after Pancham had been felled to the ground. *Musammat* Jhamni, Punni and Jia Lal were eye-witnesses to the assault from the beginning to the end. They swear that Gajadhar and Mahabir at first attacked Pancham with *lathis* and felled him to the ground. They go on to say that after the fall of Pancham, the two assailants continued to beat Pancham. but Gajadhar with the butt end of his *lathi* and Mahabir with a shoe. *Musammat* Hubia says that she saw Gajadhar and Mahabir rush out of the bush and beat Pancham with *lathis* upon which she ran to the village, being frightened, calling for help. Kali says that when he arrived he saw Gajadhar beating Pancham with the butt-end of the *lathi* and Mahabir beating with a shoe and that Pancham was then lying on the ground. The learned Judge has disbelieved *Musammat* Jhamni, Jia Lal, Punni and *Musammat* Hubia as to the use of a *lathi* by Mahabir in the assault on Pancham. He has disbelieved the first three on the ground that they were at some distance from the place of the assault and may have been mistaken as to which of the two assailants attacked the deceased with a *lathi*. *Musammat* Hubia has been discredited on the ground that she must have been confused on account of her fright and could not say with certainty whether both the assailants used *lathis*. He has held on the evidence of Kali that Mahabir beat Pancham with a shoe only; and as a shoe with an iron plate attached to its heel was produced in Court the learned Judge presumed that Pancham was beaten with that shoe. Mahabir was, therefore, found guilty of culpable homicide not amounting to murder. I am unable to agree with the learned Judge. I do not think that he has taken a correct view of the evidence in the case. The evidence of Kali is quite consistent with that of the other witnesses. Kali arrived on the scene after Pancham had been felled to the ground, when, according to other witnesses also, Mahabir had exchanged his *lathi* for a shoe. The evidence of Kali is no basis for an inference that Mahabir did not use a *lathi* prior to the fall of Pancham. Nor can it be said that *Musammat* Hubia and the other three eye-witnesses must have been mistaken as to the weapon with which Mahabir first attacked Pancham. *Musammat* Hubia was close behind the deceased and the others were not far off. There is nothing in their evidence to suggest that any of them could possibly be mistaken on the point. They distinctly and positively state that Mahabir did at first beat Pancham with a *lathi*. I think that the evidence in the case clearly shows that Mahabir used a *lathi* first in the assault on Pancham. I would also point out that there is no evidence that Mahabir beat Pancham after the latter's fall with a shoe with an iron-plate. Such a shoe was, no doubt, produced in Court but no evidence was given to prove that Mahabir had used it in the assault on Pancham. Besides medical evidence is against the theory of the use of the shoe in question. If the finding of the learned Judge as to the weapon used by Mahabir were correct the latter would be guilty of causing simple hurt only under section 323, Indian Penal Code, and not of culpable homicide not amounting to murder.

Now taking it as proved that Mahabir beat Pancham first with a *lathi*, it has to be seen what offence has Mahabir committed. The learned Government Pleader contends that Mahabir's offence falls under the de-

finition of murder. The contention is based on the provisions of section 34, Indian Penal Code. He argues that it is a fair inference to make from the fact that Mahabir and Gajadhar waylaid Pancham and beat him with *lathi* inflicting injuries which resulted in his death, that both Mahabir and Gajadhar intended to murder Pancham or at least cause such injuries as they knew were likely to result in the death of their victim. I do not think that the contention is sound. It is admitted for the Crown that the charge of murder against Mahabir can only be sustained if the help of section 34, Indian Penal Code, is called in.

Section 34 is as follows:—

"When a criminal act is done by several persons *in furtherance of the common intention of all*, each of such persons is liable for that act in the same manner as if it were done by him alone."

I have italicized the important and essential factor which makes a person liable for the acts of his comrade in crime. It must be found that the criminal act for which the several criminals are responsible was done in furtherance of the common intention of all. In the present case, there can be no doubt that the assault on Pancham was made in furtherance of the common intention of Gajadhar and Mahabir. But can it be said that murder of Pancham was the common intention of both the assailants? It is argued that there can be no express evidence as to the intention of a person. The intention must be gathered from the latter's statements or conduct. There is little difficulty in inferring intention from the conduct when the crime is committed by a single person. But the difficulty arises where several persons join in the commission of a crime. In the present case no statements of Mahabir are deposed to by witnesses which would indicate that Mahabir and Gajadhar intended to kill Pancham. The nature of the injuries inflicted on the latter is set up as the conduct of the assailants from which an inference adverse to Mahabir should be made. Now what is the nature of those injuries? Of the eight injuries described by the Civil Surgeon two alone were such as could have produced the death of Pancham, *viz.*, the fracture of the skull and the rupture of the spleen. The Civil Surgeon says so. None of the other injuries by itself or all of them together could cause the death of Pancham. And in saying this, I do not ignore the two injuries one on each temple of the deceased. It cannot be presumed in the absence of medical evidence to that effect that the injuries to the temples must also have been fatal. The Civil Surgeon would have said so in his evidence if that were the case. Therefore, there are only two injuries to be taken into consideration, *viz.*, the rupture of the spleen and the fracture of the skull. The injury to the spleen does not establish the charge of murder against Mahabir, as the spleen of Pancham was enlarged and diseased. It may have been ruptured by the fall. And even if it was ruptured by a blow by one of the assailants, the offence would be only one of simple hurt. The injury to the skull is thus the only evidence from which an inference is sought to be made about the common intention of Mahabir and Gajadhar. It is argued for the Crown that because a blow was dealt by Gajadhar or Mahabir, the evidence in the case is silent on the point, which broke the skull of Pancham and caused his death, it must be presumed that both Gajadhar and Mahabir intended to murder Pancham. I do not think that such an inference can be made in a case where the evidence leaves it in doubt as to which of the assailants dealt the fatal blow. The dealing of one fatal stroke by one of the several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked. The case-law shows that such an inference is only made where extensive injuries are inflicted, the cumulative effect of all or some of which is to cause death—vide *Queen* v. *Gour Chunder Das* (1). If the contention of the Government Pleader were conceded, innocent men also would be convicted of murder. Take for example the case of some men who are persuaded by their friend to join him on the assurance that he wants to give a simple beating to his enemy. The man really intends to commit murder but conceals his intention from his friends. The assault takes place in which the principal man deals one fatal blow while his comrades inflict simple in-

(1) 24 W. R. Cr. 5.

juries. There is no evidence as to who dealt the fatal stroke. If the existence of a fatal injury is to be a basis for the inference that all the assailants intended to commit murder then all the men in the hypothetical case would be guilty of murder. That would be a manifest miscarriage of justice. It might be said that the innocent men would be able to give evidence that they were persuaded to join in the assault on the assurance that only a simple beating was to be given to the victim. It is hardly possible for the innocent men to give such evidence. No third person is taken into confidence when men conspire to commit even a simple assault. Moreover, such evidence would never be believed in the absence of evidence as to who dealt the fatal stroke. Another and more plausible objection, to my view of the law on the subject, is that when several persons join in an assault, intending to kill their victim and one of them undertakes to and does deal one fatal stroke only and the evidence leaves it in doubt as to who dealt the fatal blow all the assailants escape punishment for murder though they intended to and did commit murder. In other words the law gives greater security to a gang of men who commit murder than to a single person committing the same crime. The objection ignores the principle that a man is presumed to be innocent until his guilt is proved. It might with equal force be said that the law shields the criminals, because in some cases they are not traced and in others when found are acquitted for want of evidence. One usually meets with three classes of cases of fatal assault where the question of the joint responsibility of the several assailants arises, *viz.*

1. Where several persons join in the assault and inflict numerous injuries on their victim and the cumulative effect of all or some of the injuries is to cause death.

2. Where several persons commit the assault and inflict minor injuries, but one of them deals a fatal blow and there is evidence of the latter's guilt.

3. Where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow.

In the first case all the assailants are responsible for the fatal assault—vide *Queen* v. *Gour Chunder Das* (1). In the second case the man who is shown by the evidence to have dealt the fatal blow is alone responsible—vide *Queen-Empress* v. *Duma Baidya* (2). In the third case where the evidence leaves it in doubt as to who dealt the fatal blow, none of the assailants is responsible for the fatal blow—vide *Emperor* v. *Bhola Singh* (3).

If the contention of the Government Pleader in this case were correct, in both the Madras and the Allahabad cases all the assailants should have been found guilty of murder. The present case falls under the third head and is covered by the Allahabad ruling. I would also point out that there is a circumstance in favour of Mahabir which was absent in the Allahabad case and which shows that Mahabir never intended to kill Pancham whatever may have been the object of Gajadhar. It is in evidence that Mahabir after the fall of Pancham beat him with a shoe. In this country shoe-beating is given to disgrace a man. There would be no object in beating Pancham with a shoe if Mahabir intended to kill him or knew that he had been killed.

I, therefore, hold that the prosecution has failed to prove that Mahabir joined Gajadhar in the assault on Pancham with the intention of committing murder.

I would dismiss the appeal.

LINDSAY, J. C.—I regret to be unable to concur with the judgment of my learned colleague in this case.

Up to a certain stage we are in agreement. We are of opinion that it is proved that the accused Mahabir and his associate Gajadhar both attacked and beat the deceased man Pancham with *lathis*. We find it also proved that after Pancham fell Mahabir belaboured him with a shoe while Gajadhar pounded him with the butt-end of a *lathi*. And we are both agreed that in acting as they did both these persons were inspired with a common intention. Where we differ is with regard to the nature of the common intention. Intention being a state

(2) 19 M. 483.
(3) 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

of mind is incapable of direct proof by the testimony of witnesses. It can be ascertained only from the statements of the party the state of whose mind is in question, or by drawing inferences from physical facts which constitute the outward manifestation of the state of mind. In considering the inferences as to intention to be drawn from a particular series of acts, the Court has to be guided by the rule of law which lays down that every person is to be presumed to have intended to produce those consequences which are the natural results of his acts. And so where, as in the present case, the question is as to the common intention to be attributed to two persons acting in concert, what we have to regard is the number and nature of the acts committed by both persons acting together and the results which ensued from those acts. As already stated it is proved that Mahabir and Gajadhar both struck Pancham with *lathis*. It is also proved that after Pancham fell to the ground Mahabir beat him with a shoe while Gajadhar hammered him with the butt-end of his *lathi*. These were the acts which these two persons committed together.

What were the results of these acts?

The answer to this question is to be found in the medical evidence. There were three serious marks of injury on the head and face, namely, a large bruise with much swelling in front of the left ear, a similar bruise in front of the right ear and a swelling on the top of the head. Immediately under this latter injury the skull was found to be extensively fractured, both the parietal bones being involved. There were two slight abrasions on the face, a slight abrasion on the point of the left elbow and a large abrasion on the left side of the spine beneath the twelfth rib. The back from the points of the shoulders down to the waist was much bruised. And lastly there was a very extensive rupture of the spleen. It is proved that this latter organ was enlarged from old disease and it may be assumed, therefore, that no excessive act of violence was needed to produce the rupture which might have been caused either by a light blow or a fall. The act which produced this injury may be left out of consideration, therefore, for the purpose of coming to a conclusion as to the question of the common intention. The fracture of the skull was sufficient to produce death and it is proved by the evidence of the village witnesses that death ensued almost immediately after Pancham was beaten. There is absolutely no evidence to show which of Pancham's assailants produced any particular one of the injuries just enumerated. These then are the facts from which the conclusion as to intention must be drawn. Pancham was severely and brutally beaten and died practically on the spot. The immediate and natural consequence of the acts done by these two men together was the death of Pancham. Having regard to the character of the acts and to the consequence that followed it appears to me that the proper conclusion to be drawn is that the common intention of Mahabir and Gajadhar was, if not to cause death, at any rate to cause such bodily injury as they knew to be likely to cause death. I do not see how two persons who attack another and fell him to the ground with *lathis* and who then proceed to belabour him as he lies upon the ground can escape the imputation that they knew they were causing bodily injury likely to cause death. It is common knowledge—a fact of which both these assailants must be deemed to have been well aware that it is a highly dangerous act to beat a man upon the head. And they must also be fixed with the knowledge that the danger was aggravated by their belabouring the man with a shoe and the butt-end of a *lathi* after he fell. In my opinion where, as here, the acts of a combination of persons proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused persons taking part in such combination is guilty of murder. In the present instance I am clear that the common intention of these two men was to cause bodily injury which they knew to be likely to cause death. I am also clear that the fatal blow which caused the fracture of the skull was done by one or other of these two persons in furtherance of that common intention. Section 34 of the Indian Penal Code applies to the case and Mahabir is guilty of and should have been convicted of murder. With reference to the various reported cases cited in the judgment of my learned colleague, I am unable to think that they can furnish any assistance in the determination of what is a question not of law but

of fact. Each case must be settled on its own facts and not on the facts of another.

ORDER.—In accordance with the provisions of section 429 of the Code of Criminal Procedure, this case will be laid before another Judge of the Court for opinion and decision. Our learned colleague, Mr. Stuart, being disqualified to deal with the case owing to previous knowledge concerning it the reference can be made as soon as there is another Judge in the Court who is competent to entertain it.

KANHAIYA LAL, A. J. C.—The accused Mahabir was convicted by the learned Sessions Judge of Rae Bareli of an offence under section 304 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. The Local Government has appealed from that conviction and sentence on the ground that the prisoner should have been convicted under section 302 read with section 34 of the Indian Penal Code and that the sentence passed upon him was inadequate.

The appeal was heard by a Bench of this Court but, in consequence of a difference of opinion, it has been laid before me under section 429 of the Code of Criminal Procedure. I have heard the learned Government Pleader for the Crown and the Counsel for the prisoner, and am of opinion that no case for the alteration of the conviction to one under section 302 of the Indian Penal Code and for the enhancement of the sentence has been made out. The facts, proved by the evidence for the prosecution, were that Gajadhar, the brother-in-law of the prisoner Mahabir, was for sometime wanted by the Police in connection with some charge. Orders were issued to Kali, the *chaukidar* of the circle, where Gajadhar resided, to find out and arrest the latter and, in order to help him, his brother, Pancham, went out on the morning of the 10th of August last in search of Gajadhar.

Meanwhile Gajadhar came to know that the *chaukidar* of his village and his brother Pancham were trying to effect his arrest. He and his brother-in law Mahabir, therefore, lay in wait behind a bush, outside the village, and at about 11 o'clock, when Pancham was passing by Gajadhar and Mahabir came out of the bush and assaulted him with *lathis*. Pancham fell on the ground face downwards. Gajadhar and Mahabir then mounted on him. Mahabir commenced to strike the lying man with a shoe, said to have been removed from Pancham's foot, while Gajadhar is said to have given Pancham some kicks and blows with his fist. *Musammat* Hubia, who lived in a *chhapper* outside Pancham's house, was passing by at the time. She raised an alarm which brought Kali, the brother of Pancham, and others on the scene. The statement of Kali that, when he came, he saw Pancham lying down and Mahabir beating Pancham with a shoe and Gajadhar striking him with the butt-end of his stick, is not corroborated by *Musammat* Punni or any other witness and cannot, therefore, be accepted. The assailants bolted on the arrival of the villagers. Pancham was removed on a cot to the village but died on his way home. The *post mortem* examination showed that he had several abrasions and bruises near the left eye-brow and left elbow, on the left side of the spine, near the ears and on the back besides a swelling on the top of the head and that his spleen was enlarged from old disease, while the thorax showed signs of old disease of both *pleuræ*. According to the Civil Surgeon, the death was caused by the rupture of the spleen and the fracture of the skull either of which alone could have been fatal. It does not appear from the medical evidence that there was more than one injury over the head. The Civil Surgeon thought that all the injuries, found on the deceased, could have been caused by the shoe produced in Court, except the fracture of the skull, which suggested a stick with a knob. There is no evidence to show that Mahabir carried such a stick, or caused that particular injury. No question was put to the prosecution witnesses to ascertain the nature of the *lathi*, which Mahabir was carrying and the fact, that after Pancham fell on the ground, Mahabir exchanged his *lathi* for a shoe indicated that it was not his intention to kill the deceased.

The case does not appear to have been tried with sufficient care for no attempt was made to ascertain where and how the shoe was found, and whether it was the one which Mahabir used; and in many places where the witnesses stated that they saw the accused beating the deceased with *lathis*, it was put down that they saw them killing him with

their *lathis* as if striking with a *lathi* was synonymous with killing. The use of an ordinary *lathi* does not necessarily presuppose an intention to cause a fatal injury or a knowledge that that would be the necessary result, and, in the absence of proof that it was Mahabir, who was carrying a heavy stick and gave the fatal blow, or that the common intention of Mahabir and his companion was something more than to teach Pancham a lesson and dissuade him from the search, he cannot be charged under section 302 of the Indian Penal Code. A man's intention or knowledge can be gathered only by drawing inferences from physical acts, which constitute the outward manifestation of the assailant's state of mind, but those physical acts involve questions as to the nature of the *lathi* used, and the force with which and the spot where and the number of times it was used; but where the evidence on that point is defective and no common intention to commit murder is established, a distinction has to be drawn between unpremeditated acts done by a particular individual, which go beyond the object and intention of the original offence and premeditated acts of the parties, as shown by their conduct during the affair. If the two originally started and lay in ambush with the object of teaching Pancham a lesson and dissuading him and, through him, his brother, from concerning himself with their arrest, the subsequent act of one of them, in going beyond the original intention and committing murder, would not render the other chargeable with murder. It has accordingly been held that, where persons go with the intention to prosecute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose, for, as the purpose is common, so must be the responsibility. But where three persons assaulted the deceased and gave him a beating, in the course of which one of the persons struck the deceased a blow on the head, which resulted in his death, it was held that, in the absence of proof that the persons had a common intention to inflict the injury likely to cause death, they could not be convicted of murder —vide *Queen-Empress* v. *Duma Baidya* (2). The same principle was recognised in *Emperor* v. *Bhola Singh* (3). In *Gouridas Namasudra* v. *Emperor* (4), where it was found that two of the accused struck the deceased several blows, inflicting several injuries, one of which caused his death but it was not proved who struck the fatal blow, it was held that, under the circumstances of the case, none of the accused could be convicted of murder but, by the operation of section 34 of the Indian Penal Code, each of them should be convicted under section 326 of the Indian Penal Code.

It is true that every one must be taken to have intended the probable and natural results of the combination of the acts, in which he joined but it is possible that, where some persons joined in committing a common act with the object of giving a lesson to one to whom they were hostilely inclined, one of them may in the heat of passion go beyond the common intention and knowingly or unknowingly commit an act which may produce a consequence, not originally seen or intended. It would be unsafe to convict a man of murder merely because he used a *lathi* on another's head for it is not in every case that a fracture of the skull is the result. In the present case, there was apparently only one injury over the head and there is nothing to show whether Pancham's head was struck by Mahabir's *lathi* or whether Mahabir or Gajadhar gave more than one blow or whether it was Mahabir who used the *lathi* with the knob on the person assaulted. The mere fact that a *lathi* was used, read with the fact that, immediately after the deceased fell, a shoe was substituted by Mahabir for the *lathi*, did not show that the prisoner necessarily knew that the death of Pancham would be the natural or necessary consequence of his act.

I am, therefore, of opinion that, on the evidence adduced, the charge of murder against Mahabir is not sustainable and the prisoner was rightly convicted under section 304 of the Indian Penal Code.

My learned brothers, who tried the appeal, did not consider it necessary to suggest an enhancement of the sentence and I, therefore, see no reason to interfere with it.

The appeal is, accordingly, dismissed.

Appeal dismissed.

(4) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 109 OF 1912.

December 5, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

VISHNU KRISHNA PURANIK—ACCUSED.

Penal Code (Act XLV of 1860), s. 292—Obscene book—Test of obscenity—Proof—Particular passages obscene—Frankness of expression.

In the case of a prosecution under section 292 of the Penal Code, in respect of a book alleged to be obscene, if the prosecution succeeds in showing that the detailed passages on which they rely are of an obscene character, the author's liability in respect of those passages would not be saved or avoided merely by reference to other passages in the book which contain moral precepts of an unexceptionable character.

The test of obscenity is whether the language complained of is such as is calculated to deprave or corrupt those whose minds are open to immoral influences. That being the test, the important point to look at would be rather the form of expression than the actual meaning, for the same meaning may be obscenely expressed by one form of language, and yet by the use of another form of language may be couched in expressions free from reproach.

A distinction should be observed between obscenity *i. e.*, language calculated to inflame the passions, and a certain primitive frankness of expression such as one would expect to find in a language like Marathi. It is not the primitive frankness or directness of expression which is most likely to corrupt or inflame the mind.

Criminal reference made by the Sessions Judge at Thana.

Mr. *L. A. Shah*, acting Government Pleader, for the Crown.

Mr. *Coyajee*, (with him Mr. *P. B. Shingne*,) for the Accused.

JUDGMENT.—In this case one Vishnu Krishna Puranik has been convicted by the Magistrate under section 292, Indian Penal Code, in that he sold or printed for sale or hire an obscene book. On the matter coming before the learned Sessions Judge of Thana, Mr. Dixit, he was of opinion that the conviction was bad, inasmuch as the impugned passages in the book were not of an obscene character. He has, therefore, made a reference to us asking that we should set aside the conviction.

We have heard the learned Government Pleader in support of the conviction, and he has read to us translations, which satisfied him, of the particular passages on which this charge was framed. The book was published in connection with a large pharmacy of native medicines situated at Panvel. The book bears the title "Vyavahar Vaidyak" which may be roughly Englished as meaning "Medicine in practice" or "Practical Medicine" and the general object of it appears to be to advertise various medicines which can be obtained from this pharmacy on payment. In order, it may be, to stimulate the purchase of these medicines the author describes certain rules of conduct calculated to acquire or preserve health. He then goes on to discuss several diseases, and in those discussions various physiological facts are noted and explained. We agree with the learned Government Pleader in one proposition, namely, that if the prosecution had succeeded in showing that the detailed passages on which they rely were of an obscene character, the author's liability in respect of those passages would not be saved or avoided merely by reference to other passages in the book which might contain moral precepts of an unexceptionable character. The question, however, is whether the prosecution have succeeded in showing that the charged passages are such as under the section should be called 'obscene.' The meaning of that word has frequently been laid down by high judicial authority; but for our present purposes we need not travel beyond the definition given by Cockburn, C. J., in *Reg.* v. *Hicklin* (1). Following that decision the test which we must apply is to see whether the language complained of is such as is calculated to deprave or corrupt those whose minds are open to immoral influences. That being the test to be applied, it seems to us, that the important point to look at will be rather the form of the expression than the actual meaning, for the same meaning may be obscenely expressed by one form of language, and yet by the use of another form of language may be couched in expression free from reproach. In this respect it is likely that I am at a certain disadvantage, inasmuch as I cannot lay claim to familiar acquaintance with current vernacular Marathi. It must, however, I think, be taken that a distinction should be observed between obscenity, *i.e.*, language calculated to inflame

(1) (1868) 3 Q. B. 360; 37 L. J. M. C. 89; 18 L. T. 395; 16 W. R. 801; 11 Cox. C. C. 19.

the passions, and a certain primitive frankness of expression such as, if I am not mistaken, one would expect to find in such a language as Marathi. But everyone conversant with human language and its resources is aware of the fact that it is not the primitive frankness or directness of expression which is most likely to corrupt or inflame the mind. Now my learned brother has assured me that there is nothing in the Marathi form of language here employed which can justify the epithet "obscene." On the contrary, the language chosen is rather of a Sanskrit character, is rather stilted and dignified than inflamatory or passionate. Certainly, as far as I myself am able to judge of the Marathi, that is a fair description of it. That is a description also which is given by a gentleman fully qualified to judge, I mean the Sessions Judge, Mr. Dixit, whose own vernacular is Marathi. He says in this reference:—"It is conceded that the language used is chaste throughout and to express the meaning no better words could have been used so far as the chastity of the language is concerned" The words, as we have noticed, are mostly directly Sanskrit, and they seem to have been chosen as being words of a colourless and unimpassioned and *quasi*-scientific character. If the mere words are discarded as being quite incapable of satisfying the legal test of obscenity, then we think that the thoughts which the words convey are equally incapable of satisfying that test, for the thoughts conveyed are in all cases serious, not to say solemn. No attempt is anywhere made by the author to represent sexual aberration or excess as a matter of triviality or as a matter easily obtaining forgiveness. On the contrary his whole purpose, which he maintains even throughout the impugned passages, is to call the reader's attention to the heavy penalty which outraged nature exacts for any violation of her physiological laws. That, we think, is clear upon an impartial perusal of the passages upon which the prosecution rely; and in support of that view we have the concurrent testimony of two gentlemen well entitled to speak, namely, Dr. Bnajekhar and Colonel Kirtikar. As the Sessions Judge observes, these are two eminent doctors both ripe in age and experience. Moreover, though by profession they are physicians, it is not merely as physicians that they have given their evidence in this case. On the contrary they are careful to point out that they speak simply as educated men familiar with the language and the subject-matter of the book. Colonel Kirtikar's evidence appears to us to be exceptionally weighty, inasmuch as he is described by the learned Sessions Judge as being not merely a doctor but a scholar, a philosopher, and a literary savant of weight and authority.

So much for the evidence which the witnesses have tendered in this. For ourselves we have judged the passages to the best of our powers of understanding them, and we see no reason to suppose that we have missed their meaning or aim. We are satisfied that there is nothing in the passages charged which is calculated to deprave or corrupt the minds of those open to such influences or to inflame the passions of the young or immature. We think, therefore, that the prosecution was in this case mistaken, and we must set aside the conviction, direct the accused to be acquitted and discharged, and order that the fine, if he has paid it, be returned to him and that the order under section 521, Criminal Procedure Code, be discharged and the books delivered to the accused.

Conviction and sentence set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 35 OF 1912.

April 18, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR

versus

THE ENTIRE DEH (VILLAGE) OF CHAKARKOTE.

Bombay Regulation XII of 1827, *s.* 37—*Neglect—Cowardice not included—Exemption of particular hamlets or individuals—Imposing separate fines on Hindus and Muhammadans.*

Neglect under section 37 of the Bombay Regulation XII of 1827 must at least consist of acts or omissions which lead to the inference that the inhabitants of a village were in sympathy with the robbers and endeavoured to obstruct or defeat the Police investigation. Mere cowardice is irrelevant to the matter,

EMPEROR *v.* THE ENTIRE DEH (VILLAGE) OF CHAKARKOTE.

The section imposes responsibility on the whole community residing within the boundaries of a village, and a Magistrate proceeding under the section has no jurisdiction to exempt particular hamlets, or to exempt particular villagers from his order. It is incompetent to impose separate fines on Muhammadan and on Hindu residents.

JUDGMENT.—This is an application for revision of an order made by the Sub-Divisional Magistrate, Sehwan, under section 37 of Bombay Regulation XII of 1827.

The section empowers the District Magistrate or the Sub-Divisional Magistrate to investigate as a criminal offence any case in which a charge of neglect or connivance is made against the inhabitants of a village in respect of prevention, detection or apprehension where a robbery has been committed within the boundary of the village or where the robbers have been satisfactorily traced thereto.

In this case a dacoity had been committed on the 22nd November 1911 at the houses of several *Banias* in the village of Chakarkote. The Sub-Divisonal Magistrate under orders of the District Magistrate issued notices on all the inhabitants of *Deh* Chakarkote calling on them to show cause why they should not be dealt with for neglect in the prevention, detection or apprehension of the offence and the offenders.

The notice made no mention of connivance and it was never alleged that the villagers were aware of the intention to commit the dacoity, or that they, in any way, connived at the offence.

The Magistrate proceeded only on a charge of neglect and by his final order found the villagers guilty of neglect or cowardice.

The Magistrate seemed to assume that cowardice was tantamount to neglect in the apprehension of the offenders. It is at least open to doubt whether the word 'neglect' in the section does not mean criminal neglect or neglect to do something which the law required the villagers to do for the policy of the section is to punish the whole village for the offence of undetected individuals in that village and it could hardly have been intended that what was not penal in the individual should be penal as against the whole village. But, however, that may be, we feel no doubt that the neglect must at least consist of acts or omissions which lead to the inference that the villagers were in sympathy with the robbers and endeavouring to obstruct or defeat the Police investigation. The Regulation is a Police Regulation and this interpretation of the word would be in accordance with the rule of construction according to the subject-matter. Any other construction would lead to this absurdity that the whole village might be fined because the victim of the robbery neglected to lock his front door.

Now the Magistrate's finding is based on two grounds only:—

(1) that the villagers showed cowardice in not resisting the dacoits;

(2) that the villagers neglected to follow the tracks of the dacoits after they left the village.

Now the charge of cowardice is in this view of the matter altogether irrelevant and is, moreover, not made out on the evidence. The dacoits were armed with two guns and swords. There was only one man in the village who had a gun and the Magistrate says he ought to have led the villagers to make a counter-attack. But this man has not been examined as a witness, nor has it been ascertained that his gun was serviceable or that he had ammunition. As to the second ground, the dacoits were identified as Brohis from over the Baluchistan Border which is close to the village. They fled back to their Alsatia immediately after committing the offence and it would have been quite impossible for the villagers or for the Police to follow them back into Baluchistan. The villagers did what they could for they gave immediate information to the Police.

The villagers are Lagharis and Banias and the very fact that the dacoity was a predatory raid from Baluchistan by Brohis completely excludes the possibility that there was any complicity between the villagers and the offenders. The application of the Regulation to this case was, therefore, most ill-advised.

The proceedings of the Sub-Divisional Magistrate were further vitiated by several illegalities. The section imposes responsibility on the whole community residing within the boundary of the village. The Magistrate therefore, issued notice on all the inhabitants of Deh Chakarkote. Having done this he could only deal with that community as a body. He had no jurisdiction to exempt particular hamlets or to exempt particular

villagers from his order. Nor had he jurisdiction to impose separate fines on the Muhammadan and on the Hindu residents.

We, therefore, reverse the order of the Sub-Divisional Magistrate and direct the fines, if paid, to be refunded.

Order reversed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 301 OF 1912.

November 15, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

SHIVDAS OMKAR MARWADI—ACCUSED—APPLICANT.

Penal Code (Act XLV of 1860), s. 186—Obstruction of public servant—Nature of offence—Proof—Municipality trying to remove goods from a strip of land—Bona fide *dispute—Bombay District Municipalities Act (III of 1901), s. 122—Practice—Theory of guilt and innocence equally likely.*

Before an offence under section 186 of the Penal Code can be said to be established against any person, it is requisite, as the section itself expressly recites, to prove that the public servant obstructed was obstructed in the discharge of his public functions. That is a matter of fact and not a matter of the public servant's intentions. His intentions may have been perfectly honest, but if in fact and in law the functions in the discharge of which he was obstructed were not public functions then no offence can be committed under section 186. The functions would not be public functions if they fall wholly outside the jurisdiction or authority which a public officer possessed.

No man can be convicted of a criminal offence where the theory of his guilt is no more likely than the theory of his innocence.

A. owned a shop. Between the shop and the public road there was a small strip of land which *A.* had been using for forty years for the purpose of depositing his bales and other goods.

A dispute arose between himself and the Municipality with reference to the title to this strip of land.

The Municipality prosecuted *A.* under the Municipal Act for an alleged encroachment but the prosecution was unsuccessful. After this, the Chief Officer of the Municipality accompanied by a posse came to *A.*'s shop and attempted to remove his goods. *A.* obstructed the officer:

Held, that *A.* was not guilty of an offence under section 186 of the Penal Code.

Application for revision from conviction and sentence confirmed by the Sessions Judge of Khandesh, on appeal from conviction and sentence passed by the first class Magistrate of West Khandesh.

Mr. *Coyajee*, (with him Mr. *R. R. Desai*), for the Applicant.

Mr. *S. R. Gokhale*, for the Municipality.

Mr. *L. A. Shah*, acting Government Pleader, for the Crown.

JUDGMENT.—The applicants in this case have been convicted under section 186, Indian Penal Code, of the offence of voluntarily obstructing a public servant in the discharge of his public functions. The circumstances underlying the prosecution are these: The petitioners own a shop at Dhulia situated on the Agra Road, and the shop abuts on that road, which is lined by two gutters. Between the petitioners' shop and the near gutter there is a small strip of land which admittedly for a period of over forty years the petitioners have been using for the purpose of depositing their bales and other goods. Latterly a dispute arose between the Municipality and the petitioners with reference to the title to this strip of land, the petitioners contending that it was their property and that the public road-way began beyond the gutter.

On the 20th September 1911, the Municipality prosecuted the petitioners under the Municipal Act for an alleged encroachment upon this strip of land. The prosecution was unsuccessful, the petitioners being acquitted. Then on the 31st October 1911, the Chief Officer of the Municipality accompanied by a posse of Municipal servants came to the petitioners' shop and attempted to remove the goods which the petitioners had placed upon this disputed strip. The petitioners obstructed the Municipal Chief Officer in his attempt to remove the goods and they have accordingly been convicted.

In the Court of the learned Magistrate who tried the case, the main issues were: Whether the Municipal Officer had power to remove the encroachment or obstruction on a public street; and whether the accused had deposited boxes and other things on the public street; and thus caused an obstruction. Both these issues were determined in the affirmative, that is to say, against the petitioners.

The petitioners appealed to the Sessions Judge and the Judge has affirmed the conviction mainly on the ground that in his view it was wholly unnecessary for the trial Court to go into the merits of the dispute which existed between the Municipality and the petitioners as to the ownership of the land. The Sessions Judge indeed goes so far as to say that it was into this error which the Magistrate fell. In the Sessions Judge's opinion all that a Criminal Court is concerned with is whether the action of the Municipality or its servants was on the face of it illegal. The learned Government Pleader who appears to support this conviction admits that he cannot defend it on the grounds taken by the Sessions Judge, and, in our opinion, those grounds are unsustainable. Before an offence under section 186 of the Penal Code can be said to be established against any person it is requisite, as the section itself expressly recites, to prove that the public servant obstructed was obstructed in the discharge of his public functions, and that we take it is a matter of fact and not a matter of the public servant's intentions. His intentions may have been perfectly honest, but if in fact and in law the functions in the discharge of which he was obstructed were not public functions, then no offence can be committed under this section. It is plain that the functions would not be public functions if they fell wholly outside the jurisdiction or authority which he as a public officer possessed.

Now in this case it is admitted on all hands that, as we have said, for a period of over forty years this strip of land has been used by the petitioners. It is equally admitted that there does and did exist between them and the Municipality a *bona fide* civil dispute as to the ownership of this plot. That being so it is at least equally likely at present that the land may be the Municipality's or that it may be the petitioners', but no man can be convicted of a criminal offence where the theory of his guilt is no more likely than the theory of his innocence.

On behalf of the Municipality, recourse was sought to be had to the provisions of section 122 of the Municipal Act. But, in our opinion, those provisions do not assist the Municipality for they do not contain, what alone would justify the Municipality's action in this matter, a clause to the effect that should any *bona fide* dispute exist between the Municipality and the private citizen as to the ownership of immoveable property, the Municipality is empowered to decide that dispute for itself. The case, we think, resembles that which was decided in *Queen-Empress* v. *Sagan* (1). The learned Government Pleader indeed suggested that this case should be distinguished on the ground that we have here, what the Judges in that case had not, a finding on evidence that the parcel of land in question is part of a public street. We have looked into the judgment and into the evidence upon this point. There is no issue putting in controversy the precise nature of this strip of land, and as we read the judgment there is no finding that the land is part of a public street.

We think, therefore, that the case is indistinguishable from *Queen-Empress* v. *Sagan* (1), and upon the grounds there stated, as well as those which we have stated for ourselves, we think that the conviction cannot be sustained. We must, therefore, reverse it, acquit the petitioners and direct that the fines, if paid, should be refunded to them.

Conviction set aside.

(1) (1888) Unrep. Cr. C. 366.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 33 OF 1912.

May 2, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

AKHTIAR *walad* SANWAN AND OTHERS—ACCUSED—APPELLANTS.

Evidence Act (I of 1872), ss. 25, 26—Statement by accused exculpating himself, admissibility of—Penal Code (Act XLV of 1860), s. 203—Giving information.

A statement made by an accused person to a Police officer by way of an explanation in order to exculpate himself is admissible in evidence.

EMPEROR v. AKHTIAR.

Emperor v. *Mahomed Ebrahim*, 5 Bom. L. R. 312, referred to.

The expression 'gives information' in section 203, Penal Code, means 'volunteers information.'

Queen-Empress v. *Joy Narain Patro*, 20 W. R. Cr. 66, referred to.

Mr. *Mathradas*, for the Accused.

JUDGMENT.—The seven appellants have been convicted of an offence under section 202, Indian Penal Code, and of these appellants Nos. 3 and 6 have been convicted also of an offence under section 203, Indian Penal Code.

The case for the prosecution is that the seven omitted to give information in respect of the murder of one Hayatun and that the 3rd and 6th appellants gave false information in regard to the murder to the Magistrate.

Mr. Mathrads urges in the first place that there is no evidence that Hayatun was murdered. But the wounds on the corpse are conclusive on this point. It is suggested that the wounds might have been inflicted after death. The Doctor says that there is nothing positive in the wounds to indicate when they were caused. This may be true from a medical point of view, but the probable inference arising from all the circumstances of the case is that they were caused before death—and this appears to be the opinion of the Civil Surgeon himself for he infers that the woman was murdered with an axe while lying on bed. The Sessions Judge has explained that the shroud need not have shown stains of blood and accused No. 4 told the Magistrate that the deceased would have been bathed even if she had been murdered. There is no evidence whatever that the grave had been tampered with except by wild animals. The conclusion that any one seeing the wounds would come to is that the woman had been murdered.

We find, therefore, that there was a murder and the accused, if they saw the body, had reason to believe that a murder had been committed, and were bound in law to give information.

They all admitted to the Sub-Inspector that they had seen the body and that there were no wounds or marks of injury on it. It is urged that this is an admission of an incriminating circumstance which, according to the rulings in *Imperatrix* v. *Pandharinath* (1) and *Queen-Emprees* v. *Nana* (2) amounts to a confession. But the accused said they saw the body and that there were no injuries on it. That statement is in no way incriminating. Far from being a confession, it is an explanation offered in order to exculpate themselves. In this respect the statement resembles that made in *Emperor* v. *Mahomed Ebrahim* (3). There the accused was found in possession of a stolen box and he explained to the Police that he was the owner of the box. This statement was, held admissible although it was subsequently used against the accused to show guilty knowledge.

Now it is not only that the accused did tell the Police that they had seen the body—but the circumstances of the case raise a strong probability that that statement was true. The accused are the caste-fellows of the deceased and four of them are near relations. The corpse was brought to their village. It was then bathed and wrapped in a shroud. Accused No. 10 was present at the bath—and the other accused all joined in burying the body. Accused Nos. 4 and 10 made statements to the same effect on oath to the Magistrate. We think that the accused had seen the wounds, that they were aware of the murder and that they deliberately omitted to give information. They have been rightly convicted under section 202.

As to the conviction under section 203 only two accused were examined on oath by the Magistrate as witnesses under section 164. If these statements are false these accused have committed the offence of giving false evidence in a judicial proceeding—see *Emperor* v. *Andal* (4).

We do not think that these statements or that statements made by witnesses to the Police amount to "information" within the meaning of the word as used in section 203, Indian Penal Code. If it did then the policy of the Legislature in omitting the word "truly" from section 161, Criminal Procedure Code, would be frustrated and every witness who made a false statement to the Police could be punished under section 203 for giving false information. We agree with the opinion expressed in the case of the *Queen-Empress* v. *Joy Narain Patro* (5),

(1) 6 B. 34.

(2) 14 B. 260.

(3) 5 Bom. L. R. 312.

(4) 13 Ind. Cas. 273; 5 S. L.R. 174 at p. 179; 13 Cr. L. J. 33.

(5) 20 W. R. Cr. 66.

that the expression "gives information" mean "volunteers information." We do not think it necessary to order a re-trial of these two accused under section 193 as they have already been punished under section 202.

We, accordingly, confirm the convictions and sentenecs of all the appellants under section 202, but reverse the conviction and sentences under section 203.

Conviction altered.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 11 OF 1913.
March 11, 1913.
Present:—Mr. Justice Coxe and Mr. Justice N. Chatterjea.
AZIZ SHEIKH AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Appeal—Criminal—Admission — Subsequent dealing with question, whether appeal lay—Sentence of one month's imprisonment under each of three sections to run concurrently—Whether appealable—Criminal Procedure Code (Act V of 1898), *s.* 35, *sub-s.* (2).

The mere fact of the admission of a criminal appeal, does not preclude the Court from dealing subsequently with the question whether an appeal lay.

An accused who has been sentenced to concurrent terms of imprisonment no one of which is individually appealable has no right of appeal against them collectively.

Abdul Khalek v. *Emperor*, 17 Ind. Cas. 813; 17 C. W. N. 72, 13 Cr. L. J. 877, dissented from.

Suknandan Singh v. *Emperor*, 17 Ind. Cas. 531; 16 C. W. N. cclxxxiv; 13 Cr. L. J. 787; 17 C. L. J. 392, approved.

Rule against the order of the Sessions Judge of Birbhum, dated December 4th, 1912, affirming that of the Sub-Divisional Magistrate of Rampurhat, dated September 23rd 1912, convicting the petitioners under sections 323, 448 and 147, Indian Penal Code, and sentencing them each to one month's rigorous imprisonment under each section, the sentences to run concurrently.

Babus *Surendra Nath Ghoshal*, for the Petitioners.

JUDGMENT.—In this case the petitioners were sentenced to rigorous imprisonment for one month under section 323 (or in the case of Meehir Sheikh under section 323 read with section 114) to rigorous imprisonment for one month under section 448, and to rigorous imprisonment for one month under section 147, all these sentences were concurrent. They appealed and the Sessions Judge passed the following order: "Admit. Send for the records. Issue notices. Bail allowed Rs. 100 each. Fix 5th October." Then during the vacation the vacation Judge heard the appeal and expressed himself as follows:—"It appears to me, therefore, that no appeal lies. As, however, the appeal was admitted by the Sessions Judge I do not pass final orders I do not know whether the appeal was admitted on a different view of the law or by reason of the fact of the sentences being concurrent not being brought to the notice of the Judge. I, therefore, leave the case to be disposed of by him." On his return the Sessions Judge passed the following order: "The judgment of the Additional Sessions Judge, so far as I am concerned, must be taken as final in spite of his saying that it is left to me."

It is argued that as the appeal was once admitted it could not, subsequently, be held that no appeal lay. We cannot accept this contention. Even if there were any provision in the Criminal Procedure Code for admitting appeals the mere fact of admission would not preclude the Court from dealing, subsequently, with the question whether an appeal lay.

The only question that really arises for determination is whether an accused who has been sentenced to concurrent terms of imprisonment no one of which is individually appealable has a right of appeal against them collectively. It was held in *Abdul Khalek* v. *Emperor* (1) that he has. We are unable to accept this view. The learned Judges observe that under the rulings of this Court concurrent sentences for the purpose of appeal must be taken in the aggregate. We cannot trace these rulings* and, in our opinion, the aggregate of three concurrent equal sentences is the same thing as each of the sentences. In other words, if a man is sentenced three times over to be imprisoned for the month of March 1913 the aggregate of his sentences is one month.

(1) 17 Ind. Cas. 813; 17 C. W. N. 72; 13 Cr. L. J. 877.

*One of them is *Bepin Behari Dey* v. *Emperor*, 11 Ind. Cas. 255; 15 C. W.N. 734; 15 C. L. J. 82; 12 Cr. L. J 391.—*Ed.*

EMPEROR *v.* UMAR.

From sub-section (2) of section 35, it would seem that it is only in the case of consecutive sentences that the question of aggregate punishment can be said to arise. We are not, therefore, prepared to follow the decision of *Abdul Khalik* v. *Emperor* (1), but we do not think that the matter need be referred to a Full Bench as one of the learned Judges who decided it seems to have changed his opinion [vide *Suknandan Singh* v. *Emperor* (2).]

We think, therefore, that no appeal lay to the Sessions Judge and the Rule, accordingly, fails and is discharged.

Rule discharged.

(2) 17 Ind. Cas. 531; 16 C. W. N. cclxxxiv; 13 Cr. L. J. 787; 17 C. L. J. 392.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 162 OF 1911.

May 30, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—APPLLICANT

versus

UMAR—OPPOSITE PARTY.

Bombay Regulation XII of 1827, *s.* 27—*Conditions in bond to be imposed by the District Magistrate himself—Interference with suspect's liberty or means of livelihood.*

The restrictions in a bond taken under section 27 of the Bombay Regulation XII of 1827 should be imposed by the District Magistrate himself, and should not unreasonably affect the personal liberty of the suspect, or have the effect of depriving him of the means of procuring a livelihood.

Application for revision against an order of the District Magistrate, Sukkur,

JUDGMENT.—This is an application for revision of an order made by the District Magistrate, Sukkur, under section 27 of Bombay Regulation XII of 1827.

That section contemplates an order being made with the assent of the suspected person in order to obviate the severer procedure of the suspect being committed to prison in default of furnishing security.

The restrictions contained in the bond should, however, be imposed by the Magistrate himself and are subject to two important conditions first that they will not unreasonably affect the personal liberty of the suspect and second that they will not have the effect of depriving him of the means of procuring a livelihood.

The applicant complains that though a resident of Dakkhan and though apparently required to continue to reside in that village and although there is a Poiice Post 4 miles off he has been ordered to attend roll call every day 12 miles off at the village of Gahiji.

Now there are two objections to this order. In the first place the bond does not require the suspect to attend roll call at any particular place. Clause (*a*) of the bond requires the suspect to attend roll call at such time and place as may be notified to him by the District Superintendent of Police. This is not in compliance with the section under which the restrictions should be imposed by the Magistrate himself. The Magistrate has no authority to delegate his duty in this matter to the District Superintendent of Police who might possibly appoint a station so distant as to be repugnant to the conditions which limit the restrictions to be such as do not unreasonably interfere with the suspect's liberty or means of earning a livelihood.

Again, it seems probable that the restriction as to the roll call at Gahiji 12 miles distant is open to the objection that it unreasonably restraints the suspect's liberty and prevents his earning his livelihood on his land which is at Dakkhan. We need however deal with this matter now for the order is *ultra vires* and the form in which the bond is taken needs revision.

We accordingly direct the District Magistrate to re-consider the matter and himself impose such restrictions as the circumstances of the case require and as the law allows. These restrictions to be embodied in a fresh bond to be entered into by the suspect.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 54 OF 1912.

May 16, 1912.

Present:--Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

SOHRAB *walad* ALI MURAD—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859), s. 2—Summary trial not allowed.

The proceedings of a Magistrate up to the order under section 2 of Act XIII of 1859 do not constitute a trial for any offence and, therefore, the procedure under section 260, Criminal Procedure Code, does not apply.

JUDGMENT.—The Magistrate tried the accused summarily for an offence under section 2 of Act XIII of 1859 and ordered him to refund the advance or in default to undergo rigorous imprisonment for 14 days.

The proceedings of the Magistrate up to the order under section 2 do not constitute a trial for any offence and, therefore, the procedure under section 260, Criminal Procedure Code, is not applicable—see *Emperor* v. *Dhondu* bin *Krishna Kamblya* (1), *Emperor* v. *Balu Saluji* (2), *Imperator* v. *Abdulla* walad *Tayab* (3), *Imperator* v. *Tayab* walad *Isso* (4), *Imperator* v. *Kayo* walad *Lakho* (5), *Imperator* v. *Ahmed* walad *Rahimdin* (6), *Imperator* v. *Chanasar* walad *Dosul* (7), *Imperator* *Umar Keto* (8) and *Imperator* v. *Tahir* walad *Rano* (9).

The only offence, if any, declared by the Act is the omission to comply with the Magistrate's order under section 2. But the case has not reached this stage.

We, therefore, reverse the order of the Magistrate and remand the case for disposal according to law.

Case remanded.

(1) 1 Ind. Cas. 378; 33 B. 22; 6 Bom. L. R. 255; 1 Cr. L. J. 263.

(2) 1 Ind. Cas. 387; 33 B. 25; 10 Bom. L. R. 1126; 8 Cr. L. J. 409.

(3) to (9) Criminal Reports Nos. 37 to 43 of 1908, of this Court.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 139 OF 1912.

December 5, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

RAMA SUDAMA MAHAR—ACCUSED.

Reformatory Schools Act (VIII of 1897)—Criminal Procedure Code (Act V of 1898), s. 399—Detention in Reformatory School—Period to be definite.

A., a lad of thirteen years, was convicted of theft. The Magistrate imposed upon him rigorous imprisonment for two months but directed that, instead of suffering the imprisonment, *A.* should be detained in a Reformatory School for five years "or until he attains the age of eighteen years" :

Held, that the words "or until he attains the age of eighteen years," should be deleted from the Magistrate's order as the period of detention should be an exact or definite period.

Criminal reference made by the District Magistrate of Poona.

JUDGMENT.—This is a reference by the District Magistrate of Poona in regard to an order passed by a first class Magistrate with regard to one Rama Sudama Mahar of Lonavla, who is found to have committed theft. The learned Magistrate finds that the accused lad is thirteen years old. Instead, therefore, of suffering the rigorous imprisonment for two months which was imposed, the accused was by the convicting Magistrate directed to be detained in a Reformatory School for five years "or until he attains the age of eighteen years." The District Magistrate objects to the alternative period of time expressed in the words "or until he attains the age of eighteen years;" and we think that the decision of *Queen-Empress* v. *Rama* (1) is good authority for the objection. We must, therefore, delete from the Magistrate's order the words "or until he attains the age of eighteen years," leaving the period of five years as the exact period for which the boy is to be detained in the Reformatory.

(1) 24 M. 13.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.
APPEAL No. 79 OF 1911.
March 19, 1913.
Present:—Lord Atkinson, Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

JOOPOODY SARAYYA AND OTHERS—APPELLANTS

versus

PULAVARTI LAKSHMANASWAMY—RESPONDENT.

Hindu Law—Joint family in partnership with a third person—Joint family partition—Annual revenue accounts—Discontinuance—Capital account—Dissolution of partnership—Limitation Act (IX of 1908), *Sch. I, Art.* 106.

Plaintiff's family owned a half share along with the defendant in a partnership business carried on in *K*.

Prior to 1891 detailed accounts, suitable to a current partnership business, were annually rendered between the parties.

In 1891, however, the account furnished was not a revenue but a capital account, showing a complete division of the partnership shares.

From that time forward, the defendant managed the business without any interposition or interference by the joint family or any representative thereof in their interest.

In 1901 a letter of the members of the joint family written to the defendant after certain admissions as to the nature and limit of his connection with the business at *K*. narrated their unanimous request for a settlement according to a verbal arrangement made previously between parties.

A partition had taken place of the joint family property:

Held, that the cessation of the annual accounts points to some radical change having taken place, and the other circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm in the year 1891.

The suit, therefore, initiated eleven years after that event is barred by Article 106 of the Limitation Act.

Appeal from a judgment and decree of the High Court dated December 10th, 1908, reversing those of the Subordinate Judge of Rajahmundry, dated September 16th, 1905.

FACTS.—The present appellants and their family carried on an old established business at Kotapally, while the present respondent's father established at Akuvidu the business now in question and carried it on there at date of the suit. In 1891 the members of the appellants' family hitherto joint effected a partition and a final account of the Akuvidu business was drawn up which showed a balance due to the appellants' family, which was set off by agreement against the sum due to respondent's father on the accounts of Kottapally business. Since then none of the appellants' family took part in the management of the Akuvidu business or contributed to its funds or received any share in its profits. The present suit was started *inter alia* for the dissolution of this partnership and for an account and share of profits. The Subordinate Judge decided in favour of the appellants, but the High Court reversed it holding that partnership was dissolved in 1891 and that the present suit was barred by limitation. There were concurrent findings of two lower Courts on the question of the dissolution of partnership in 1891.

Mr. *Dunne*, for the Appellants, contended that the Akuvidu partnership business had not been dissolved by agreement as alleged and that the rights of the appellants had never ceased or put an end to. There was no estoppel by conduct nor was the claim barred by limitation.

Messrs. *DeGruyther*, *K. C.*, and *Brown*, for the Respondent, contended that the partnership in question was dissolved long before the suit. The appellants' family were, since 1891, excluded from any share in the business. The suit was barred by limitation and ought to have been brought within three years of the dissolution.

Mr. *Dunne* replied.

JUDGMENT.

LORD SHAW.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 10th December 1908, which reversed a judgment of the Subordinate Judge of Rajahmundry, dated the 16th September 1905. The suit as brought included a claim for partition of certain family property. That part of the suit has been settled. What remains constitutes the subject of the present appeal. The assertion is that the plaintiffs' family has a half share, along with the defendant (the present respondent) in a partnership business carried on in Akuvidu. The High Court has held that this claim is barred by limitation and has dismissed the suit.

It is unnecessary to refer to various other pleas in the case, including those founded on an alleged misjoinder of causes of action because, in the opinion of their Lordships, the conclusion reached by the High Court

on the plea of limitation was clearly correct.

In or about the year 1868 a partnership business was started in Kottapally. At a later date a business was started at Akuvidu. This latter was throughout under the management of one Venkanna, the adoptive father of the respondent. The position of Venkanna (who was the second defendant in suit) was this: He maintained that in both businesses he had a half share; that in, or shortly before, the year 1891, an arrangement was made under which the joint family represented by the appellants made a partition of their family property; and it cannot be denied that, with regard to the Kottapally business, this partition became an accomplished fact. Venkanna, however, further maintained that there were cross-claims: that he was entitled to a certain share of the assets of the Kottapally business; that, on the other hand, the joint family was entitled to a certain share in the Akuvidu business; that these claims were set against each other, and that from 1891 the joint family has had no share in the Akuvidu business.

It has to be admitted that, if a partition has taken place of the joint family property, it is at least not unlikely that that would have extended to all the businesses which the joint family shared; and it must further be conceded that, if the joint family's interests were divided, a dissolution of the Akuvidu partnership with Venkanna was naturally incident to the situation thus created. Different *personae* had arisen in law, and with these it was open to Venkanna to say whether he should be allied in partnership or not. What Venkanna does say is, that the dissolution—thus not unnatural in the situation of the joint family affairs in 1891—did in fact take place. If this is so, the suit, which was initiated 11 years after that event, is, of course, barred by the three years' limitation established by section 106 of the Limitation Act.

In the opinion of their Lordships, the High Court has come to a correct conclusion, and it is quite unnecessary to enter upon the details of the case, which, in the view taken by the Court, amply confirm the result which has been reached.

Four salient points may simply be noted. (1) Prior to 1891, and year after year, detailed accounts, suitable as those of a current partnership business, were rendered as between the joint family, on the one hand, and Venkanna on the other. After that year these accounts entirely ceased. But (2) in the year 1891 an account was furnished of a different character. That account, in their Lordships' opinion, was to all intents and purposes not a revenue but a capital account, showing a complete division of the partnership shares. It was, in short, in form and in substance an account entirely suited to the event and purposes of a dissolution of partnership. (3) From that time forward Venkanna managed the Akuvidu business without any interposition or interference by the joint family or any representative thereof in their interest. It is true that certain requests were made to Venkanna for payment, but these were requests, not for a share of profit, but for the payment of the balance due upon the dissolution account. Finally (4), Venkanna having been apparently throughout maintaining that his liabilities under the Akuvidu business were balanced by his share of the assets in the Kottapally business, the dispute was arranged by a letter of the 3rd May 1901, the authenticity and importance of which is not denied. It was written to Venkanna by the first three plaintiffs and by Lakshmanaswamy, who is called as the first defendant. In fact, it is the letter of the members of the joint family; and in this letter, signed by them, they admit to Venkanna "you are singly carrying on business," and they refer to the "verbal arrangement before this among ourselves that the property acquired by you by carrying on business at Akuvidu, and the property acquired by us by carrying on business at Kottapally, should be duly divided and taken according to shares." They then narrate their unanimous request for a settlement, and agree to take from Venkanna a sum according to his wishes Serious questions might be raised as to whether the writers of such a letter were not barred from thereafter instituting the present suit, but for the purpose of the point of this decision it is sufficient to say that it completely confirms the idea of a dissolution of partnership having been effected at a previous date, and it squares

with the events on that footing which took place in the year 1891.

Mr. Dunne presented a careful argument, in which he strongly insisted that, as the Akuvidu partnership was one at will, it must be presumed to last till now, unless a definite date of dissolution could be put forward and made out. But, in their Lordships' opinion, this has been done, and in a substantially conclusive manner. When annual accounts ceased, and a final account, showing the division of both capital and revenue was made out, the presumption was for dissolution as at the definite date of the year in account thus closed. The cessation of the annual accounts points to some radical change having taken place, and the other circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm as in the year mentioned.

All other questions in the case are thus at an end. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and the judgment of the High Court affirmed. The appellants will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Sanderson, Adkin, Lee* and *Eddis.*

Solicitor for the Respondent: Mr. *Douglas Grant.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

APPEAL No. 124 OF 1911.

April 8, 1913.

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

GANESHA ROW—APPELLANT

versus

TULJA RAM ROW—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 462—*Father guardian* ad litem *of his minor son—Compromise—Without leave of Court—Not binding on minor—Joint Hindu family—Father or managing member—Their power to bind minor members controlled in suits by law.*

A father or managing member of a joint Hindu family may, in certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family.

But when in a suit he is the next friend or guardian of the minor his powers are controlled by the provisions of the law (section 462, Civil Procedure Code) and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court.

Appeal from a judgment and decree of the High Court, dated September 28th, 1909, affirming that passed in Original Suit on September 2nd, 1908.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment. For the original and appellate judgments of the High Court see 1 Ind. Cas. 380 and 3 Ind. Cas. 928.

Messrs. *De Gruyther, K. C.*, and *Brown*, for the Appellant, contended that the compromise was not binding on the minor as no sanction of the Court was obtained. The deeds of agreement of November 19th, and 21st and December 6th of 1897 were not fair, nor were they supported by good consideration on any reasonably adequate consideration made in the interest of the minor. They were tainted by fraud and were illegal.

Reference was made to *Manohar Lal* v. *Jadu Nath Singh* (1).

Sir *E. Richards, K. C.*, and Mr. *Dunne*, appeared for the Respondents and were not called upon to reply.

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Madras, dated the 28th of September 1909,* which, affirming a decree made in the exercise of its original civil jurisdiction on the 2nd of September 1908,† dismissed the plaintiff's suit.

The facts which have given rise to the present action relate back to the year 1886. The defendants Tuljaram and Rajaram are two brothers, being the sons of one Venkata Row, who died in 1871. Tuljaram and Rajaram, with two other sons of Venkata Row named respectively Rama Chandra Row, since deceased, and Luchmana Row, formed a joint undivided Hindu family. In 1881 there was a dissolution of the joint family and a partial division of the family property. A large proportion of the assets was, however, left undivided in the hands and under the control of Tuljaram, the first defendant, who seems to have

(1) 8 Bom L. R. 489; 10 C. W. N. 898; 4 C. L. J. 8; 16 M. L. J. 291; 3 A. L. J. 710; 28 A. 585; 33 I. A. 128; 9 O. C. 219; 1 M. L. T. 210.

* *See* 3 Ind. Cas. 928—*Ed.*

† *See* 1 Ind. Cas. 380—*Ed.*

been the managing member of the family in respect at least of the business or businesses in Madras.

In 1886 a suit was brought on the original side of the High Court of Madras by Athmaran, the son of Luchmana Row, against Tuljaram for ascertainment of the remaining undivided family assets in his hands, for accounts and partition and other reliefs. This seems shortly to have been the general scope of the action instituted in 1886, in which Rajaram, the present plaintiff's father, and other surviving members of Venkata Row's family were parties. The plaintiff, Ganesha Row, who was not born at the time of the institution of the suit, was added as defendant on his birth in December 1887, and by an order dated the 20th November 1888, his father Rajaram was appointed his guardian *ad litem*.

On the 14th of January 1892 a preliminary decree was made declaring the rights of the parties and directing accounts against Tuljaram.

By the final decree made on the 21st of October 1896 and a subsequent order of the 17th of August 1897, he was declared accountable to the family for a considerable sum of money, the share of the plaintiff's branch in the total sum being, according to the High Court, about Rs. 86,000. Tuljaram appears to have filed an appeal from the final decree of the first Court, and during its pendency he entered into agreements with the adult parties to the suit by which they either abandoned their claims, as in the case of the plaintiff's father, or compromised them for smaller sums.

Rajaram's agreement, which is dated the 21st of November 1897, recites that he "acting for himself and as guardian for his minor son Venkat Row" (another name for the plaintiff) "with a view to terminate the litigation that had been going on in the family for the past eleven years and more, and to make an amicable settlement of all matters in dispute between the several members of the family," and in consideration of the defendant Tuljaram consenting to withdraw his appeal, Rajaram agreed to "relinquish and disclaim for himself and for his minor son Venkat Row" the several sums of money for which Tuljaram was found liable to Rajaram's branch, and "to release and discharge Tuljaram from all liability in respect thereof to himself and to his minor son Venkat Row". And on the 25th of November 1897, Rajaram instructed the Registrar of the High Court "to enter up satisfaction of the decree" in respect of the several sums which amounted in the aggregate to something like Rs. 86,000. Tuljaram also on his side withdrew the appeal he had preferred against the decree. Admittedly no leave was either applied for or obtained from the Court in regard either of the agreement or the entering up of satisfaction of the decree.

Matters remained in this condition until the plaintiff attained his majority. After some preliminary proceedings to which it is unnecessary to refer for the purposes of this judgment, he brought this suit on the 7th of November 1906 to recover from the defendant Tuljaram on the basis of the decrees in the suit of 1886 a sum of Rs. 1,60,000 principal and interest.

Rajaram was also made a defendant in this action, and his acts relating to the agreement and the satisfaction entered under it were challenged as fraudulent, without consideration and not binding on the plaintiff, having been made without leave of the Court.

The learned Judge on the original side of the High Court who tried the case was of opinion that the suit was not maintainable in view of the provisions of section 244 of the Code of Civil Procedure. Treating it, however, as an application under that section he dealt with the matter on its merits.

He held that the compromise entered into by Rajaram was binding on the plaintiff, and that it was supported by consideration which consisted in the withdrawal by Tuljaram of his appeal. The principal ground of his judgment is to be found in the following passage:—

"In this case under the terms of the decree, the money, in respect of which the agreement AA was arrived at and satisfaction entered up, was made payable to the third defendant personally and not to the minor sixth defendant. If the minor had been represented by another guardian *ad litem*, and third defendant could just as well have made the compromise and entered up satisfaction of the amount payable to him under the decree and it could not have been suggested that section

462 was applicable to the case. It makes no difference, in my opinion, that the third defendant happened to be the guardian *ad litem* of the sixth defendant because in making the compromise and entering up satisfaction he was not acting as guardian *ad litem* on behalf of the minor sixth defendant but as the third defendant in the suit."

The learned Judge accordingly dismissed the plaintiff's suit, and his judgment has been affirmed on appeal by the High Court in its appellate jurisdiction. With regard to the invalidity of Rajaram's acts as affecting the plaintiff's right, the learned Judges in the Appellate Court have taken the same view as the first Court, that Rajaram, in entering into the compromise, acted in his personal capacity, which they considered him competent to do as "his appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf." They were further of opinion that "as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bona fide* compromise of a disputed claim."

It seems to their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No doubt, a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. Section 462 of the Code of Civil Procedure expressly provides that:

"No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian."

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem* for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a *bona fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

The learned Judges, however, seem to have lost sight of the fact that the agreement, which is challenged in this case, was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that, in view of the provisions of section 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' judgment the fact that the monies were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

Their Lordships are of opinion that there should be a declaration in this case that the agreement of the 21st November 1897 and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

SONBA *v.* MUNIRUDDIN.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between parties.

The respondent, Tuljaram, will pay the costs of the appeal to the High Court in its appellate jurisdiction and the costs of this appeal. The costs of the trial on the original side of the High Court and those which will be incurred in the future proceedings will abide the result of those proceedings.

Case returned.

Solicitor for the Appellant: Mr. *Douglas Grant.*

Solicitor for the Respondent: Mr. *John Josselyn.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 284-B OF 1911.

August 31, 1912.

Present:—Mr. Stanyon, A. J. C.

SONBA—PLAINTIFF—APPELLANT

versus

MUNIRUDDIN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 31—Period of grace—Applicability to Berar—Date of passing of the Act—Interpretation.

In section 31 of the Indian Limitation Act, 1908, the words 'from the date of the passing of this Act' cannot be construed in Berar to mean 'from the date of the *application* of this Act to Berar' and the Act as applied to Berar gives the same chronological period of grace as was given in British India—a period which began on the 7th August 1908 and ended on Monday, the 8th August 1910.

Appeal against the decree of the District Judge, East Berar, Amraoti, dated the 26th July 1911, reversing that of the Munsif, first class, Amraoti, dated the 17th October 1910.

The Hon'ble Sir *B. K. Bose*, for the Appellant.

JUDGMENT.—This judgment will govern the disposal of the three cases tabulated below:—

Number of suit.	Names of the parties.	Date of institution of suit.	Original Court.	Number of the appeal in District Court.	Number of the second appeal in High Court
514 of 1910 ...	Sonba—*Plaintiff* ... v. 1. Shaik Gulab, 2. Mirabai ... *Defendants.*	27th August 1910.	Munsif No. 1 of Amraoti	577 of 1910 ...	284-B of 1911.
290 of 1910 ...	Sonba—*Plaintiff* ... v. 1. Raoji, 2. Poornaji ... 3. Harbaji ... *Defendants.*	27th August 1910.	Sub-Judge No. II of Amraoti.	77 of 1911 ...	285-B of 1911.
164 of 1910 ...	Sonba—*Plaintiff* ... v. 1. Munir-ud-din, 2 Govinda ... *Defendants.*	27th August 1910.	Sub-Judge No. 1 of Amraoti.	75 of 1911 ...	47-B of 1912.

All these are suits brought by the same plaintiff to enforce deeds of mortgage, and each claim is barred by time unless it can be saved by the provisions of section 31, Act IX of 1908, as applied to Berar. The last date allowed in British India for instituting suits, which depended upon that section for being within time, was Monday, the 8th August 1910; but it is contended that the Act was applied to Berar on the 28th August 1908, and that the two years of grace allowed under that section must be

reckoned from that date. In the Courts of the Subordinate Judges this contention failed, and the plaintiff's suits were dismissed. In the Court of the Munsif limitation was not pleaded, and the Munsif, in a hasty disposal of the case, overlooked the bar, and decreed the claim. This decree was reversed, and the dismissals of the other two cases confirmed, in the District Court of East Berar, on the common ground that the period of grace given by Act IX of 1903, section 31, as applied to Berar, ran from the 7th August 1908 for two years, and, therefore, all the three suits were filed beyond time. The plaintiff has now appealed to this Court in all three cases, as above shown. These appeals were heard simultaneously, and, as already stated, this judgment will govern the disposal of them all.

Section 5 (1) of the General Clauses Act, 1897, enacts as follows:—

"Where any Act of the Governor-General in Council is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor-General".

Section 1 (3), Act IX of 1903, lays down:

"This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January 1909".

It follows that section 31 aforesaid came into force in British India on the 7th August 1908, that being the date on which the enactment received the assent of the Governor-General.

By an Order in Council of His Imperial Majesty the King-Emperor, called 'Indian (Foreign Jurisdiction) Order in Council, 1902, dated the 11th June 1902', (published in the *London Gazette* of the 13th June 1902, published in India on the 12th September 1902, and reproduced at page 232 of the *Central Provinces Gazette* of the 20th September 1902), His Imperial Majesty was pleased to confer upon the Governor-General of India in Council certain administrative powers over "the territories of India outside British India, and any other territories which may be declared by His Majesty in Council to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor-General of India in Council, or some authority subordinate to him, including the territorial waters of any such territories".

It is by virtue of the power conferred by the above Order in Council that the Governor-General of India in Council determines, *inter alia*, the law and procedure to be observed in Berar. This part of the jurisdiction is given effect to by the issue of Notifications from the Foreign Department of the Government of India. The Order in Council above quoted allows the Governor-General of India in Council to make laws for the territories within the limits of the Order, "whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise". Therefore it is a common course for the Governor-General in Council to apply, with or without modification, all or a part of a British Indian enactment to Berar. The enactment, *as applied*, comes into force in Berar from such date as may be stated expressly or by necessary implication, in the Notification, or, where no such date is stated, then from the date of Notification. By Foreign Department Notification No. 3470—I-B, dated the 28th August 1908, the Governor-General of India in Council applied Act IX of 1903 to Berar, "so far as it is applicable". No date was stated, expressly or by necessary implication for the coming into force of sections 1 and 31 of the Act. Therefore those sections came into force on the 28th August 1908, and then, by force of section 1, as applied to Berar, the remainder of the Act came into force in that territory from the 1st January 1909.

But the whole enactment was applied to Berar without any further modification than was necessary to make it applicable to that territory. In particular, no modification was made of the provisions of section 31. Sub-section (1) thereof, with which we are now concerned, reads thus:—

"Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second Schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty

years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable".

The contention on behalf of the plaintiffs-appellants amounts to this, that in Berar the words "the date of the passing of this Act" should be read as "the date of the *application* of this Act to Berar." I am of opinion that this contention cannot be maintained. It is no doubt a plausible argument that in British India the words "the date of the passing of this Act" are synonymous with the words "the date on which this section comes into force" and that the words "at once" in section 1 of the original Act, must, in its Berar *replica*, be read to mean the "28th August 1908" and not the "7th August 1908" as in British India. But there is a fallacy here. The passing of an Act is one thing: its coming into force is another. It is frequently the case that an Act "comes into force" some time after it is "passed". The procedure necessary to pass an enactment in British India begins in the Legislative Council and ends with the formal assent of the Governor-General of India. This is manifest from section 20 of the Indian Councils Act, 1861, (24 and 25 Vict. c. 67), from section 5 (1), General Clauses Act, 1897, and the English Interpretation Act, 1889, (52 and 53 Vict. c 63), section 36, clause 2, and section 38. Therefore, the Indian Limitation Act, 1908, was 'passed' on the 7th August 1908. When it was applied to Berar on the 28th August 1908, as far as it was applicable, sections 1 and 31 came into force in that territory at once, and the rest of the Act on the 1st January 1909. Section 31, even as applied to Berar, laid down a period of grace stated to be "two years from the date of the passing of this Act". The whole Act was applied by Notification and was thus a part and parcel of that Notification. Under section 20, General Clauses Act, 1897, I am bound to construe the expression "passing of this Act" as adopted for the purposes of the Notification, as having the same meaning as in the original enactment, unless there is something repugnant in the subject or context which is not the case here. In other words the Act as applied to Berar gave the same chronological period of grace as was given in British India—a period which began on the 7th August 1908 and ended, according to the Bombay High Court—*Sheodas Dalutram* v. *Narayan Asaji* (1)—on Sunday, the 7th August 1910, or, according to what I regard as the more correct view of the Allahabad High Court—*Hira Singh* v. *Musammat Amarti* (2)—and of this Court—*Balkrishna* v. *Tema* (3)—on Monday, the 8th August 1910. When section 31 was applied to Berar it contained words, *i. e.*, "the date of the passing of the Act," which were synonymous with the words "the 7th August 1908," and the Governor-General in Council applied those words to Berar without any modification. The words "at once" in section 1 could not be applied to Berar without modification, and came under the general reservation "as far as it may be applicable" made in the Notification to meet such cases. But there is no such impossibility in applying section 31 *en bloc*. It reduced the period of grace by three weeks in the case of Berar, but those three weeks being at the commencement of the period were rightly disregarded as making no practical difference to the litigants concerned. It is a reasonable presumption that the Government of India desired to make the enactment as uniform as possible in its application to the Central Provinces and Berar, and the necessary Notification, therefore, appeared soon after the enactment was passed. It gave mortgagees in Berar whose mortgages were governed by section 31, a period of grace from the 28th August 1908 to the 8th August 1910 to file their suits. It cannot be disputed that if section 31 had contained the words "two years from the 7th August 1908" there is nothing in the Notification or its date which would have saved a suit in Berar filed after the 8th August 1910. I am unable to see that any other interpretation can be put on words which, when applied, stood for "the 7th August 1908."

For the above reasons, I am of opinion that the view taken by the lower Appellate Court is correct, and the three appeals in

(1) 12 Ind. Cas 811; 36 B. 268; 13 Bom. L. R. 1153.
(2) 14 Ind. Cas. 154; 34 A. 375; 9 A. L. J. 439.
(3) 12 Ind. Cas. 810; 7 N. L. R. 176.

this Court must all fail. The present appeal is, therefore, dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF JUDICIAL COMMISSIONER, CENTRAL PROVINCES, NAGPUR

APPEAL NO. 91 OF 1911.

April 8, 1913.

Present:—Lord Atkinson, Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

GULAB SINGH AND OTHERS—APPELLANTS

versus

RAJA SETH GOKULDAS AND OTHERS—RESPONDENTS.

Central Provinces Court of Wards Act (XVII of 1885), s. 18—Hindu Law—Managing member of joint Hindu family placing whole joint family property under the management of Court of Wards—Interest of a member of the family—Power of the managing members—Power of the Chief Commissioner under the Act—Proposal for mortgage of property under Court of Wards sanctioned—No necessity for a particular transaction of mortgage or its precise terms—Applicability of the Act to joint Hindu families—Conveyancing little understood in country parts of India.

M. and *D*, two brothers, the senior and managing members of a *Mitakshara* joint Hindu family, consisting of ten persons, describing themselves as *zemindars* of several villages in the Central Provinces, made a written application to the Deputy Commissioner of their District, stating therein that they were indebted to a large extent, and that they were neither able to arrange for the liquidation of the debt nor to manage the estate, and, therefore, praying that the Deputy Commissioner would assume the management of their *malaguzari* villages under section 7(*c*) clause 4 of Act XVII of 1885, and arrange for the discharge of their debt.

The petition was duly forwarded to the Chief Commissioner for sanction which was given, accepting also the proposals for the liquidation of the debt, and in the result the mortgage was made upon which a suit for possession of the mortgaged property or in the alternative for a decree for sale was brought by the mortgagees.

Held:

(*i*) that the interest of a member of an undivided *Mitakshara* family in the family property is not individual property.

Gharibullah v. *Khallak Singh*, 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 25 A. 407 (P. C.) and *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. (P. C.) 1; 20 Eng. Rep. 30, referred to.

(*ii*) that *M.* and *D.* in making the application to the Deputy Commissioner were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their individual interests;

(*iii*) that under the circumstances of the family *M.* and *D.* acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner;

(*iv*) that they in making the application acted within their powers and authority as the managing members of the joint family;

(*v*) that all the immoveable property constituting the ancestral estate of the joint family was placed and taken under the superintendence of the Court of Wards;

(*vi*) that Act XVII of 1885 was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others;

(*vii*) that the Chief Commissioner had power to sanction the superintendence of the joint family property and had given sanction to the proposal of mortgaging the property;

(*viii*) that it was not necessary under section 18 of Act XVII of 1885 that the actual mortgage to be made should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage;

(*ix*) that a large amount of the mortgage-money remaining unpaid, and the Court of Wards failing to transfer the mortgaged property to the mortgagees and relinquishing the management of the estate, the mortgagees were entitled under the terms of the mortgage to bring the suit for sale;

(*x*) that conveyancing is but little understood in the country parts of India.

Appeal from the decree of the Judicial Commissioner of the Central Provinces, dated the 7th May 1907, affirming that of the District Judge of Hoshangabad, dated the 4th April 1906.

Mr. *Lowndes*, for the Appellants, contended that the deed of mortgage was void and of no effect for want of previous sanction thereto of the Chief Commissioner. In any event it could not bind the first three appellants who had nothing to do with the Court of Wards.

Mr. *DeGruyther*, *K. C.*, with him Mr.

GULAB SINGH *v.* RAJA SETH GOKULDAS.

Parikh, on behalf of the Respondents, contended that there were concurrent findings of the two lower Courts on all material facts. The deed of mortgage was binding upon the first three respondents irrespective of the provisions of Act XVII of 1885 and that they are further personally liable for the discharge of the debts thereby incurred.

Mr. *Lowndes* replied.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 7th May 1907 of the Judicial Commissioner of the Central Provinces which affirmed with slight modifications a decree, dated the 4th April 1906, of the District Judge of Hoshangabad.

The suit in which the appeal arose was brought on the 22nd September 1904 in the Court of the District Judge of Hoshangabad by mortgagees upon a mortgage of immoveable property which was made on the 10th December 1891 by the Deputy Commissioner of the District of Hoshangabad as and being the Court of Wards for that district. The suit was one for possession of the mortgaged property including the *sir* lands, or alternatively for a decree for sale. Certain other alternative reliefs were claimed.

The defences to the suit, so far as they are now material, were that the mortgage had, it was alleged, been made by the Deputy Commissioner without the previous sanction of the Chief Commissioner and was void; that the property mortgaged was the undivided ancestral property of a joint Hindu family under the rules of the *Mitakshara*, and that the Court of Wards had no right or authority to mortgage the shares, rights, or interests of those members of the family who are not Government wards or who were minors; and that no decree for sale, or for possession, or for any of the alternative reliefs could be made.

The District Judge on the 4th April 1906, having found that there was then due on the mortgage Rs. 2,32,403 for principal and interest, made a conditional decree for sale. From that decree only the defendants, Gulabsingh, Tikaram, Sitaram, Dulichand son of Pemsha, and Himmatsingh, who are the appellants here, appealed to the Court of the Judicial Commissioner. The Judicial Commissioner on the 7th May 1907, on appeal slightly varied the decree of the District Judge and added a declaration that the defendants will not be personally liable for any sum by which the sale-proceeds of the mortgaged property may fall short of the amount due for the time being on the mortgage, and in other respects affirmed the decree for sale of the District Judge with costs of the appeal to his Court against the then appealing defendants. On the 25th August 1908 the then District Judge of Hoshangabad, finding that the defendants had not paid into Court or to the plaintiffs Rs. 2,67,871-10-8, principal, interest and costs, made a decree absolute for sale of the mortgaged property specified in a Schedule to that decree, and allowed interest on the decreed sum from the 24th July 1903 until liquidation, adding the declaration which had been made by the Judicial Commissioner.

For the purposes of this appeal it is necessary to refer as briefly as may be to the facts antecedent to the commencement of this suit. On or shortly before the 1st July 1890 Maharajsingh, now dead, and his brother, Dulichand, a defendant to this suit, who described themselves as *zemindars* of Baherakhedi, Bagalkhedi, Patlai, Punwasa, Bamuria, and Sarora, *Pargana* Hoshangabad, made a written application to the Deputy Commissioner of Hoshangabad, in which they stated that they were indebted to the extent of about Rs. 1,14,358-11-9; that they were neither able to arrange for the liquidation of the debt nor to manage the estate; and that if the villages should be lost on account of the indebtedness:—

"Our children will have no estate left to them;" and prayed that "if, under section 7 (*c*) clause 4, of Act XVII of 1885, you be pleased to assume the management of our *malguzari* villages of Baherakhedi and others, and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves, for which they will ever remain grateful to you. The rest lies with you."

The villages mentioned in the petition were the undivided ancestral property of a joint Hindu family governed by the rules of the *Mitakshara*, and Maharajsingh and Dulichand, who were brothers, were the senior and managing members of that family. At that time the joint family consisted of Maharaj

singh, his son Gulabsingh then about thirty-six years old, Tikaram then about twenty-one years old, and Sitaram then about nine years old, and Dulichand and his sons Himmatsingh then about twenty-two years old, Bajilal then about sixteen years old, Fatichand then about eight years old, and Jagannath then about five years old, and a son of Gulabsingh named Dinanath, who was then about eight years old. The indebtedness of the family in respect of which the property was liable to be lost amounted to about Rs. 1,20,000. As will later appear, the petition was duly forwarded to the Chief Commissioner for his sanction to the Court of Wards assuming the superintendence of the property mentioned in the petition, that sanction was given, and in the result the mortgage was made upon which this suit was brought.

Having regard to the defences which were set up in this suit, it is necessary to consider with what object that petition was presented to the Deputy Commissioner, and what authority, if any, Maharajsingh and Dulichand had to bind the other members of the joint family by their action in presenting the petition. It has been contended on behalf of the appellants that Maharajsingh and Dulichand had power to bind only their own individual interests in the joint property, and that if their object was to get the Court of Wards to assume the superintendence of the joint family property, they acted without authority and their action could not and did not bind the other members of the joint family.

Maharajsingh and Dulichand were *zemindars* and were the *malguzars* of the property mentioned in their petition, and were, as their Lordships have said, the senior and managing members of the joint family of which the property mentioned in their petition was the ancestral property. The application was made under the Central Provinces Government Wards Act, 1885, (Act XVII of 1885). The application was not drawn up with the precision with which it probably would have been drafted by a trained lawyer, but as has been pointed out by this Board in more than one appeal the art of conveyancing is but little understood in the country parts of India. It must, in their Lordships' opinion, be taken that in making the application to the Deputy Commissioner, Maharajsingh and Dulichand were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their own individual interests.

It appears to their Lordships to be obvious that the intention of Maharajsingh and Dulichand in making that application was that the Court of Wards should in the interests of all the members of the joint family assume the superintendence of the immoveable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property, which on a partition of that property, not then in contemplation, might possibly come to Maharajsingh and Dulichand. Neither Maharajsingh nor Dulichand had more than the mere co-parcenary interest of a member of the joint family in the family property. Neither of them had any defined share. It was held by this Board in 1903 in *Gharibullah* v. *Khallak Singh* (1) that the interest of a member of an undivided *Mitakshara* family in the family property is not individual property. It had previously been held by this Board in 1866 in *Appovier* v. *Rama Subba Aiyan* (2) that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shown to their Lordships that it was the practice of the Courts of Wards of the Central Provinces to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharajsingh and

(1) 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 25 A. 407 (P. C.).

(2) 11 M. I. A. 75; 8 W. R. (P. C.) 1; 20 Eng. Rep. 30.

Dulichand acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharajsingh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family.

Before, apparently, that formal application was made, the Deputy Commissioner had been in communication with the plaintiffs' firm to ascertain the terms upon which they would advance the money required for the liquidation of the then indebtedness of the family on the security of the immoveable property of the family, which he described in a letter of the 21st June 1890 as consisting of the five whole villages, a 12-annas share in another village, and 20 plots held on absolute occupancy tenures in different villages. In that letter the Deputy Commissioner enclosed "a list of the property it is proposed to hypothecate, with particulars as to income and expenditure." It is obvious that from the first it was on the security of a mortgage of the ancestral property of the family that it was intended to obtain a loan from the plaintiffs.

On the 1st July 1890, the Deputy Commissioner of Hoshangabad forwarded to the Commissioner of the Nerbudda Division the application of Maharajsingh and Dulichand, praying that their estate might be taken under the management of the Court of Wards, and having mentioned his estimate of the then indebtedness as Rs. 1,14,358-11-9, the annual income of the property and the outgoings, and that it was proposed to borrow Rs. 1,00,000 from the plaintiff's firm, he recommended that the Chief Commissioner should be asked to sanction the assumption of the management of the property by the Court of Wards until the liabilities of the family should be liquidated. There was some further correspondence between the Deputy Commissioner, the Commissioner of the Nerbudda Division, and the Secretariat of the Central Provinces, and ultimately, on the 28th January 1891, the Commissioner of the Nerbudda Division was informed by the Secretariat that the Chief Commissioner had sanctioned the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharajsingh and Dulichand, *malguzars* of Baherakhedi and other villages in that district, and had also sanctioned an allowance of Rs. 883 per annum being made for the maintenance of the proprietors, and accepted the proposals for the liquidation of the debt. What were the precise terms of those proposals does not appear from the papers which are before the Board, but it may be assumed from the papers which are before the Board that the proposals which were approved by the Chief Commissioner included a proposal to obtain from the plaintiff's firm, on the security of a mortgage of the ancestral property, a sum sufficient to liquidate the then indebtedness of the family.

On the 31st January 1891 the following official notification appeared in the "Central Provinces Gazette": —

"No. 609.—Declaration by the Chief Commissioner under section 7 (1) (*c*) of the Central Provinces Government Wards Act (XVII of 1885).

"The Chief Commissioner is pleased to declare Maharajsingh and Dulichand, *malguzars* of Baherakhedi, in the Hoshangabad District, on their own application, incapable of managing their property, and has sanctioned the assumption of its superintendence by the Court of Wards of that district."

The property referred to in that notification must, in their Lordships' opinion, be deemed to have been all the immoveable property which constituted the ancestral estate of the joint family which was under the management of Maharjsingh and Dulichand, and was referred to in their application. It was that ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated. It was by a mortgage of that property that it was intended to raise a sum sufficient to liquidate the indebtedness of the family. It could not have been intended that the Court of

Wards should take over the management and superintendence of the family property so far only as the unpartitioned interests of Maharajsingh and Dulichand in the joint family property were concerned; if that had been the object, it would have frustrated the intention with which the proposal was made that the superintendence of the property should be assumed by the Court of Wards.

One effect of the notification was expressly to disqualify Maharajsing and Dulichand to manage the family property. It could not have been intended that they should be disqualified so far only as their own unpartitioned interests in the property were concerned, and that they should be qualified to manage the property so far as the interests of the other members of the family were concerned; nor could it have been intended that the Court of Wards and the members of the joint family other than Maharajsingh and Dulichand should jointly manage the unpartitioned family property.

Act XVII of 1885 was not as precisely worded as it might have been, but it obviously was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others situate within the territories for the time being administered by the Chief Commissioner of the Central Provinces. In passing Act XVII of 1885 the Indian Legislature could not have been unaware that much of the immoveable property held by Hindus within these territories was family property of joint Hindu families. It is difficult to see how the Court of Wards could exercise some of the powers entrusted to it under the Act, as, for example, the power of letting the whole or any part of the property of Government wards under its superintendence, or could perform the duties of superintendence, which included the management and collection of rents, unless in such a case as this the Chief Commissioner was entitled under the Act to sanction the assumption by the Court of Wards of the superintendence of the family property of the joint Hindu family, whether the application that the property should be taken under the management of the Court of Wards was made by all the members of the family or by the managing members only. Their Lordships are of opinion that the Chief Commissioner had power to sanction the assumption by the Court of Wards of Hoshangabad of the superintendence of the joint family property which was the property mentioned in the application of Maharajsingh and Dulichand.

It must, in their Lordship's opinion, be inferred from the letter of the 28th January 1891 from the Secretariat to the Commissioner of the Nerbudda Division that the Chief Commissioner of the Central Provinces had given his sanction to the proposal that the Court of Wards of the District of Hoshangabad should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. It was not in their Lordships' opinion necessary under section 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage. The sanction which is to be inferred from the letter of the 28th January 1891 empowered the Court of Wards to mortgage the property under section 18 of Act XVII of 1885.

It having been agreed between the Court of Wards and the plaintiffs' firm that they should advance Rs. 1,20,000 on the security of a mortgage of the family property, the plaintiffs' firm in March 1891 advanced the Rs. 1,20,000, and by the 25th March 1891 the Court of Wards with the money so advanced discharged the then indebtedness of the family. On the 10th December 1891 the Court of Wards of Hoshangabad in the exercise of its statutory power made the mortgage upon which this suit has been brought. In their Lordships' opinion the Court of Wards had obtained from the plaintiffs' firm most favourable terms for the loan, although owing to then unforeseen circumstances the object of saving the property for the family has not been obtained.

By the mortgage all the rights, title, and interest of the mortgagors in the property mentioned in the first schedule to the mortgage, together with all actual and reputed rights, easements, and appurtenances to the same, and all cultivated and uncultivated

land, groves, *abadi*, *sir*, rents, and profits, by whatever name the same should be known, were hypothecated by way of mortgage to the mortgagees. The mortgage money was to be re-paid with interest by annual instalments extending over more than 30 years. It was agreed that in the event of Rs. 30,000 becoming overdue the Court of Wards should recover such sum by sale or otherwise of sufficient of the hypothecated property.

The mortgage deed also contained the following important clauses:—

"And it is further agreed that the Court of Wards shall continue to manage this estate so long as there is any prospect of the debt being re-paid from income of the same, and that if from any cause this should appear impossible, that the Court of Wards shall, if the mortgagors so desire, either sell up the entire property or so much as may be necessary and devote the proceeds to liquidation of the debt, or make the estate over to the mortgagees if they prefer this course in satisfaction of their claims, and that upon such sale or transfer all further liabilities on the part of the Court of Wards towards the mortgagees shall cease.

"And it is further agreed that it will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event of management being relinquished before such time, liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise."

During the years 1892 and 1893 the Court of Wards paid to the mortgagees Rs. 16,000. Since then no instalment has been paid. The Court of Wards, owing to unforeseen circumstances, found it impossible to pay the balance of the mortgage debt or any other instalments or interest, and on the 10th December 1901 the plaintiffs' called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage. On the 13th March 1902 the Deputy Commissioner of Hoshangabad, who was the Court of Wards, by letter of that date, gave the plaintiffs notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned, and offered to make over to them the mortgaged portion of the estate—"in full satisfaction of your claims with all outstanding rental arrears and debts, excepting the cultivating rights in *sir* land which are to be reserved for the maintenance of the Wards."

It is to be observed that in that letter the members of the joint Hindu family were treated as Government wards. The offer to hand over the mortgaged property less the *sir* lands was not in compliance with the contract in the respect in the mortgage deed and was declined. On the 23rd August 1902 it was officially notified that the superintendence of the estate of the family had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards with effect from the 12th June 1902. The mortgaged property was not sold by the Court of Wards, the mortgage debt, with the exception of Rs. 16,000 which were paid in 1892 and 1893, has not been paid, and the Court of Wards did not transfer the mortgaged property to the mortgagees, and the management of the estate was relinquished by the Court of Wards.

Their Lordships are of opinion that under these circumstances the moneys remaining unpaid under the mortgage became payable, and the plaintiffs were entitled to bring this suit for sale. Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner should be affirmed, and that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Downer* and *Johnson*.

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

APPEAL No. 78 OF 1912.

April 29, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Raja DEBI BAKHSH SINGH—APPELLANT

versus

HABIB SHAH—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9—

DEBI BAKHSH SINGH *v.* HABIB SHAH.

Plaintiff dying during pendency of suit—Suit dismissed for default--Inapplicability of the provisions—Inherent power of Court.

The rules or orders of the Code of Civil Procedure, 1908, dealing with the case of the non-appearance of a suitor do not apply to the situation which arises when a suitor is dead.

Appeal heard *ex parte* from a judgment (see 14 Ind. Cas. 711) and a decree of the Court of the Judicial Commissioner of Oudh, dated the 5th December 1911 (see 14 Ind. Cas. 221) affirming on review a judgment and decree dated February 20, 1912 which had reversed an order of the Court of the Deputy Commissioner of Bahraich, dated September 11, 1911.

FACTS.—Facts are fully stated in 14 Ind. Cas. 221 and 711.

Messrs. *De Gruyther*, *K. C.*, and *Kyffin*, for the Appellant, contended that the Court of the Judicial Commissioner had no power to interfere under the Code of Civil Procedure with the order of the Deputy Commissioner who had an inherent power to deal with such matters under section 151 of Civil Procedure Code.

JUDGMENT.

LORD SHAW.—The appellant's father, Raja Muneshar Bakhsh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd May 1911, in the Court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st May 1911. On the 4th July the following occured before the Deputy Commissioner:—"On the case being called today the plaintiff was not present. I, therefore, dismiss the claim. Costs upon plaintiff."

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st June. It is plain to their Lordships that, upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognised. It requires no words of their Lordships to show the inapplicability of Rules or Orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under Order XXII, rule 9, of the Civil Procedure Code. He did so on the 3rd August, which was well within the period of six months' limitation under Article 176 of the first Schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under section 34 of the Rent Act.

On the 11th September 1911 the Deputy Commissioner pronounced the following order:—

"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Mallanpur. The other side claim that the re-hearing is barred under section 34 of the Rent Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented applicant's putting up this case. Under these circumstances I accept this application, and fix 27th October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly on the 5th December 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order, and on the 20th February 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitiated by applying to a dead man orders and rules applicable to a defaulter. By the Code of Civil Procedure, section 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends

of justice, or to prevent abuse of the process of the Court." In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th September 1911 restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd August 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

Appeal allowed.

Solicitors for the Appellant: Messrs *T. L. Wilson, & Co.*

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1074 OF 1912.
April 16, 1913.
Present:—Mr. Justice Ryves and
Mr. Justice Lyle.
JIWAN BAKHSH—DEFENDANT—APPELLANT
versus
Munshi KHAN BAHADUR KHAN—
PLAINTIFF—RESPONDENT.

Evidence—Time of death, proof of—Municipal Register not properly proved, whether admissible in evidence.

In order to prove the time of death of a particular person a Municipal Register was produced. The clerk who produced the register could not say who wrote the particular entries relied on nor could he say who was responsible for keeping the Register nor on whose information the entries were made:

Held, that the entries were inadmissible in evidence.

Sampat v. *Gouri Shankar*, 10 Ind. Cas. 713; 14 O. C. 68, referred to.

Second appeal from the decision of the Additional Judge of Bareilly, dated the 16th of May 1912.

Mr. *Ghulam Mujtaba*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—This is a suit for possession of a half share of a house by partition. The lower Courts decreed it. Jiwan Bakhsh defendant No. 1 appeals, the decision of the case turns on the question of whether Bakhshi Begam died before her son Abdul Aziz or not. The defendant's case is that she died first and that all her property, therefore, passed to her son from whom it passed to his father to the exclusion of Latafat Ullah from whom the present plaintiff might derive his title.

In finding that Abdul Aziz died before Bakshi Begam the lower Courts have both chiefly relied on entries in a certain register. In our opinion the register has not been properly proved and the entries in it are not admissible in evidence. It was produced by a Municipal clerk who was new to the work. The entries were not in his handwriting and he could not say who wrote them.

Neither could he say who was responsible for keeping up the register or on whose information the entries were made or who was responsible for checking their correctness. It is not shown that the entries in question were made by any public servant in the discharge of his official duties. We agree with the opinion expressed in *Sampat* v. *Gauri Shankar* (1) very similar case.

It is clear that the decisions of the two lower Courts are mainly based on the entries in the register. The Court of first instance merely says that the other evidence corroborates them. The lower Appellate Court says that the other evidence is unsatisfactory. Plaintiff is out of possession, he is trasferee from Latafat Ullah and seeks partition 18 months after the death of Bhakhsi Begam and Abdul Aziz by ousting a man now admittedly in possession of the whole property. Under these circumstances it lay on him to establish his case by clear evidence. We have read the oral evidence and are of opinion that leaving the register out of consideration it is insufficient to do so.

We, therefore, decree the appeal and dismiss the suit with costs in all Courts. In this Court on the higher scale.

Appeal decreed.

(1) 10 Ind. Cas. 713; 14 O. C. 68.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 524 OF 1912.

November 13, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

THE GOVERNMENT PLEADER, BOMBAY—APPLICANT

versus

ANNAJI NARAYAN DESHPANDE—AND ANOTHER—OPPONENT.

Bombay Regulatin II of 1827, *s.* 56—*Pleader—Misbehaviour not limited to professional misconduct—High Court—Jurisdiction disciplinary*

The occurrence of the word "misbehaviour" in juxtaposition with the case of a Pleader merely accused of a criminal offence suggests that the misbehaviour need not necessarily be restricted to professional misbehaviour.

The jurisdiction of the Bombay High Court in such matters is not limited to cases where a Pleader's alleged misconduct is committed in the course of his professional duties.

There is no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England.

Government Pleader v. *Jagannath*, 33 B. 252; 10 Bom. L. R. 1169, relied upon.

Messrs. *D. A. Khare* and *C. A. Rele*, for Opponent No. 1.

Mr. *Campbell*, (with him Mr. *G. S. Mulgaonkar*), for Opponent No. 2.

JUDGMENT.—This is a petition by the Government Pleader who invokes the disciplinary jurisdiction of the Court against two Pleaders, named Deshapande and Kanmadi. The former was enrolled as a District Pleader in 1895, and the latter was enrolled in 1896. The charges against these persons are set out in detail in the Government Pleader's petition and need not at present be recapitulated. It will be enough for the moment to say that they involve alleged acts of fraud and gross misconduct. These proceedings are taken under clause 56 of Regulation II of 1827, which provides that a Pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed; and the first argument which has been addressed to us turns upon the construction of the words of this clause, particularly the word 'misbehaviour' which is the governing word in this case. For the purposes of considering this argument, we must, of course, assume that the acts of fraud and misconduct, alleged against the opponents, were committed by them. It has been contended by Mr. Khare for the first opponent, Deshpande, and also by Mr. Campbell for the second opponent, Kanmadi, that the word 'misbehaviour' in clause 56 must be narrowly construed so as to be restricted to misbehaviour in the strict course of a Pleader's professional duties. We are, however, unable to accept this construction. It appears to us that the words of the clause itself do not favour the argument; and the occurrence of the word 'misbehaviour' in juxtaposition with the case of a Pleader merely accused of a criminal offence rather suggests that the misbehaviour need not necessarily be restricted to professional misbehaviour. It is clear, moreover, that the larger construction is that which has the authority of this Court, for upon that construction the case of *Government Pleader* v. *Jagannath* (1) was decided. Lastly, there appears to us to be no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England. The rule prevailing in England, however, is clearly against the opponents' contention. That contention was considered in *In re Blake* (2) and was disallowed by Cockburn, C. J., who said that in deciding that case he would "proceed on the general ground that, where an Attorney is shown to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of Attorney and client was subsisting between him and the person defrauded, or in his character as an Attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers." Mr. Justice Wightman in concurring said that it was of the greatest importance that transactions to which Attorneys are parties should be *uberrimæ fidei*, and that the conduct of those who are accredited as officers of the Court should be above suspicion. So Mr. Justice Crompton, in

(1) 2 Ind. Cas. 264; 33 B. 252; 10 Bom. L. R. 1169.

(2) (1860) 3 E. & E. 34 at p 38; 30 L. J. Q. B. 32; 6 Jur. (N. S.) 1242; 2 L. T. (N. S.) 429; 129 R. R. 604; 121 Eng. Rep. 357.

repudiating the narrower view of the Court's jurisdiction, quoted from Lush's Practice, where it is laid down that for any gross misconduct, whether in the course of his professional practice or otherwise, the Court will expunge the name of the Attorney from the roll. Mr. Justice Blackburn in explaining his reasons for the same view said:—"It is not necessary, in order to induce the Court to interfere in a summary manner, that the misconduct charged should either amount to an indictable offence, or arise out of a transaction in which the relation of Attorney and client subsists between the Attorney and the person against whom he has been guilty of 'misconduct.'" He quoted with approval what was said by Baron Alderson in *Stephens* v. *Hill* (3), namely, "If persons are to be accredited by the Court, it is our duty to watch over and control their conduct." This case was followed in *In re Hill* (4), where Chief Justice Cockburn says: "I am perfectly prepared to abide by what I said in *In re Blake* (2). When on Attorney does that which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as Attorney of the Court." Mr. Justice Blackburn also used language which is apt to our present purpose. He said: "We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an Attorney."—Reference may also be made to *In re Weare, Ex parte Incorporated Law Society* (5), where the Court upheld the view that its jurisdiction was complete even although the misconduct of the Attorney was not professional misconduct. Lord Justice Lindley in discussing the question says: "What is the function of the Court in considering applications to strike Solicitors off the rolls? It is impossible to express that function better than in the language of Lord Mansfield in the case of *Re Brounsall* (6), which was repeated and adopted with little variation in the later case of *Rex.* v. *Southerton* (7). The question is whether a man is a fit and proper person to remain on the roll of Solicitors and practise as such. That is the question." Lastly it may be observed that the *Sanad* which was issued to these opponents recites that they shall not be liable to removal from their situation "during their good behaviour," the words "good behaviour" being apparently of a general description. For these reasons we are of opinion that it is incorrect to hold that this Court's jurisdiction in such matters is limited to cases where a Pleader's alleged misconduct is committed in the course of his professional duties.

It remains to determine whether or not the Government Pleader has succeeded in establishing the charges which he has made against these opponents. We are clearly of opinion that he has so succeeded; and in our judgment nothing more is required to establish that proposition than to set out the facts as they are now ascertained to be. We do not pause to discuss those facts at any length. For the most part they are admitted facts; and although a minor detail here and there has been challenged, or an attempt has been made to put an innocent complexion upon one or two incidents, we are satisfied on the evidence, and after hearing all the arguments, that the true view of the facts of this case is the view which was taken by the District Judge, and on appeal by this Court.

The facts, then, to which we refer, are in substance these: The genealogy of the parties concerned is given in the District Judge's judgment and need not now be repeated. Pandurang Shamji owned a house and certain Survey Numbers in the village of Madbhavi. In 1902 Pandurang died, leaving his widow Rakhamabai and a separated brother, Govind. His son Narsu having predeceased Pandurang, his daughter Dhondubai was left in a position of exceptional helplessness, seeing that her

(3) (1842) 10 M. & W. 28; at p. 34; 1 Dowl. (N. s.) 669; 11 L. J. Ex. 329; 6 Jur. 585; 62 R. R. 517.
(4) (1868) L. R. 3 Q. B. 543; 9 B. & S. 481; 37 L. J. Q. B. 295; 18 L. T. 564; 16 W. R. 1061.
(5) (1893) 2 Q. B. 439; 62 L. J. Q. B. 596; 69 L. T. 522; 58 J. P. 6.
(6) (1778) 2 Cowp. 829; 98 Eng. Rep. 1385.
(7) (1805) 6 East. 126; 8 R.R. 428; 2 Smith 305; 102 Eng. Rep. 1235.

own husband was a half-witted man. In 1904 Pandurang's widow died ; and in the same year the predeceased son's widow Venubai filed Suit No. 174 of 1904 against Rakhamabai and the mortgagees of certain parts of Pandurang's property, for arrears of maintenance and for future maintenance. Rakhmabai died during the pendency of this suit, and her three daughters were brought on the record as defendants in her stead. In this suit Deshpande was the Pleader for Venubai, while Kanmadi was the Pleader for the mortgagee, Ghenappa. Dhondubai pleaded that Pandurang's property had been given to her by Pandurang during his life and that it was not liable for Venubai's maintenance. Dwarkabai on the other hand admitted Venubai's claim and her liability to satisfy one-third of it. The defendant Ghenappa urged that the properties which he held in mortgage were not liable as his claim was prior. In the end a decree was passed substantially in favour of Venubai, but the lands mortgaged to Ghenappa were excluded from the properties liable to contribute on the ground that the mortgages were effected during Pandurang's life-time. The Court disallowed Dhondubai's claim that the properties were given to her by Pandurang. This decree, which was made in October 1905, threw upon Venubai the obligation to pay Court-fees.

Against this decree Dhondubai preferred an appeal to the District Court, her main contention in that appeal being, as it had been in the trial Court, that she was the donee of the properties from Pandurang. The appeal remained pending for a long period of time, and the Pleader instructed by Dhondubai to conduct it was a gentleman named Mr. Natu. There is reason to suppose that about this time Govind and his two sons, Hanmant and Shamji, were casting covetous eyes upon this property. It must also be noted that the property adjoined lands belonging to the opponent Deshpande, and there are clear indications that from an early date the existence of this property had excited Deshpande's avarice.

On the 21st December 1906 occurred the first series of overt transactions in this connection. They are instruments executed by Dhondubai in favour of Deshpande. Exhibit 93 is a sale-deed of the undivided moiety of the Survey Numbers, while Exhibit 92 was a self-liquidating mortgage for a term of ten years, operating upon the other undivided moiety of these lands. There was also an oral agreement made by Deshpande that he would conduct Dhondubai's appeal and would see to the education of her son. It is in our judgment clear upon the evidence either that no consideration or that a very fragmentary consideration passed from Deshpande in connection with these instruments. It is equally clear that the whole transaction was a hole and corner one, rushed through with suspicious haste, and that the woman Dhondubai had no opportunity to obtain, and did not obtain, any independent legal advice.

These matters later came to the knowledge of Shamji Govind, who was naturally anxious to defeat Deshpande; and it appears that Dhondubai and her relatives soon began to realise the true effects of these Exhibits 92 and 93. In these circumstances on the 12th May 1908, Deshpande passed an agreement in favour of Dhondubai's husband, Shesho Kulkarni, by which Deshpande, waiving some of the privileges reserved to him under Exhibits 92 and 93, agreed to accept all liability for the expenses involved in bringing the land under cultivation. The Government Pleader urges, and we think with accuracy, that this concession was made by Deshpande in order to remove the doubts and suspicions which had formed in the minds of Dhondubai and her relatives, and to keep them quiet.

Meanwhile in January 1908, Dhondubai's sister Dwarkabai had died. Shamji, anxious, as we have said, to save the property from Deshpande, resorted to the second opponent Kanmadi and consulted him as to the best means of effecting this purpose. Kanmadi saw that the unmarried daughter would take to the exclusion of the married daughter, and, therefore, advised Shamji that if possible he should obtain a conveyance from Dwarkabai's relatives on her husband's side. Shamji himself, however, did not take such a conveyance. But on the 29th November 1908 the opponent Kanmadi himself takes a deed of this character from Dwarkabai's husband, Bharmaji. The Government Pleader contends, and again we think with justice, that this was an attempt by Kanmadi to sup-

plant his client Shamji and to takeadvantage of the disputes concerning the title of this property. In any event the manœuvre afterwards became known to Shamji, and on the 1st of December 1908, we have another set of transactions. By Exhibit 145 Kanmadi conveys an undivided one-third of these lands to Shamji's brother, Hanmant, and he agreed to give another one-third to Dhondubai. The object of these transactions was, in our opinion, to enlist the assistance of Shamji and Dhondubai, without whose aid the title derived from Bharmaji would be uncertain and precarious. With their aid, however, Kanmadi was placed in a position of much strength which he proceeded to use to the best advantage. He, Dhondubai, Dhondubai's husband and Shamji Govind, then repaired to Belgaum, and there on the 18th December 1908, Dhondubai who had been kept from any opportunity of consulting her Pleader, Mr. Natu, applied to the Court to withdraw her appeal. That application was allowed, and the parties being satisfied returned to their homes.

On the 23rd December Kanmadi conveyed to Dhondubai, not the one-third which he had promised, but only one-sixth (see Exhibit 142). On the same day by Exhibit 141 Hanmant, the brother of Shamji, conveyed one-fourth of his one-third to Dhondubai's husband. Thus on the 23rd December 1908 Dhondubai's husband became entitled to an undivided one-fourth of the property. These devices came to the knowledge of Deshpande who perceived that he had been outwitted by Kanmadi. He, therefore, approaches Bharmaji on his own account, and on the 6th of January 1909 obtains from Bharmaji, nominally for a sum of Rs. 1,000, a conveyance of this identical property. The conveyance is Exhibit 160, and it is worth while to refer to it for a moment for the purpose of seeing the value which the parties themselves were putting on the documents previously obtained. In this instrument Bharmaji recites that "there was really speaking an agreement between me and Kanmadi, Pleader at Athni, whereby he agreed to get it decided that all those lands belonged to me alone and to get the possession thereof awarded to me and in respect of his remuneration and costs for his accomplishing the same I was to give him ¼th of the said lands. But he got from me a hollow sale-deed written in his favour in respect of the said lands, having mis-represented to me *inter alia* that my doing so would give him facility in conducting the work and security for the costs that he would have to incur. But within a few days after the sale-deed was passed, he began to dispose of the said land by making sales etc., thereof in favour of others, representing that he was the actual owner. Hence it being clear that he does not intend to complete the agreement that was made between us, I am convinced that he deceived me fully."

Thereafter Deshpande made attempts to get possession of the property by filing possessory suits against some of the tenants. Kanmadi, it appears, intervened, and there was an abortive attempt to effect a compromise. When that attempt failed, the final step was taken in these proceedings, and Deshpande and Kanmadi made common cause against Dhondubai and Shamji. In pursuance of this conspiracy between them Deshpande conveys an undivided half to Apte, a client of Kanmadi, while Kanmadi conveys his undivided half to one Kulkarni, a client of Deshpande. These conveyances were executed on the 25th and 26th March 1909. They were presented for registration on the same day, the 29th March, when both the opponent Pleaders were present at the registration office. It must be noted that neither of these documents describes any source of the transferor's title or gives any warranty of title. On the 2nd February 1910 Deshpande files Suits Nos. 41 and 42, and the evidence in both was recorded in Suit No. 41. The parties were substantially the same, the defendants including the tenant concerned on the land, Shamji, his father Govind, Dhondubai, Kanmadi and Kulkarni in whose favour Kanmadi had conveyed the undivided moiety. The suits were ultimately tried by the learned District Judge of Belgaum who subjected all the evidence to very careful examination and wrote an exhaustive judgment showing that he had got to the bottom of the whole of the transactions which had occurred between the various parties. Dhondubai and Shamji defended themselves on the ground that Exhibits 92 and 93 were obtained without consideration and under undue influence and were void. The District Judge found that

the fraud and undue influence which the defendant set up had been proved and he consequently dismissed Deshpande's suits. Deshpande appealed to this Court, and the appeal was heard by our brother Chandavarkar and one of us. It was ultimately dismissed, and this Court's judgments show that we accepted the District Judge's findings of fact. It is important only to add that in the suit before the District Judge, Deshpande had to be virtually forced into the witness box by the District Judge himself. Kanmadi did not appear as a witness at all.

Now as we are satisfied that the facts are as we have stated them to be, it appears to us to follow inevitably that as against the opponent Deshpande the following propositions are made good; *first*, that by fraud and undue influence and without the payment of any real consideration he took a conveyance to himself of valuable property from a Hindu lady who was in a position of peculiar helplessness, who was the adversary of his own client Venubai in the suit, and whose appeal was still pending; *secondly*, by so doing he in order to promote his own dishonest schemes placed his interests in direct conflict with the interests of his client, Venubai; and, *thirdly*, when his scheme was checked by Kanmadi, who was on his own account endeavouring to filch this property from the rightful claimants, he made common cause with Kanmadi, and the two together sought to support their position by further unreal transactions with some of the parties interested.

Upon the same facts it appears that as against Kanmadi the following propositions are made good: *first*, that after he had been consulted as a Pleader by Shamji, he, either of his own motion or in collusion with Shamji, purported to purchase the property for himself, and to purchase under a title which conflicted with the title of Dhondubai, the mortgagor of his original client Ghenappa; *secondly*, that in prosecution of this same dishonest scheme he prevailed upon this ignorant woman Dhondubai to withdraw her pending appeal without allowing her an opportunity to consult the Pleader whom she had engaged to conduct that appeal for her; *thirdly*, as an aggravation of the foregoing, he omitted to carry out even the paltry promises on the faith of which he had induced Dhondubai thus to sacrifice her own interests and, *fourthly*, he subsequently joined Deshpande in entering into a series of sham tranactions in order to conceal this fraud and retain their hold over the property.

There is, in our opinion, only one redeeming feature in this case, and that is the expression of regret which the opponent Pleaders have instructed their legal advisers to make to this Court in the event of their legal defences proving unavailing. We were glad to hear this expression of regret which, we hope, is sincere, and we have allowed it to influence us in the measure of punishment which we feel our duty to inflict. We must, however, bear in mind that it is the bounden duty of this Court to vindicate its own *Sanads*; by that we mean, to take measures to prevent the abuse of that confidence which such *Sanads* inspire, especially among the less advanced classes in the Moffusil. This Court which is responsible for the issue of these *Sanads* is equally responsible for seeing that the position of dignity and influence thus conferred is not diverted to dishonest uses. Such dishonesty if practised in the Moffusil is usually of an especially reprehensible character, seeing that parties there are almost wholly dependent upon Pleaders for the protection of their instersts. It may be that the most powerful check against malpractices of this kind would lie in a healthy public opinion in the profession itself, and it may perhaps stimulate the formation or the development of such an opinion to reflect that the honourable profession of Pleaders has no worse enemies than those among its own members who are capable of stooping to dishonest or discreditable practices. Our order is that Deshpande's certificate be suspended for a period of two years and that Kanmadi's certificate be suspended for a period of one year.

Certificates suspended.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 7 OF 1912.

June 27, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

RAMCHAND PITAMBHARDAS—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR.

Evidence Act (I of 1872), ss. 34, 114, ills. (b)—Books 'regularly kept in the course of business', meaning of—Effect of method of keeping books—Accomplice—Evidence—Direction as to the value of statement of an unreliable witness—All accomplices not unreliable.

Books are 'regularly kept in the course of business' within the meaning of the provisions of section 34, Indian Evidence Act, if they are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong.

The particular method, however, of keeping the books may affect their value as evidence.

The rule of evidence contained in section 133, Evidence Act and in section 114 (*b*) amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot be held proved, within the meaning of section 3, if there be no other evidence of it than the statement of an unreliable witness.

All accomplices are not condemned by law as wholly unworthy of credit.

Mr. *Teckchand*, for the Accused.

JUDGMENT.—Appellant has been convicted of two severe offences under section 161, Indian Penal Code, and sentenced to 18 months' rigorous imprisonment and a fine of Rs. 2,500 for each offence, and in default, six months' further rigorous imprisonment, the substantive sentences of imprisonment to run concurrently.

Mr. Teckchand, for appellant, has dealt first with the offence which forms the subject of the second charge. The prosecution alleged that appellant, being *Mukhtiarkar* of Kandhkote, obtained and accepted from a *zemindar*, Pariokhan, an illegal gratification of Rs 100 as consideration for doing an official act, *viz.*, inspecting the survey numbers in respect of which Pariokhan had claimed remission.

The facts of the case are, briefly, as follows:—Pariokhan is owner of a considerable amount of land. For the cultivation of it he had formed a small syndicate or partnership consisting of himself, Paru and Maidino; Paru having a five-annas share, Maidino 7-annas and Pariokhan 4-annas. On the 29th September 1910, Pariokhan forwarded an application to the accused for remission in respect of 35 numbers (Exhibit 13). On the 8th October he presented a second application in respect of 10 numbers (Exhibit 14) and on the 13th October a third application in respect of 15 numbers (Exhibit 15). In the ordinary course of official duty, the *Mukhtiarkar* should have, personally, or by his head Munshi, inspected all the numbers in respect of which remission was claimed, at a very early date after receiving the application. The actual inspection did not take place till the 9th November. After making these petitions Pariokhan, on three occasions, saw the accused personally and asked him to inspect the lands; the answer given in each case was that accused would come when it was convenient. The dates of the first two visits cannot be accurately fixed, but the third visit was paid at Suranipur, and it has been ascertained from the accused's own diary that he was there on the 27th October. On the 28th October the accused inspected some numbers close to those of Pariokhan, but though he had finished the work by 10 or 11, returned back to head-quarters without attempting to inspect Pariokhan's land. The 29th was a Saturday, and the 1st to 6th November were Dewali holidays. On the 8th November, despairing of getting any remission, Pariokhan called on the *Mukhtiarkar* at Kandhkote, early in the morning and paid him Rs. 100. On the following day the lands were inspected and the necessary certificate enabling Pariokhan to get remission was issed.

The only witness to the actual payment is Pariokhan himself. But he is corroborated very fully by his partners, Maidino and Paru, who had been consulted throughout as to the payment, his son Kamalkhan and by Panjo and also by entries in the books of Maidino, in the Dero Bandi kept by Maidino and in Paru's *rezki bandi*. All this evidence has been carefully analysed and assessed by the learned Sessions Judge. We shall, therefore, discuss it only so far as is necessary to meet the arguments urged by Mr. Teckchand on behalf of appellant.

Mr. Teckchand suggests three alternative theories:—

Firstly.—The whole evidence, documentary and oral, is entirely false, forged and suborned under pressure exerted, directly or

indirectly by Mohamed Ibrahim, the Deputy Collector of Kandhkote.

Secondly.—The entries may be true; but the oral evidence is false.

Thirdly.—All the evidence except that of Pariokhan, may be true. Even if the partnership had resolved to bribe the *Mukhtiarkar*, it does not follow that he really was bribed; Pariokhan may have retained the Rs. 100.

It seems to us wholly improbable that Mohamed Ibrahim deliberately got false evidence created in order to ruin the accused and Mr. Teckchand does not go so far as to allege this. But he argues that Mohamed Ibrahim was extremely anxious to see a charge of bribery proved against accused and that some unknown subordinate, or *zemindar*, from a desire to please Mohamed Ibrahim or from a belief that the officers of Government generally desired a conviction, may have persuaded the several witnesses to make false entries and give false testimony. As is usual in criminal defences, enmity is alleged. In 1893 accused was Superintendent of Umarkote Jail, as well as *Mukhtiarkar* and Magistrate. A charge of escaping from custody was pending in his Court against one Jiand, who, meanwhile, had been sentenced to imprisonment for life on another charge. The accused, however, sent for Jiand in order to try him for the less offence, and while under his charge, Jiand escaped. Accused was called on for an explanation, it being pointed out that it appeared wholly superfluous to send for a man undergoing a life sentence merely to try him for a comparatively trivial offence. Accused excused himself by throwing the blame on Sirdar Mohamad Yacub, then Deputy Collector of the Nara Valley, contending that no instructions had been issued to the Public Prosecutor to withdraw the charge, accused, as Magistrate, was bound to proceed with it. We do not consider it probable that Mohamed Ibrahim could have been influenced by this trifling incident in his brother's official career to the extent of countenancing an attempt to prove a false charge against the accused fourteen years afterwards.

Nor does it seem to us even possible that Mohamed Ibrahim could have arranged for so many witnesses to be tutored, and so many false entries to be written up. He took over the duties of Deputy Collector, Kandhkote, on the 15th November, and started on tour on the 24th. It was in pursuance of special instructions from the Deputy Commissioner that he tested the remission work (Exhibit 5). On the 16th December he sent in reports (Exhibits 6 and 7) giving full reasons for regarding the remission work of accused as "grossly unsatisfactory," and for inferring that "he had not been clear-handed in the matter." On the 12th January accused submitted a long explanation (Exhibit 8). Between the 3rd or 4th January and the 20th Mohamed Ibrahim was at Jacobabad in connection with the horse-show. On the 27th January he had an interview with the Deputy Commissioner. Between the 5th and 17th February he was absent on 10 days' leave. It is hinted by Mr. Teckchand that these 10 days were spent in getting up this false case, but there is absolutely nothing whatever to justify the accusation. On the 17th February he again had an interview with the Deputy Commissioner, on the 18th February a very large number of *Banyas'* books, including most of those exhibited, were seized under orders of the Deputy Commissioner. These books were examined; and as a result of the examination, Pariokhan and other witnesses were sent for and questioned. Mohamed Ibrahim had nothing whatever to do with this inquiry. His active work in connection with the case appears to have ceased after sending in his reports. Orders for the prosecution of the accused were issued by the Deputy Commissioner. It was not until after the books had been seized and Pariokhan and other witnesses examined, that it was even decided to institute a prosecution and to base it on these two charges. While, therefore, we are satisfied that there is no good reason, whatever, to support that Mohamed Ibrahim concocted a false case against accused, we also consider that it is altogether improbable that any other person had the opportunity of doing so. It has not been established that any one had an adequate motive for taking such action. All the entries have been described in full detail in the judgment of the lower Court, and every objection taken by Mr. Teckchand has been there satisfactorily disposed of. Though the books have been kept in the slovenly way common to *Mofussil Banyas*, there seems no

good reason to suppose that the entries relied on are false. What appears to be a conclusive piece of evidence in favour of their genuineness was provided by the defence who called for the production of Maidino's *katcha roznama* and put in entries Exhibits 25 and 26. These entries are still relied on by the defence They show that Rs. 75 was taken by Maidino to Pariokhan's village on the 28th Assu and Rs. 5 were paid to Panjo Khoso on the 2nd *Kati* to the debit of Pariokhan's lease. The entry of Rs. 75 runs thus:—"To the debit of the 'Gumdeletero' of Maidino, cash taken by him to Pariokhan's village." Maidino explains that he had hoped that the *Mukhtiarkar* would take less than Rs. 75 and that the entry was, as it were, a suspense entry. The defence rely on it as not containing any mention of Pariokhan's leases, and on it not being in terms, debited to the partnership; but the book was only a *katcha roznama*, and the entry appears to us such as might well have been made under the circumstances. We are then asked to believe that the prosecution starting with the fact that Maidino did really take Rs. 75 to Pariokhan's village on the 28th *Assu* and that Rs. 5 were paid to Panjo Khoso for the partnership on the 2nd *Kati*, proceeded to make false corresponding entries in the *pucca roznama* and *khata* of Maidino (Exhibit 21, Exhibit 22 Exhibits 23 and 24 and Exhibit 27), in the *dero bandi* kept by Maidino (Exhibits 31, 32, and 33), and in the *rezki bandi* of Parumal (Exhibit 35). In order to accomplish this, three sets of books must have been dealt with, all original entries must have been destroyed, a very large number of pages re-written and fresh entries made. It is not suggested that Pariokhan or Maidino or Paru had any interest whatever in falsely implicating the accused. The only possible theory is that overwhelming pressure was used by some high officer to compel all to commit forgery and perjury· but we cannot believe that such pressure was used.

The second line of defence is based on an apparent inconsistency between the entries and the evidence of Pariokhan. The 28th *Assu*, according to Solar Calendar, which Maidino and Paru observe corresponds with the 13th October and the 2nd *Kati* with the 13th October. Taking the documentary evidence by itself it would appear that immediately after the 3rd application for remission had been put in, Pariokhan arranged for a Rs. 100 to be at his disposal; that Maidino commenced by grudgingly producing Rs. 75 on the 13th October and after a few days gave another Rs. 20. But this is not the story as given by Pariokhan. He seems certain that he and his partners did not arrange for the payment, until after his second visit to the *Mukhtiarkar*, on the 27th October. But he is 60 years old, and when he gave his evidence in the Sessions Court, more than a year had elapsed since the events to which he was deposing had occurred. In his deposition before the Deputy Commissioner on the 23rd February 1911 (Exhibit 17) it is not stated at what period the money was got ready for payment. Kamalkhan (Exhibit 18) son of Pariokhan who deposited the money with Prau, and afterwards drew it out for payment to the *Mukhtiarkar*, cannot say how long it remained with Paru (line 110). Maidino (Exhibit 20) seems not quite clear whether the money was got ready immediately after the third application was put in (see lines 18-39), or after the subsequent visits, (see lines 335-375). He is sure that Pariokhan had been two or three times to the *Mukhtiarkar* and had been disappointed (line 338, line 373) but it seems quite possible that the witness was confusing the applications made to the *Mukhtiarkar* with the subsequent visits. At line 471 he states: "After I took away Rs. 75 from my village there took place a talk between me, Paru and Pariokhan that money should be paid to the *Mukhtiarkar* as other men were paying him." And lines 528-534 seem to make it clear that the money had been in readiness some days before Dewali and was not paid until after it. See also line 664: "The Dewali came off some days after I had paid over the Rs. 75, I cannot say how many days after." Paru (Exhibit 34) is unable to give the date on which he paid over the Rs. 95 and Rs. 7, for the Rs. 95 being only for safe custody was not entered at all, and the Rs. 7 was merely recorded on a board apparently with no date and not entered up until 27th *Poh*. There is nothing in his evidence inconsistent with the theory suggested by the entries, and adopted by the prosecution.

Mr. Teckchand suggests that Mohamed Ibrahim or other person who was responsi-

ble for getting up the case, was misled by the Solar dates, and mistaking them for Lunar dates, conceived the idea of connecting the Rs. 95 and Rs. 7 with a bribe to the accused. The 28th *Assu* according to the Lunar Calendar would be the 1st November and the 2nd *Kati* would be the 8th November. Had the Rs. 75 and the Rs. 26 been obtained from Maidino on these dates, then the first consultation as to bribing the *Mukhtiarkar* would have been after Pariohkan's third visit. But it is scarcely conceivable that the person responsible for engineering this extensive and successful conspiracy could have made so foolish an error as to consult a calendar not in use in Kandhkote and its neighbourhood, and the theory of the defence is, we think, adequately met by pointing out that there is nothing which can fairly be termed a proved fact to support it. It is clear from the terms of the complaint that the complainant (Mohamed Ibrahim) was acquainted with the Solar Calendar; and at a very early stage of the prosecution case the actual date of paying the Rs. 100 to the accused had been ascertained by comparing an entry in Paru's book dated 25th *Kati* (Solar Calendar) with the corresponding English date in the accused's diary.

Mr. Teckchand has argued that none of the book-entries were properly admitted in evidence, inasmuch as the books were not regularly kept in the course of business. He appears to support the view that unless books are kept in accordance with the most apporved, or at any rate an approved method, they should not be admitted under section 34, Evidence Act. But books are "regularly kept in the course of business," if they are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong. It has been established that Maidino kept a *katcha roznama* in which all moneys received and paid out were always entered, that all such entries were, from time to time, transferred to the *pacca roznama* and the *khata*, and that all entries relative to Pariokhan's lease were written up also in the *dero bandi*. This is quite sufficient to satisfy us that the books were regularly kept. That entries in the *pacca roznama* and *katcha* were not made until after some weeks, that the pages were not regularly numbered or indexed, and that the cash-book was not balanced daily, are all matters that go to affect the value of the books on evidence, but which do not touch the question of their admissibility. We are satisfied that there is sufficient regularity and interdependence in the various accounts to make the interpolation of false entries difficult and dangerous.

It has also been earnestly contended that Pariokhan is an accomplice, and that there should be no conviction based on his evidence unless corroborated. Cases have been cited which seem almost to support the proposition that no person charged with taking a bribe can be legally proved guilty. But the rule of evidence contained in section 133, Evidence Act, and in section 114 (*b*) amounts to nothing more than a direction, to all Judges and Magistrates that a fact cannot reasonably be held proved, within the meaning of section 3, if there be no other evidence of it than the statement of an unreliable witness. But all accomplices are not condemned by the law as wholly unworthy of credit; and where, as in the present case, a bribe was practically extorted, it is possible for those paying it to be credible witnesses in spite of their being technically accomplices. And where a fact is deposed to by credible witnesses, the Court is justified in believing it to be true. In this case we have further strong corroboration in the books of account in the evidence of Panjo, and in the fact that the *Mukhitarkar* inspected the land the day after the alleged payment was made.

Lastly it is urged that Pariokhan may have received the money but yet may not have paid it to the *Mukhtiarkar*. On this point, we consider that the lower Court's estimate of Pariokhan's evidence is correct. The whole amount was brought into account when Maidino and Paru settled up and they, at any rate, must have been fully satisfied that Pariokhan had not misappropriated the money. No good reason has been alleged for supposing that this aged and, apparently respectable *zemindar* should head a conspiracy to ruin a *Mukhtiarkar* against whom he had no grudge. The record discloses nothing from which it could be inferred that any witness was pressed to give evidence.

In the case which forms the subject of the other charge it is alleged that Dilavesh

made four applications for remission on the 14th March 1910; that on some date not clearly fixed he went to the accused and asked him to come and inspect the lands; that accused came the next day to inspect some neighbouring lands and in the evening of that day Dilavesh called on him and paid him Rs. 60. On the following day the 20th March 1910, accused inspected the lands, and that evening Dilavesh again called on him and paid a second Rs. 60. It is alleged that unless the first 60 had been paid accused would not have inspected the numbers and that unless the second 60 had been paid, the remission certificate would not or might not have been granted. The evidence consists of the depositions of Dilavesh (Exhibit 37) and the *Banya* Suku. Suku also produces entries in his books. The case seems a very simple and a very clear one. Mr. Teckchand impugns the evidence on the following grounds:—(1) Dilavesh's account of the interviews with his *Banya* partners, differs from that of Suku. (2) It is not clear when or where Dilavesh first visited the *Mukhtiarkar*. (3) The entries in the books are unsatisfactory and unreliable.

The only important point in which Dilavesh and Suku differ is as to the presence of the other Hindu partners at the consultations leading up to the payment, and when the money was given to Dilavesh. But the obvious explanation appears to be that Suku was anxious to keep his partners out of the case. No *Banya* cares to give evidence against a Hindu official if he can possibly avoid it. Had the case been a false one, Dilavesh would certainly have been tutored to give a story consistent with Suku's

Dilavesh states that he first visited the *Mukhtiarkar* at Kandhkote and that the day following the *Mukhtiarkar* came to see Pariokhan's lands. It is known that these lands were inspected on the 19th March and that the *Mukhtiarkar* was not at Kandhkote on the 18th. Dilavesh is clearly in error. But he gave his evidence on the 16th December 1911, 21 months after the events deposed to, and it may well be that he had forgotten where he had seen the *Mukhtiarkar*.

Suku states that when he first gave the money to Dilavesh, he made a note on a *kacha* paper, that a day or two later Dilavesh came to him and gave the details, which were duly recorded. At that time his *kacha khariro* was not with him, and it was not until $1\frac{1}{2}$ months or more afterwards that the entries were transcribed into it. (Exhibit 43). The entries were afterwards transferred to *pacca khariro*. (Exhibit 44). Exhibit 43 bears no date; the entry above is dated the 7th *Vesakh*, and the one below it the 8th. Mr. Teckchand has commented on the absence of the date as being suspicious, but we can see nothig more than a careless omission. The *pacca khariro* was not one of the books originally seized by the Police, but was sent for after the inquiry before the Committing Magistrate had commenced, so that if the case be a false one, it could not have been a part of the evidence relied on by the prosecution. A peculiarity of the books is that successive entries sometimes bear successive dates for a certain number of days only, an entry of much earlier date being suddenly interpolated; this, in turn, being followed by a series of entries of successive dates. Suku has explained the system at considerable length. Each partner goes out on tour from time to time, and on his return he enters up all transactions of his tour in proper order of date. We do not consider that this peculiar practice which seems to have been consistently followed, detracts materially from the value of the entries as evidence. The two books put in seem to have been regularly kept—all payments and receipts being eventually entered in them in the ordinary routine. We see no reason for disbelieving either Dilavesh or Suku.

Mr. Tekchand has, we feel confident, urged every argument that could possibly be put forward on behalf of appellant, and if, in this judgment, every point has not been discussed; it is because it has been already adequately dealt with in the complete and very careful judgment of the lower Court. We find it impossible to hold that there is any reasonable doubt as to the guilt of the accused on either charge, and the conviction in each case must be upheld.

Mr. Tekchand has asked for remission of sentence on the ground that appellant is an old man who has hitherto borne a good character, and who will, by the bare act of conviction, be very severely punished.

But the offence is a very serious one, and the punishment must be such as to serve as an effective deterrent. We consider that any less severe sentence than that which the lower Court has passed would be ineffectual.

We confirm the convictions and sentences, and order the appellant to be arrested.

Convictions confirmed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT NO. 261 OF 1913.

April 7, 1913.

Present:—Mr. Justice Imam.

KETRA MONI DASI—PLAINTIFF

versus

SHAMAL DHONE DUTT—DEFENDANT.

Contempt—Comments on pending cases—Intention of offender to be considered—Pre-possess or prejudice minds of person—Prejudice trial—Intention to preserve honour being discussed in papers before judgment.

Comments on cases pending or allegations against parties to suits that are pending, if published, amount to contempt on the part of the offender. But it would not be right to lose sight of the intention by which a person giving pubiicity to a matter which is the subject of the charge of contempt, is actuated.

Duncan v. *Sparling*, 10 T. L. R. 353, relied upon.

The plaintiff in this case is the daughter of the defendant. She instituted a suit against him for the recovery of certain properties left by her mother. On the day after the suit was instituted there appeared in two newspapers a paragraph in each with a sensational heading "Suit against an Attorney" which made reference to some of the allegations set out in the plaint. The defendant who is an old Attorney replied by two letters addressed to the Editor of the two newspapers being only anxious to preserve his honour being discussed in the papers before a judicial declaration had been made by a competent Court. On the statements contained in those two letters, an application has been founded for proceedings for contempt against him:

Held, that as the intention of the defendant was not to pre-possess or prejudice the mind of any person in reference to the matter in dispute, and as the publications in question do not tend to prejudice a trial the date of which is not yet fixed and which is very distant, the defendant was not guilty of contempt.

Standard Newspaper Limited, In re, 'Times" of the 20th January 1907, p. 13, followed.

MOTION.

This is a Rule calling on the defendant to show cause why he should not be committed to Jail for contempt for making certain allegations and charges made and contained in two separate letters appearing in the "Bengali" and the "Indian Daily News" over his signature.

The plaintiff is a daughter of the defendant. The suit has been instituted for the recovery of certain properties left by the plaintiff's mother in the hands of the defendant in trust for the plaintiff and her sister. The suit was instituted on March 10th, 1913, and on the next day there appeared in the newspapers mentioned above a paragraph in each with sensational heading "Suit against an Attorney." The paragraph ran thus:—

"Suit against an Attorney.

At the High Court on Monday, before the Master, a suit was filed by Babu Kumar Krishna Dutt, Attorney-at-law, on behalf of Sreemutty Khetter Money Dassee, daughter of Babu Shamul Dhone Dutt, an Attorney, for recovery of properties left by her mother in the hands of Babu Shamul Dhone Dutt in trust for her and her sister. It was alleged that Babu Shamul Dhone Dutt turned her out without accounting to her of the trust estate in his hands."

After this sensational paragraph had appeared in the papers, the defendant replied by two letters addressed to the Editors of the newspapers. The letters were published in the said newspapers on March 21st, 1913, and ran thus:—

"Suit against an Attorney.

To

THE EDITOR,

THE INDIAN DAILY NEWS.

SIR,

With reference to the publication appearing in your issue of the 11th day of March instant, headed "Suit against an Attonery" in which it is stated that Babu K. K. Dutt, an Attorney, filed a plaint against me on behalf of my daughter, Srimati Khetter Moni Dassi, who, it is alleged, was turned out by me without my having accounted for the trust properties of her mother in my hands, I beg to inform you that the said suit is a false and malicious suit instituted by persons who bear ill-feeling towards me and also of other designing persons with ulterior motives. The present suit is utterly false and groundless. Yours, etc.

Shamul Dhone Dutt."

On the statements contained in those two

letters, this application has been founded for proceedings for contempt against him.

Messrs. *P. R. Das* and *P. K. Chuckerbutti*, in support of the Rule.

Messrs. *N. Sircar*, *C. C. Ghose* and *B. N. Bose*, showed cause.

JUDGMENT.—This is a Rule calling on Shamul Dhone Dutt, the defendant in Suit No. 261 of 1913, to show cause why he, should not be committed to the custody of the Superintendent of the Presidency Jail for contempt, for making certain allegations and charges made and contained in two separate letters appearing in the "Bengali" and the "Indian Daily News" newspapers over his signature and why he should not pay to the plaintiff her costs of and incidental to this application. The petitioner, Sreemati Khetra Moni Dassi, is a daughter of the respondent and has instituted a suit against him for the recovery of certain properties left by her mother in the hands of Babu Shamul Dhone Dutt in trust for her and her sister. The suit was instituted on the 10th March 1913, and on the 11th March there appeared in two papers the "Bengali" and the "Indian Daily News" a paragraph in each with a sensational heading "Suit against an Attorney". This paragraph had reference to the institution of the suit and made reference to some of the allegations set out in the plaint. The respondent, Babu Shamul Dhone Dutt, is an Attorney of this Court and has been such since the year 1870. He describes himself as a very old man and as having practically retired from the practice of his profession. Nothing against the character of the respondent has been alleged so far as his reputation in his profession is concerned. After this sensational paragraph had appeared in the papers the respondent replied by two letters addressed to the Editors of the "Bengali" and the "Indian Daily News" and it is on the statements contained in those two letters that the application in this Court has been founded for proceedings for contempt against him. Mr. Das appearing in support of the Rule has referred to several cases of authority that establish that comments on cases pending or allegations against parties to suits that are pending, if published, amount to contempt on the part of the offender. No one can deny the soundness of the Rule that has been enunicated on this subject by the enormous number of cases that the reports can furnish us. But it could not be right to lose sight of the intention by which a person giving publicity to a matter which is the subject of the charge of contempt is actuated. The case of *Duncan* v. *Sparling* (1), in which two learned Judges Mathew, J., and Cave, J., expressed their concurrent opinion, is a sufficient authority for the proposition that the intention of the person giving currency to a statement has to be considered. If the intention on the part of Babu Shamul Dhone Dutt had been to pre-possess or prejudice the minds of any person in reference to the matter in dispute, there could be no question as to his guilt. It is quite true that in matters of such contempt as the one now alleged we have got to see whether the publication tends to interfere with the due course of justice and it has been argued by Mr. Das that the publication of the two letters in question tends to impair or prejudice a fair trial and indeed a Court of Justice, and it is likely to occasion, loss to the plaintiff of witnesses who may have to be examined on her behalf. Mr. Dass further urges that although the actual trial may be at some distant date from now, nevertheless, the miscellaneous application may be made and, therefore, the publication in question is likely or at least tends to cause prejudice the defendant. I must, therefore, examine the conduct of the respondent in the light of his intentions as also in the light of interference with the Court of Justice. Dealing with his intention first it is quite obvious that he would never have rushed into Press if he had not been influenced by feelings of grave apprehensions as to his reputation arising out of a sensational paragraph that has appeared in the papers. In fact, the respondent in his letters to the two newspapers starts by making a reference to what had already been published by those two papers in connection with his case and I am quite satisfied from those two letters of his that there was no intention on his part to either pre-possess or prejudice the minds of any persons in reference to the matter in dispute. As

(1) 10 T. L. R. 353.

regards the other question of his conduct to prejudice the course of justice, the case *Ex parte the Standard Newspaper Ltd.* (2) is sufficient to absolve the respondent from a charge of contempt. In that case Mr. Justice Darling sitting with Mr. Justice Phillimore, held the view which I am disposed to adopt in this case, that is, that the publications in question do not tend to prejudice a trial, the date of which is not yet fixed and which, undoubtedly, is a very distant one from now. The Rule in this case was granted on an application which did not disclose the fact that the paragraphs in each of the two newspapers had appeared with a sensational heading and which was enough in itself to frighten an old man who was only anxious to preserve his honour being discussed in the papers before a judicial declaration had been made by a competent Court. I am not prepared to take such a serious view of the conduct of the respondent as I am asked to take by the petitioner. It is quite possible that the respondent has come very near the line but in my view he has not transgressed that line inasmuch as the motive was not to create a favourable impression in his favour for the advantage of his case nor do I think there is any apprehension that his letters tend to prejudice a fair trial. The Rule, therefore, is discharged. Parties to bear their respective costs.

Rule discharged.

(2) "Times" of the 20th Januaay 1907, p. 13.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 58 OF 1913.

April 10, 1913.

Present:—Justice Sir Richard Harington, Bart., and Mr. Justice Coxe.

BASANTA KUMARI DASI—SECOND PARTY—PETITIONER

versus

MOHESH CHANDRA LAHA—FIRST PARTY—OPPOSITF PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Joint family—Property belonging to joint family—Exclusive possession of member—Jurisdiction of Magistrate—Title to possession, joint or separate, foreign to inquiry.

The question whether the parties have a joint title to the land, is one which the Magistrate cannot investigate under section 145 of the Criminal Procedure Code. The only question for him is whether either party has actual possession, and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order irrespective of the titles of the parties.

Co-sharers in an estate may by express or tacit arrangement be each separately in actual possession of specified and demarcated portions of the estate. In that case there is nothing to prevent the application of section 145.

When property is found as a fact to be, not constructively, but actually in the joint possession of the parties, the section cannot apply. But if it is found that one co-sharer is in actual possession and the other is not, the Magistrate may make an order under section 145.

Makhan Lal Roy v. *Barada Kanta Roy*, 11 C. W. N. 512; 5 Cr. L. J. 296, explained.

Rule against the order of the Deputy Magistrate of Dacca, dated December 2, 1912, declaring the first party under section 145 of the Criminal Procedure Code to be entitled to possession of the two disputed plots until evicted therefrom in due course of law.

Babus *Harendra Narayan Mitter* and *Bhudev Chandra Roy*, for the Petitioner.

Mr. *P. L. Roy*, Counsel, Babus *Atulya Charan Bose* and *Ramani Mohan Chatterjee*, for the Opposite Party.

JUDGMENT.

HARINGTON, J.—This Rule was issuedat the instance of the 2nd party in a proceeding under section 145 calling upon the District Magistrate and the opposite party to show cause why the order made under that section should not be set aside having regard to the case of *Makhan Lal Roy* v. *Baroda Kanta Roy* (1).

The facts are that the first and second party are members of the same family and reside in the *ijmali* family dwelling house each occupying a specific portion of the house.

The dispute which has given rise to a likelihood of a breach of the peace relates to two plots Nos. 1 and 2 which are within the premises, and are bounded as shown in the proceedings.

Each party claims to be in possession of the plots in dispute to the exclusion of the other.

For the petitioner it is contended, on the authority of *Makhan Lal Roy's* case (1), that

(1) 11 C. W. N. 512; 5 Cr. L. J. 296.

as the land is *ijmali* no order can be made under section 145.

For the respondent it is argued that an order can be made under the section if it be found that either party is in actual possession of the disputed plots, whether the land is *ijmali* or not.

The case relied on by the petitioner was one which related to a dispute as to some huts which had been erected on land in the joint possession of the parties. The huts had been recently built: the judgment can be supported on the ground that the Court has found that the huts were built on land which was not in the exclusive possession of either party. If that be so and the huts were not in possession of either party to the exclusion of the other the order under section 145 could not be made.

I am not prepared to hold that the decision involves the wider proposition contended for by the learned Vakil for the petitioner. No doubt, there are expressions in the judgment which support the proposition but it is not necessary as a ground for the decision.

The learned Vakil argued that the section was only applicable where the parties had conflicting titles to the land in dispute, and that sub-section (6) providing that the party in possession was to retain possession until evicted in due course of law was conclusive to show that no order could be made when the parties to the dispute were jointly entitled to the land as one joint tenant could not evict another; the party out of possession, therefore, would be for ever debarred from getting possession of the land to which he was entitled jointly with the other party.

In my opinion this argument is a fallacious one. No doubt, the party out of possession could not maintain ejectment against his co-owner in possession.

If he sued claiming a declaration of his title and joint possession, and obtained a decree, he would not under that decree be able to evict the other party.

But if he sued for partition, established his title to a share of the property in dispute, got his share partitioned by metes and bounds and adjudged to him that would, in my opinion, amount to an eviction of the other party in due course of law from that portion of the lands in dispute to which the plaintiff was found entitled.

It is a fallacy, therefore, to say that sub-section (6) makes it impossible to apply section 145 in cases where the parties are jointly entitled to the land because a joint owner out of possession cannot evict a joint owner in possession. He can evict him from his share of the lands not by a suit in ejectment but a suit for partition.

I am disposed to think that sub-section (6) was purposely drafted as it is so as to make it impossible for a joint owner out of possession to get put in under a decree giving him joint possession, as such a proceeding would most probably bring about the very breach of the peace which section 145 is designed to prevent.

On reading the terms of section 145 I think it is clear that the question whether the parties have a title to possession jointly or have a title to possession separately cannot be considered. Under sub-section (1) the Magistrate is to call on the parties to put in their claim "as respects the fact of actual possession" and the Magistrate, "without reference to the claims of such parties to a right to possess the subject in dispute" .....shall.....if possible decide whether any and which of the parties was at the date of the order "in such possession of the said subject".

"Such possession" can only mean the "actual possession" referred to in sub-section (1).

The question for the Magistrate is, therefore, actual possession and actual possession only co sharers in an estate may by express or tacit arrangement be each separately in actual possession of specified and demarcated portions of the estate.

What is there then to prevent the application of the section?

How can the question whether the land is *ijmali* or partitioned affect the question who is in actual possession of it? Take a hypothetical case; suppose *A.* and *B.* are jointly entitled to possession of a defined plot of ground. *A.* alleges he is in possession to the exclusion of *B.* *B.* alleges he is in possession. They are entitled to joint possession: if the Magistrate finds that both *A.* and *B.* are actually enjoying the joint possession to which they are entitled then, of course, he cannot make an order under section 145 in favour of one against the other but if he finds that one is in actual possession and the other

not in possession, I cannot see why he should not make an order under section 145. There is nothing in the form of the order given in Schedule V, Form XXII, rendering it inapplicable.

In short, in my view, the question whether the parties have a joint title to the land is one which the Magistrate cannot investigate under section 145. The only question for him is whether either party has actual possession and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order irrespective of the titles of the parties.

In my opinion, therefore, the circumstance that the lands were *ijmali* does not affect the case.

There is another reason why this ground should not be allowed to prevail. The objection was not taken by the petitioner at the outset.

Having alleged an exclusive possession, and acquiesced in the hearing of the case on that footing he cannot now be heard to say that the whole proceedings were bad because the land is *ijmali*.

But notwithstanding my view on the points argued I felt at first some difficulty in maintaining the order. The Magistrate has contrived to word it in such a way as to look as though he had considered title to possession instead of actual possession.

But a perusal of the body of the judgment shows that he directed his mind to the fact of actual possession he finds in express terms actual possession and that is sufficient, notwithstanding the somewhat unfortunate wording of the last paragraph.

The Magistrate's attention is directed to Schedule V, Form XXII, which shows how an order ought to run.

The Rule must be discharged.

COXE, J.—This was a Rule to show cause why an order under section 145, Criminal Procedure Code, should not be set aside having regard to the decisions in the case of *Makhan Lal Roy* v. *Baroda Kanta Roy* (1).

So far as the facts alone are concerned this case and the case cited seem to me indistinguishable. In both cases it was common ground between the parties and it was found by the Magistrate that the lands in dispute were not in the joint possession of the parties. In both cases, however, it was found that the land in dispute belonged to the family dwelling house of the parties and in the case cited the learned Judge held that section 145 did not apply to such a case. Perhaps I may say as one of the Judges that issued this Rule, that we granted it in order that the case cited might be carefully re-considered. Its importance is beyond question as no property is so apt to occasion a breach of the peace as the property of an undivided or incompletely divided family.

Now I fully agree that when property is found as a fact to be, not constructively but actually in the joint possession of the parties, the section cannot apply. An order for joint possession would obviously rather encourage than prevent a breach of the peace. But when it is found that the property as a fact is not actually in joint possession it appears to me immaterial whether the parties have a joint title to it or not. The case cited, however, can, in my opinion be distinguished because the learned Judges in that case found distinctly that the parties were in joint possession. Speaking with the utmost respect I cannot agree that this Court was entitled under the Charter to arrive at that finding in opposition to the finding of fact of the Magistrate and the pleadings of the parties or indeed in opposition to the finding of the Magistrate alone. But having arived at that finding the rest of the decision was inevitable.

It has been argued that the use of the word "evicted" in the last sub-section of section 145 and of the word "ousted" in Form XXII shows that the section was not intended to apply to property to which the parties had a joint title inasmuch as in such a case the remedy of the defeated party would be a suit not for eviction but for joint possession. My learned brother has pointed out that this does not necessarily follow and has explained the introduction of the word "evicted" into the section. Unless this explanation is accepted it appears to me that use of the words "evicted" and "ousted" must be a mere oversight in drafting. It must be admitted that so slight a slip might be made. On the other hand it is inconceivable that the Legislature really intended to exclude from the operation of section 145 the very property which is most prolific

of disputes leading to a breach of the peace.

I agree, therefore, to discharge the Rule.

Rule discharged.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 69 AND 70 OF 1912.

July 9, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—PROSECUTOR

versus

Musammat JAMAL KHATUN—APPLICANT.

AND

EMPEROR—PROSECUTOR

versus

Musammat KHATIJAN—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 205, 255, 342, 366—Accused exempted from personal appearance—Appearance by Pleader—Involving performance of all acts—Section to be liberally exercised.

Section 205 of the Criminal Procedure Code of 1898 allows the accused to appear by Pleader, and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial, such as answering the examination by the Court under section 342, or pleading, or refusing to plead to the charge under section 255 of the Code.

The discretion under section 205 of the Code is one that should be liberally exercised in the Province of Sind.

Emperor v. *Mahomed*, 4 Ind. Cas. 1152; 3 S. L. R. 167; 11 Cr. L. J. 197, referred to.

Application for revision against the order of the Resident Magistrate, Matli.

Mr. *Lalchaud Hasamal*, for the Applicants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the Resident Magistrate, Matli, requiring under section 205 (2), Criminal Procedure Code, the personal attendance of two *pardanashin* ladies who have been accused of an offence under section 493, Indian Penal Code.

The Magistrate's predecessor had made an order exempting these accused from personal attendance—but at the close of the case for the prosecution, the Magistrate considered that he was bound to enforce their personal attendance in order to examine them under section 342. Now admittedly the examination of the accused by Court under section 342 (1) is imperative. But we are of opinion that when an order under section 205 has been made the provisions of this section are complied with when the Pleader for the defence is examined on behalf of his client. Section 205 allows the accused to appear by Pleader and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial such as answering the examination by the Court under section 342 or pleading or refusing to plead to the charge under section 255. The terms of section 366 (2) support this view for it contemplates the absence of the accused up to the stage of judgment and even after that stage where the judgment is one of acquittal or one awarding a sentence of fine. Again the form of summons to an accused, Schedule V, From I, runs as follows:—

"Whereas your attendance is necessary to answer to a charge of . . . you are hereby required to appear in person or by Pleader." This implies that the Pleader who appears represents the accused for the purpose of answering to the charge and this would include answering questions put by the Magistrate on the case made out by the prosecution.

As a matter of law, therefore, there was no necessity for the Magistrate to insist on the personal attendance of the accused ladies for the purpose of their examination or plea, for his discretion to permit them to appear by Pleader continued. As the Magistrate was under a mistaken view of the law on this point we reverse his order and leave it open to him to make such other order as regards the attendance of the accused as may seem expedient to him. We would, however, invite his attention to what was said in the case of *Emperor* v. *Mahomed* (1) for it was there pointed out that the discretion under section 205 is one that should be liberally exercised in this Province.

Order reversed.

(1) 4 Ind. Cas. 1152; 3 S. L. R. 167; 11 Cr. L. J. 197.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3969 OF 1910.
February 28, 1913.
Present:—Mr. Justice D. Chatterjee and
Mr. Justice N. Chatterjea.
KAMAL DHARI THAKUR—PLAINTIFF—APPELLANT
versus
Maharaja Sir RAMESHWAR SINGH BAHADUR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (*VIII of* 1885), *Sch. III, Art.* 3—*Limitation, special—Dispossession by landlord not acting as such but as auction-purchaser—Dispossession by sole landlord and co-sharer landlord, if difference between—Dispossession by delivery of possession by Court—Dispossession to be otherwise than in due course of law.*

The special limitation provided in Article 3, Schedule III of the Bengal Tenancy Act does not apply to the case of an occupancy *raiyat* who is dispossessed from his holding by his landlord, not acting as landlord but in his character or capacity of auction-purchaser.

Abhoy Churn Mookerjee v. *Shaik Titu*, 2 C. W. N. 175; *Brojo Kishore Mahapatra* v. *Saraswati Dassi*, 6 C. W. N. 333 and *Mahomed Khalil* v. *Harendra Nath Bhattacharya*, 5 C. L. J. 650, relied upon.

It would make no difference in principle whether the purchaser is a co-sharer landlord or the sole landlord or the entire body of landlords.

The special limitation is applicable as much to a dispossession by a co-sharer landlord, as to dispossession by a sole landlord or entire body of landlords.

Annada Sundari Chandalini v. *Kebul Ram Changa*, 7 C. W. N. 542, relied upon.

The dispossession effected by the act of delivery of possession by the Court is not "dispossession" by the landlord within the meaning of Article 3, Schedule III, of the Bengal Tenancy Act, which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law.

Aminuddin Munshi v. *Ulfutunnissa Bibi*, 3 Ind. Cas. 315; 13 C. W. N. 108; 9 C. L. J. 131, distinguished.

Appeal from the decree of the District Judge of Darbhanga, dated April 19th, 1910 reversing that of the Munsif of Samastipur dated, July 29th, 1909.

Babu *Kulwant Sahay*, for the Appellant.

Babus *Ram Charan Mitra* and *Jogendra Nath Mukherjee*, for the Respondent.

JUDGMENT.—The plaintiff, a minor, sued for confirmation of possession, and in the alternative for recovery of possession of 30 and odd *bighas* of *kasht* land, on a declaration that the decree obtained by the defendant No. 1 in a suit for rent, in respect of the said lands, and the proceeding in execution whereof, the lands were sold and purchased by the defendant No. 1 (which were subsequently settled by him with the defendant No. 2) were fraudulent and inoperative against him.

The Court of first instance found that the *amlas* of the defendant No. 1 kept the plaintiff, who was the defendant in the rent suit, and his mother in complete ignorance of the suit, that the written statement said to have been filed on his behalf in the said suit by his mother had not been filed by her, and that the rent decree which was tainted by fraud and the sale held in execution thereof were invalid. It held, however, that the plaintiff was out of possession since the defendant No. 1 obtained delivery of possession on purchasing the lands, and accordingly gave a decree for possession of the same.

On appeal the learned District Judge held that the plaintiff having been dispossessed on the 30th April 1904, when the delivery of possession was effected and the suit having been brought on the 13th July 1908, the suit was barred by the special limitation of two years under Article 3, Schedule III, of the Bengal Tenancy Act, and on the merits, holding that there was nothing to justify a finding that deliberate fraud had been committed, set aside the decree of the Munsif and dismissed the suit. The plaintiff has appealed to this Court.

The first point to be determined is whether the special limitation provided in the Bengal Tenancy Act applies to the suit, for if it does not apply, the suit will not be barred apart from any other consideration, as the plaintiff is still a minor. The Munsif found that the plaintiff was dispossessed by the *dakhaldehani* and that finding has been accepted by the learned District Judge. The question, therefore, is whether the *dakhaldehani* (delivery of possession) to the defendant No. 1 by which the plaintiff was put out of possession, constitutes dispossession by the landlord. We are of opinion that it does not, and for two reasons. The *first* is, that although the defendant No. 1 is the landlord, he obtained possession not as a landlord, but as a purchaser at a sale held in execution of a decree. It has been held in several cases in this Court that the special limitation does not apply to a case where an occupancy *ryot* is dispossessed from his holding by his landlord, not acting as landlord but in his character as auction-purchaser. See *Abhoy Churn Mookeerjee* v.

Shaik Titu (1), *Broio Kishore Mahapatra* v. *Saraswati Dassi* (2), *Mahomed Khalil* v. *Hirendra Nath Bhattacharya* (3).

It is true in those cases, the purchaser was a co-sharer landlord and not the sole landlord, but we think that makes no difference in principle. The special limitation is as much applicable to a dispossession by a co-sharer landlord, as to dispossession by a sole landlord or entire body of landlords. See *Annada Sundari Chandalini* v. *Kebulram Changa* (4). The reason of decision of the three cases cited above is that the landlord takes possession in a capacity different from that of the landlord and that reason applies as much to a purchase by a sole landlord or the entire body of landlords as to a purchase by a co-sharer landlord. The possession is delivered to the landlord (whether he is a sole landlord or a co-sharer landlord), not as a landlord, but as a purchaser.

Secondly, we are of opinion that the dispossession effected by the act of delivery of possession by the Court is not 'dispossession' by the landlord within the meaning of Article 3, Schedule III, of the Bengal Tenancy Act. The landlord (as purchaser), no doubt, moves the Court to deliver possession and possession is delivered to him at his instance, but he sets up possession through the intervention of the Court. The delivery of possession by which the dispossession is effected is an act of the Court and when the landlord gets into possession by a process of the Court, we do not think it is an act of dispossession by the landlord, within the meaning of the Article, which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law.

Reliance was placed on behalf of the respondents in the case of *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (5). There the purchaser at a sale in execution of a landlord's decree for rent dispossessed the plaintiffs who were some of the heirs of the tenant and who had not been made parties to the rent suit. In that case, it was found that the dispossession was made by the landlord through the contesting defendant (the purchaser) who acted in collusion with him in dispossessing the plaintiffs. If the actual dispossession was made by the purchaser subsequent to the delivery of possession by the Court, in collusion with the landlord, then the case might fall within the principle of the cases where it has been held that a dispossession by a person in collusion with, or under a settlement from, the landlord is virtually dispossession by the landlord and that, therefore, the special limitation applies to such cases. The learned Judge, however, in the course of the judgment said: "It is clear that when the landlord sold the holding, he impliedly undertook to recognise the purchaser as his tenant and to make settlement with him. In pursuance of that implied offer, the contesting defendant purchased the land and took possession of the same and has now been recognised by the landlord as his tenant. If there had been no such implied offer and agreement to recognise him as a tenant he would never have purchased the land. In these circumstances, we think, that the landlord and the contesting defendant must be held to be acting in collusion in the act of dispossessing the plaintiffs and it is not the new tenant who alone has dispossessed them. For this reason we think that the rule of limitation is two years under Article 3, Schedule III, of the Bengal Tenancy Act."

If the only act of dispossession by the purchaser was the act of taking possession by process of Court then the decision is opposed to the rulings we have cited above in which it was clearly laid down that the special limitation does not apply where the dispossession is by the landlord not in his capacity as landlord but in his capacity as auction-purchaser. If the special limitation does not apply where the landlord is himself the purchaser, much less will it apply when the purchaser is a third person, even if he may be said to be in collusion with the landlord by the mere fact of purchasing at the sale. None of the said rulings are referred to in the said judgment, and the principle of the said rulings does not appear to have been considered in the case. We, therefore, respectfully dissent from the view taken in that case and follow the principle of the

(1) 2 C. W. N. 175.
(2) 6 C. W. N. 333.
(3) 5 C. L. J. 650.
(4) 7 C. W. N. 542.
(5) 3 Ind. Cas. 315; 13 C. W. N. 108; 9 C. L. J. 131.

decisions to which we have referred. We accordingly hold that the special limitation of two years prescribed by Article 3, Schedule III, of the Bengal Tenancy Act does not apply to the present case and as the plaintiff is still a minor, the suit is not barred by limitation.

We are also of opinion that the learned District Judge has not arrived at proper findings on the merits of the case. This was probably because the learned Judge thought the question of limitation was fatal to the case. At the outset, the learned Judge is in error in stating that the Munsif had laid the onus too heavily on the appellant (defendant), but the Munsif relied on the evidence for the plaintiff and the circumstances of the case, and does not appear to have placed the onus upon the defendants. Then the Judge says that the onus which lay upon the plaintiff has not been discharged by the mere deposition of his mother. Her mere deposition might not be sufficient, but the Munsif relied upon other facts and circumstances as well which have not been considered at all by the Appellate Court. Lastly the learned Judge has not arrived at a positive finding that the written statement was not filed by the plaintiff's mother or that the decree was not obtained by fraud or that the proceedings in execution thereof were not invalid—matters upon which the Munsif came to clear findings in favour of the plaintiff. We think the case has not been properly tried on the merits by the lower Appellate Court, and that the case must go back to that Court The decree of the lower Appellate Court is accordingly set aside and the case is remanded to that Court for a re-hearing of the appeal on the merits and for disposal according to law. Costs to abide the result.

Appeal allowed ; Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 328 OF 1912.

January 17, 1913.

Present:—Sir Henry Drake-Brockman, KT., J. C.

KASHAM KHAN—PLAINTIFF—APPELLANT

versus

Musammat SAWITRI—DEFENDANT—RESPONDENT.

Practice—Mortgage suit—Plaintiff making person in possession of mortgaged property defendant with representative of mortgagor—Representaitve not appearing—Other defendant pleading satisfaction of debt—Satisfaction proved—Plaintiff estopped from urging that other defendant had no right to redeem—No decree could be passed against representative.

In a suit for foreclosure of a mortgage the plaintiff joined the cultivator in possession of the property mortgaged with the representative of the mortgagor defendant. The representative did not put in appearance, but the other defendant pleaded satisfaction of the mortgage-debt by the mortgagor. The Court of first instance decided that the debt had been satisfied:

Held, (1) that the plaintiff having made the cultivator a party with the obvious intention of securing a foreclosure decree against him also, could not be allowed in appeal to allege in contradiction of his assumption at the trial, that the person in actual possession had no interest or right to redeem;

(2) that in face of the finding that the mortgagor had himself paid off the mortgage-debt, no decree could be passed on the mortgage even against the representative of the mortgagor who did not put in a defence.

Second appeal against the decree of the Divisional Judge, Nagpur Division, dated the 29th April 1912, confirming that of the Subordinate Judge, Wardha, dated the 20th September 1911.

JUDGMENT.—The appellant is assignee of a mortgage He sued for foreclosure of the mortgaged property, an absolute occupancy holding, joining as defendants the tenant and another person whom he described as *wahitdar* (cultivator in possession). The tenant, a woman, put in no appearance, but the other defendant pleaded satisfaction of the mortgage-debt by the mortgagor, deceased husband of the female defendant. Both the Courts below have held that the debt was satisfied. In the lower Appellate Court the plaintiff urged that the male defendant had no right to redeem and should not have been joined as a party, but this contention has been overruled on the ground that the plaintiff's conduct amounted to an

admission of both defendants' right to redeem.

The only point pressed in second appeal is that a decree should have been passed against female defendant who did not contest the claim, the other defendant being discharged as he failed to prove any interest in the equity of redemption. As to the male defendant's position it is perfectly clear that he could not be discharged as uninterested without giving him an opportunity to prove an interest. The appellant made that defendant a party with the obvious intention of securing a foreclosure decree against him also, and cannot be allowed to get rid of the effect of his own act by merely alleging, in contradiction of his assumption at the trial, that the person in actual possession has no right to redeem. The object was to save the trouble and expense of a second suit against the occupier of the land and having taken the chance of a decision in his favour the appellant must abide by the result: see *Sham Chand* v. *Doya Moyee* (1). In *Dhurm Das Pandey* v. *Musammat Shama Soondri Debia* (2) Lord Campbell laid it down as a safe maxim for a Court of Appeal to be guided by, that an objection which if taken might have been cured and which has not been taken in the Court below shall not be taken in the Court of Appeal. No doubt, the lower Appellate Court might in this case have framed an issue as to the existence of an interest in the male defendant, but having regard to the definition of an issue in Order XIV, Schedule I, Civil Procedure Code, it certainly cannot be said that rule 25, Order XLI, *ibid.* laid any duty upon that Court to take such a course. The pleadings contain no indication that the occupier's possession was other than lawful and the tenant herself did not even care to appear.

The Courts below having found that the mortgagor himself paid off the mortgage-debt, I am unable to understand upon what principle a decree should be passed on the mortgage against the female defendant who did not put in a defence. As was held in *Janki Das* v. *Ahmed Husain Khan* (3) it would be distinctly illogical to find in one and the same decree that as against one defendant nothing was due and as against the other that nothing had been paid. There was certainly no admission by the tenant and the plaintiff was bound to prove his claim against her.

For these reasons I concur with the lower Appellate Court in thinking that the claim to enforce the mortgage was rightly dismissed against both defendants. This is accordingly dismissed without notice to the respondents.

Appeal dismissed.

(1) 9 W. R. 338.
(2) 3 M. I. A. 229 at p. 242; 6 W. R. (P. C.) 43; 18 Eng. Rep. 184.
(3) 25 A. 159; A. W. N. (1902) 218.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3261 OF 1910.
April 23, 1913.
Present:—Mr. Justice Chapman and Mr. Justice Mullick.
MANMOHINI DASSI—PLAINTIFF—APPELLANT
versus
ADWAITA MAITI AND OTHERS—DEFENDANTS—RESPONDENTS.

Lakheraj—*Registration—Regulation XIX of* 1793, *ss.* 24, 29—*Supplying of information, omission of—Collector to enter information in register, effect of—Registration of* lakheraj *and long possession without payment of rent—Road Cess Return—Admission by proprietor of existence of* lakheraj—*Evidence—Evidence Act (I of* 1872), *s.* 13.

A *lakheraj* was registered under the provisions of Regulation XIX of 1793 and the *lakherajdar* in compliance with the requirements of section 24 of the Regulation supplied the necessary information. The Collector, however, omitted to enter the information in a register in accordance with the requirements of section 29:

Held, that the omission of the Collector could not deprive the *lakherajdar* of his title:

Held, also, that the entry in the register kept in the Collectorate showing that the *lakheraj* was registered, taken together with the long possession of the *lakherajdar* without payment of rent, would be good evidence of his *lakheraj* title.

An entry in a Road Cess Return in which a former proprietor of an estate admitted the existence of a *lakheraj*, although not binding on the auction-purchaser of the estate at a revenue sale, is evidence under section 13 of the Evidence Act.

Appeal from the decree of the Sub-Judge of Midnapur, dated August 25th, 1910, affirming that of the Munsif of that place, dated September 27th, 1909.

Babus *Baidya Nath Dutt* and *Mohini Nath Bose*, for the Appellant.

Babus *Jogendra Chandra Ghose* and *Satendra Nath Mukherjee*, for the Respondents.

RAM CHANDRA *v.* TATYA.

JUDGMENT.—The plaintiff is an auction-purchaser at a revenue sale and sues to take possession of 11 *bighas* of land which the defendants claim to be their valid *lakheraj* tenure.

Both the Munsif and the Subordinate Judge have found that the defendants have made out their case. The suit has, therefore, been dismissed.

The plaintiff appeals.

The lower Appellate Court finds as a fact that the *lakheraj* set up by the defendants was registered under the provisions of Regulation XIX, of 1793. The extract marked Exhibit Q taken from a register kept in the Midnapur Collectorate since 1784 makes this quite clear. But the learned Vakil for the appellant urges that this is not the register contemplated by section 29 of Regulation XIX and, therefore, no valid *lakheraj* has been proved. We are unable to accept this argument. The *lakherajdar* has in this case complied with the requirements of section 24 of the Regulation and supplied the information called for. The omission on the part of the Collector to enter that information in a register inscribed, paged and signed in the precise manner required by section 29 could not under any circumstances deprive the *lakherajdar* of his title. There is nothing in the Regulation to justify the view that the only method of proving a *lakheraj* grant is by an entry in the Periodical Register described in section 29. On the contrary section 28 expressly negatives this view. Moreover, the learned Subordinate Judge, as we read his judgment, finds that the register from which Exhibit Q has been extracted, contains all the information required for the "Periodical Register" and that though not bearing the inscription directed by section 29 it is in fact a Register prepared under the provisions of that section. We accept this view. The defects brought to our notice in regard to Exhibit Q are of a trivial and formal nature.

But even if it were conceded that no register has been prepared in the Midnapur District under section 29 the entry in Exhibit Q taken together with the long possession of the defendants without payment of rent would be good evidence of their *lakheraj* title.

Then there is an entry on a Road Cess Return in which a former proprietor of the estate admitted the existence of the *lakheraj*. Although not binding on the plaintiff this entry is evidence under section 13 of the Indian Evidence Act.

On behalf of the respondents we are asked to take into consideration Exhibit A which purports to be a *sanad* given by the Superintendents of the "Bare Jamai Duftar" referred to in section 48 of the Regulation but we agree with the learned Subordinate Judge that it has not been satisfactorily proved that the grant was made or confirmed by any such Superintendent. But the learned Subordinate Judge upon a consideration of the whole case has come to the conclusion that the defendants have discharged the onus placed on them. We think his decision is right and dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 39 OF 1912.

December 23, 1912.

Present:—Mr. Drake-Brockman, J. C.

RAM CHANDRA—DEFENDANT—APPELLANT

versus

TATYA—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 201, 207—Termination of agent's authority—Lambardar *acting as agent of the proprietary body—Imperfect partition of village does not terminate* lambardar's *agency.*

A *lambardar*, acting as agent for the proprietary body of the village, sued a defaulting tenant for arrears of rent, and obtained a decree. Immediately afterwards, an imperfect partition of the village came into force. There was no change, however, in the office of *lambardar*:

Held, that the *lambardar* was competent to execute the decree.

In the absence of any of the circumstances which terminate an agency as laid down in section 201 of the Contract Act and of evidence of conduct implying revocation or renunciation, under section 207 thereof, the mere coming into force of an imperfect partition does not terminate the *lambardar's* authority to act as agent of the village proprietors.

Second appeal against the decree of the District Judge, Wardha, dated the 25th August 1911, confirming that of the Junior Munsif, Hinganghat, dated the 13th May 1911.

Mr. *M. B. Kinkhede*, fo the Appellant.

Mr. *J. Mittra*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for possession of field No. 43/2 in *Mauza* Chakur which was once the ordinary holding of Waman, father of the present appellant, Ramchandra. Waman did not pay the rent for the agricultural years 1905-06 and 1906-07 and was sued for the arrears by Janki Bai, the *lambardarin*, acting as agent for the proprietary body consisting of herself and Tanba, brother of the present respondents. A decree was obtained on the 9th May 1908 and immediately afterwards an imperfect partition of the village came into force by virtue of which field No. 43/2 fell into Tanba's *patti*. Janki Bai, however, conducted the execution proceedings as she had conducted the suit, and eventually Waman was ejected on the 8th February 1909 as provided by section 85, Central Provinces Tenancy Act. Waman and Tanba are both dead. Janki Bai is still *lambardarin* of the entire village.

Ramchandra claims to be still tenant of the field. His case in the first Court was that after rejecting Waman Janki Bai re-let the field to him. Both the Courts below have found that this alleged re-letting did not take place. What is now contended on Ramchandra's behalf is that Janki Bai was not landlord of the field when she ejected Waman and that consequently the ejectment did not put an end to the original tenancy. The Court of first instance did not go into this question, considering that both parties had accepted the ejectment as valid, Tanba by whom the present litigation was commenced having ratified the *lambardarin's* action in the ejectment proceedings. In first appeal the learned District Judge dealt with the question thus:—

"The decree for arrears of rent was in favour of Janki Bai. It was in respect of the rent for the years for which Janki Bai was the *lambardarin*. By the partition Janki Bai did not cease to have interest in the decree which was for arrears of rent for the years for which she was the *lambardarin*, and as the decretal amount was not paid she was quite competent to apply for ejectment of the tenant. The decree was not transferred to plaintiffs' father (*sic*) on account of partition by operation of law as it was for the rent of the years prior to partition. Janki Bai had obtained it in her capacity of *lambardari* and was entitled to execute it in the same capacity by ejectment of the tenant. I, therefore, hold that ejectment of Waman by Janki Bai was perfectly legal and had the effect of determining Waman's tenancy and that as the fields of Waman have fallen in the *patti* of the plaintiffs they were entitled to maintain this suit for the ejectment of Wawan on the ground that he had no interest left in the fields and was a mere trespasser."

The position assigned by the appellant to Janki Bai after partition is that of a mere transferee of a money claim to the arrears. Such a transferee would doubtless not be entitled to eject the defaulting tenant. This view, however, leaves entirely out of account the fact that Janki Bai sued and executed her decree as agent of the proprietary body. The appellant has to show that this agency terminated on the imperfect partition coming into force. No such termination was pleaded in the Court of first instance. The circumstances which terminate an agency are laid down in section 201, Indian Contract Act, to be:—

(1) the principal revoking his authority;

(2) the agent renouncing the business of the agency;

(3) the business of the agency being complete;

(4) either the principal or the agent dying or becoming of unsound mind;

(5) the principal being adjudicated an insolvent;

Prima facie none of these conditions obtained here as a result of the partition. Janki Bai continued as *lambardarin* and took out execution, Waman who could hardly have been unaware of the partition raising no objection, and Tanba putting in no claim under rule 16, Order XXI or rule 10 (1), Order XXII, Civil Procedure Code, on the strength of the change in landlords. Under section 207, Indian Contract Act, revocation and renunciation of an agent's authority may be implied in the conduct of the principal or agent respectively, but here such conduct on the part of both as is evidenced by the record supports the theory that the agency continued at any rate for the purposes of proceedings against tenants who were judgment-debtors in respect of arrears of rent accrued due before the

partition. And continuance in such cases obviously serves the convenience of all concerned: the judgment-debtor is in no way precluded from enforcing the rights conferred on him by section 88, Tenancy Act, while co-sharers other than the *lambardar* are spared the trouble of acquainting themselves with the details of proceedings which their customary represntative has already brought almost to completion. In the case of ex-partners after a dissolution it is this consideration of convenience which led to the enactment of section 263, Indian Contract Act, and section 38 of the English Partnership Act, 1890 (53 and 54 Vict. c. 39); see *Butchart* v. *Dresser* (1) and *In re Bourne* (2). Under those provisions the authority of each partner to bind the firm continues notwithstanding the dissolution so far as may be necessary to wind-up the affairs of the partnership, while the English statute expressly confers power to complete transactions begun but unfinished at the time of the dissolution.

For these reasons I concur in the conclusion reached by the lower Appellate Court. The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(1) 102 R. R. 269; 4 De G. M. & G. 542; 1 W. R. 178; 10 Hare 453; 43 Eng. Rep. 619.

(2) (1906) 75 L. J. Ch. 779; 2 Ch. 427; 54 W. R. 559; 95 L. T. 131.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 151 OF 1911.

April 9, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. H. N. Roy.

AMBICA CHARAN SHER KAIBARTA —PLAINTIFF—APPELLANT

versus

SRINATH DUTTA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 375—Compromise—Subject of claim—Proceeding of Court—Registration—Stamp duty—Registration Act (III of 1877), s. 17.

When a *solenamah* refers to the subject of the claim, it becomes when recorded a proceeding of the Court and does not require registration or stamp duty.

Natesan Chetti v. *Vengu Nachiar*, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20, relied upon.

Appeal from the decree of the Additional Sub-Judge of Khulna, dated September 30th, 1910, affirming that of the Second Munsif of Khulna, dated December 4th, 1909.

Babu *Jadu Nath Kanjilal*, for the Appellant.

Babus *Nil Madhab Bose* and *Ambica Charan Das*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This second appeal arises out of a suit for rent. The contesting defendants are the tenants, and the question is whether the plaintiff has a title to this rent. There are certain *pro forma* defendants, and they, undoubtedly, were at one time the immediate landlords of the present tenant defendants. It is the plaintiff's case that these *pro forma* defendants created a *kaemi maurusi* interest in his favour which still exists. If that be so then the plaintiff's title to recover this rent is made out. The *pro forma* defendants admit that they did create this interest, and that it still exists: but the contesting defendants contend that this is not proved, and in support of this view point to section 107 of the Transfer of Property Act, and section 17 of the Registration Act. By way of answer to this the plaintiff relies on a decree which he declares embodies the transaction that created this *kaemi maurusi* interest. Nor is he alone in this, because the *pro forma* defendants join in this contention, and indeed are co-appellants with him from the decree of dismissal by the lower Appellate Court.

The contesting defendants, on the other hand, maintain that the transaction was not embodied in the decree and that section 375 of the Code of Civil Procedure of 1882 prevents its inclusion in the decree.

Now, the question whether or not this arrangement was embodied in the decree is a matter of construction. The decree has been read to us in the vernacular and has been translated to us in English, and I think it is a fair view of that decree to say that it does embody the transaction; and in so saying I find that I am in close accord with what was determined in similar cir

cumstances by the Madras High Court in *Natesan Chetti* v. *Vengu Nachiar* (1).

The next question is whether section 375 of the Code of 1882 furnishes any answer to this. It is said that this arrangement is outside the permissible scope of the decrees in view of the terms of that section. But here again we derive assistance from the Madras decision and the authorities to which the learned Judges in that case refer, and I would accordingly hold that the compromise related to the suit and its subject-matter. In this view of the compromise and the decree in accordance therewith, section 107 of the Transfer of Property Act and section 17 of the Registration Act afford no answer to the plaintiff's claim, and in support of this conclusion it will suffice again to refer to the Madras decision and the authority there cited.

For these reasons, I am of opinion, that the plaintiff in this case has established his *kaemi maurusi* interest, and is thus entitled to sue the tenant defendants successfully for the rent that is claimed in this suit.

The result is that, in my opinion, the decree of the lower Appellate Court is erroneous and there should have been a decree passed in the plaintiff's favour. We must reverse the decree of the lower Appellate Court, and pass a decree in the plaintiff's favour for Rs. 21-4 with costs throughout. The decretal amount will bear interest at 6 per cent. per annum, from this date.

Roy, J.—I concur with my Lord in the judgment he has pronounced, and I am of opinion, that the *solenamah* produced in the case is admissible in evidence, and the *solenamah* establishes the plaintiff's title to the land and right to receive rent from the tenant defendants. I think it is indisputable that when a *solenamah* refers to the subject of the claim, it becomes a proceeding of the Court and does not require registration or stamp duty. The law lays down that the terms shall be recorded. That means that the *solenamah* becomes a proceeding of the Court.

Appeal allowed.

(1) 3 Ind. Cas. 701; 33 M. 102; 6 M. L.T. 313; 20 M. L. J. 20.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 171 OF 1912.

January 19, 1913.

Present:—Mr. Hallifax, Offg. A. J. C.

RAZA HUSSAIN—DEFENDANT—APPELLANT

versus

SHIOSAHAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24—Suit remanded to be tried again by the first Court—Power of District Judge to transfer it to his own file.

Where an Appellate Court remands a suit for fresh decision on the merits by the Court which first decided it, the District Judge is competent, under section 24 of the Code of Civil Procedure, 1908, to transfer the suit to his own file and decide it.

Sita Ram v. *Nauni Dulaiya*, 21 A. 230; A. W. N. (1899) 38, distinguished.

Second appeal against the decree of the Divisional Judge, Jubbulpore Division, dated the 11th January 1912, confirming that of the District Judge, Jubbulpore, dated the 8th May 1911.

Mr. *P. S. Kotwal*, for the Appellant.

Sir *Bipn Krishna Bose* and Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—This suit was tried originally by Mr. Haidar Ali, Subordinate Judge of Jubbulpore. His characteristically absurd and improper judgment was set aside by the Divisional Judge on appeal, and the suit was remanded for a fresh decision on the merits. On this the District Judge transferred it to his own file and proceeded to hear and decide it. The first ground taken in second appeal is that he had no power to do this after the Divisional Judge had ordered that it should be tried again in the Court which first decided it. Reliance is placed on the ruling of *Sita Ram* v. *Nauni Dulaiya* (1), which was also cited in the lower Appellate Court. That, as the learned Divisional Judge has pointed out, is easily distinguishable by the fact that there the suit was remanded to the Court of the District Judge, who thereupon transferred it to that of a Subordinate Judge.

There are also other points of differentiation. In *Sita Ram's* case (1), the District Judge in the first instance decided the suit on a preliminary point and there was no reason why he should not try it out on the merits. Here Mr. Haidar Ali had heard the evidence and had adjudicated on it once, in a most unsatisfactory manner and one which showed that

(1) 21 A. 230; A. W. N. (1899) 38.

he held the views he expressed very strongly, and it was obviously undesirable that he should decide the suit again. Again *Sita Ram's* case (1) was originally instituted in the Court of the Subordinate Judge and taken by the District Judge on his own file in the preliminary stages. The learned Judges were of opinion that section 25 of the old Civil Procedure Code was not applicable to the case, but even if it were, the District Judge's power of transfer had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge. Here the transfer was the first in the case and the District Judge acted under the much wider powers given to him by section 24 of the Civil Procedure Code now in force. Another objection which might have been, but was apparently not, taken to the transfer in *Sita Ram's* case (1) was that the appeal from the Subordinate Judge's decree lay to the Court of the District Judge and was actually heard by him. I am not inclined to think that the learned Judges attempted to lay down even so broad a principle as that section 25 of the old Civil Procedure Code had no application to a case remanded under section 562 of that Code. If they did I am, with all respect, unable to follow them, and I prefer the exactly contrary view expressed by the High Court of Calcutta in *Tarucknath* v. *Gouree Churn* (2). In any case, even if section 25 of the old Code did not authorise the withdrawal of the suit, section 24 of the present Code most certainly does.

[The rest of the judgment is immaterial for the purposes of this report.—*Ed.*]

(2) 3 W. R. 147.

CALCUTTA HIGH COURT.

CIVIL RULE No. 234 OF 1913.

April 14, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Jutsice Newbould.

HARI LAL—PETITIONER

versus

PRYAG RAM—OPPOSITE PARTY.

Appeal—Temporary injunction—Whether appeal lies against order refusing temporary injunction—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1, O. XLIII, r. (1) (r).

An appeal lies against an order refusing to grant a temporary injunction.

Rule against the order of the District Judge of Gya, dated February 21st, 1913.

Babu *Surendra Nath Ghoshal*, for the Petitioner.

Babus *Umakali Mukherjee* and *Sudhangshu Sekhar Mukherjee*, for the Opposite Party.

JUDGMENT.—The question for decision in this Rule is whether an appeal lies against an order refusing a temporary injunction.

Order XLIII, rule 1 (*r*), provides for an appeal against an order under rule 1 of Order XXXIX. Order XXXIX, rule 1, lays down that the Court may by order grant a temporary injunction. Now section 588, clause 24, of the old Code (Act XIV of 1882) gave an appeal against orders under section 492 and section 492 laid down that the Court may by order grant a temporary injunction or refuse such injunction. The words "or refuse such injunction" have been omitted from Order XXXIX, rule 1, of the present Code, and it is contended for the opposite party, that as Order XLIII, rule 1, provides for an appeal, only against an order under Order XXXIX, rule 1, and as the only order mentioned in Order XXXIX, rule 1, is an order granting an injunction an appeal lies only against an order granting an injunction and not against an order refusing it.

But although the words "or refuse such injunction" have been omitted from Order XXXIX, rule 1, there can be no doubt that the Court has the power to refuse an injunction. Order XXXIX, rule 1, merely lays down under what circumstances the Court may by order grant a temporary injunction. It cannot be said that the only order which can be passed by the Court is an order granting an injunction.

The Court "may" grant, it is not bound to grant, an injunction. The fact that the Court "may" grant an injunction if the matters stated in the Rule are proved implies that the Court, has the power to refuse an injunction, if those facts are not proved. So that notwithstanding that the words "or refuse such injunction" have been omitted from Order XXXIX, rule 1, the Court has as much power to refuse such an injunction under the present Code as it had under section 492 of the old Code which expressly stated that the Court may refuse the injunction. If the words "an order under rule 1 of Order XXXIX" in Order XLIII, rule 1, mean only

an order granting an injunction, we must hold that the only order which can be passed under Order XXXIX, rule 1, is an order granting an injunction, in other words, that an order refusing an injunction cannot be passed under that rule. This certainly cannot be held. Order XXXIX, rule 1, is the only order under which the Court can deal with an application for temporary injunction, and there is no other section which gives the Court power to refuse an injunction. "An order under rule 1 of Order XXXIX," therefore, refer to any order passed under Order XXXIX, rule 1, and since under that rule, the Court has the power of refusing an injunction, we think an appeal lies against an order refusing an injunction. The view we take is supported by the observations of the Privy Council in the case of *In the matter of the petition of Hadjee Abdoollah* [*Reasut Hossein* v. *Hadjee Abdoollah*] (1), where in considering the question whether section 75 of the Registration Act VIII of 1871 (of which the final words were "no appeal lies from any order made under this section") excluded an appeal not only where the Judge directed the Registrar to register a deed, but also when the application for registration was rejected, observed: "Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term 'an order made under this section,' because, if the Judge does not make his order of rejection under the 75th section, it is difficult to see what other section gives him jurisdiction to make it." But their Lordships did not think it necessary to decide the point in that case.

Section 104 of the new Code, no doubt, lays down that an appeal shall be from the orders mentioned in that section and save as otherwise expressly provided in the body of the Code, or by any law for the time being in force from no other orders, and clause (1) mentions "any order made under rules from which an appeal is expressly allowed by rules." But clause (*r*) of rule 1, Order XLIII, expressly gives an appeal from an order under rule 1 of Order XXXIX and if an order refusing to appoint a Receiver is an order under that rule, an appeal is expressly allowed from such an order under clause (*r*).

In all the clauses (except one) of rule 1, Order XLIII, the words used are "an order" but the clauses themselves show that "an order" under a particular rule includes an order refused under that rule, although the Court is not expressly authorised by that rule to pass an order of refusal. For instance clause (*c*) gives an appeal against "an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit." But Order IX, rule 9, says that the Court "shall make an order setting aside the dismissal" if satisfied of certain matters. It does not expressly authorise the Court to reject an application for setting aside an order of dismissal but clause (*c*) of Order XXXIX, rule 1, shows that an order rejecting such an application is an order under Order IX, rule 9. Similarly clause (*t*) in Order XLIII, rule 1, gives an appeal against "an order of refusal under rule 19 of Order XLI to re-admit or under rule 21 of Order XLI to re-hear an appeal" although those rules do not expressly authorise the Court to pass orders of refusal. Similar observations apply to clauses (*d*), (*k*), (*n*) and (*o*) of Order XLIII, rule 1. So that notwithstanding the fact that the rules to which they refer mention only orders granting an application, the clauses themselves show that orders of refusal are within the rules. Some of the clauses of rule 1, Order XLIII, expressly give a right of appeal only against an order of refusal, and they do not create any difficulty, because the Legislature expressly restricts the right of appeal against orders of refusal. But clauses (j), (*l*) and (*m*) give a right of appeal against an order granting an application as well as against an order of refusal, clause (j) refers to orders under rule 72 and rule 92 of Order XXI setting aside or refusing to set aside a sale, but rule 92 expressly provides for confirming as well as for setting aside a sale, whereas rule 72 provides only for setting aside a sale.

Clause (*m*) gives an appeal against an order under rule 3 of Order XXIII recording or refusing to record an agreement or compromise, but rule 3 only provides for the Courts ordering an agreement or compromise to be recorded and does not expressly authorise the Court to refuse to do so. Similar observations apply to clause (*l*). It may be said that when an appeal was intended to be given both against an order of refusal as well as against an order granting

(1) 2 C. 131; 26 W. R. 50; 3 I. A. 221.

an application, it is so expressly stated as in clauses (*j*), (*l*) and (*m*) but the same argument might have applied to some of the clauses of section 588 of the old Code. Clause 7 gave an appeal from orders under section 111, setting off, or refusing to set off one debt against another and clause 16 gave an appeal from orders under section 312 or section 313 for confirming or setting aside or refusing to set aside a sale. Clause (24) gave an appeal from orders under section 503. Section 503 (like Order XL, rule 1, of the present Code to which it corresponds) mentioned only an order appointing a Receiver and not an order refusing to appoint a Receiver. Section 588, clause 24, did not expressly mention an order refusing to appoint a Receiver just as clause (*s*) of Order XLIII, rule 1, does not expressly mention it. But notwithstanding the fact that clauses 7 and 16 of section 588 expressly mentioned orders refusing as well as orders granting and section 503 did not expressly mention an order of refusal, it has always been held that an appeal lay against an order refusing to appoint a Receiver; see *Boidya Nath Adya* v. *Makhan Lal Adya* (2), *Gossain Dulmir Puri* v. *Tekait Hetnarain* (3), *Venkatasami* v. *Stridavamma* (4).

However that may be when clause (*r*) gives an appeal against an order under rule 1 of Order XXXIX and an order refusing an injunction can be passed under that rule and must be taken as an order under that rule we think that an appeal lies against an order refusing an injunction.

The order of the learned District Judge is accordingly set aside, and the case is sent back to that Court for a hearing of the appeal according to law. The costs of this Rule which we assess at one gold *mohur* will abide the result.

Order set aside.

(2) 17 C. 680.
(3) 6 C. L. R. 467.
(4) 10 M. 179.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1143 OF 1909.

August 14 1911.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

D. DEVALRAJU AND OTHERS
PLAINTIFFS—APPELLANTS
versus
MAHAMED JAFFER SAHEB—
DEFENDANT—RESPONDENT.

Landlord and tenant—Denial of tenancy—Termination of tenancy—Eviction—Unexecuted decree for ejectment—No eviction.

A tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without proving that he has surrendered possession to his landlord, or has been evicted by title paramount, or has attorned thereto, or that at least he has given notice to his landlord that he intends to claim under another and more valid title.

Eviction must be actual and not merely constructive.

An unexecuted decree for possession would not amount to eviction.

Second appeal against the decree of the Subordinate Judge of Kistna at Ellore, in A. S. No. 292 of 1906, presented against that of the District Munsif of Ellore, in O. S. No. 71 of 1905.

Mr. *P. Naranamurthy*, for the Appellants.

Mr. *A. Krishnasavami Aiyar*, for the Respondent.

JUDGMENT.

AYLING, J.—The Subordinate Judge has reversed the District Munsif's decree on two grounds: (1) that as a competent Court has decided in Original Suit No. 139 of 1901 that the second plaintiff and not the first plaintiff (appellant) is the *dharmakarta*, the appellant cannot maintain a suit on the basis of a rent deed executed to him as *dharmakarta*; (2) that the defendant has discharged the claim in full.

The second contention is, undoubtedly, inadmissible. Not only was no plea of discharge set up by the first defendant, but it is clear that the Subordinate Judge's view that the payments noted on the foot of the deed Exhibit A, operated as a full discharge of the rent to the end of the lease is based on a mistaken view of that document. It is distinctly stated in Exhibit A that the last payment is only for *Faslis* 1309 and 1310.

The other point is more difficult of decision. On the whole I am inclined

to think that it must be governed by section 116 of the Evidence Act, which prevents a tenant during the continuance of his tenancy from denying his landlord's title at the commencement thereof. In this case there is nothing to indicate that the tenancy under Exhibit A has terminated. The first defendant has not attorned to the second plaintiff in any way nor has he been evicted. It is argued with some plausibility that the decree in Original Suit No. 139 of 1901 is tantamount to a determination of the tenancy; but after careful consideration I do not think this plea can be accepted in the peculiar circumstances of this case. The second plaintiff got a decree for possession and for mesne profits, but he has not executed the former portion and has entered into a compromise with the first plaintiff by which he accepted certain money payments in full satisfaction of his claim for mesne profits. Even apart then from the second plaintiff's being joined in the present suit and acquiescing (as he appears to have done) in the first plaintiff's claim there is no reason why the first defendant should not be held bound by the ordinary rule of estoppel or should be allowed to escape payment of the rent due by him in accordance with the terms of the lease.

In my opinion the decree of the Subordinate Judge must be set aside, and that of the District Munsif restored with costs throughout.

SPENCER, J.—This is a suit between landlord and tenant. The lease-deed upon which the first plaintiff (appellant) sues is Exhibit B; its term is six years from *Faslis* 1307 to *Faslis* 1312; and the present claim is in respect of rent for *Faslis* 1310, 1311 and 1312.

The suit was decreed in the Court of first instance. In the Subordinate Judge's Court, the District Munsif's decision was reversed and the suit was dismissed on the grounds (1) that the first plaintiff could not maintain the suit when it has been declared in a separate suit (Original Suit No. 139 of 1901) that not he but another named D. Sivaramayya who was added as second plaintiff was the rightful *dharmakarta* of the Onkara Visveswaraswami temple, (2) that he had received Rs. 900 and odd from the defendant in full discharge of the rent due up to *Fasli* 1312.

On the second point the Subordinate Judge was clearly wrong in deciding the case upon a plea of discharge which the defendant did not set up in his written statement. Further he based his opinion upon the entries of payment made at the foot of the lease-deed and these entries do not show that anything was paid for any *fasli* subsequent to 1309 and 1310.

On the first point the short answer is the provision of section 116 of the Evidence Act, which lays down that a tenant cannot during the *continuance of the tenancy* be permitted to deny that his landlord had a good title at the beginning of the tenancy. The relation of landlord and tenant continues until it is proved to have ceased (*vide* section 109, Evidence Act). But it is argued that in this case the landlord's title had determined by notice of the decision of a competent Court in a suit to which he was a party, and that justice requires that the tenant should be permitted to raise this plea as he is liable to the person who has the real title and may be forced to make payment to him. The answer to this is that the tenant does not allege in his written statement that he has surrendered possession to his landlord, or has been evicted by title paramount, or has attorned thereto, or that at least he has given notice to his landlord that he intends to claim under another and more valid title. In "Bigelow on the Law of Estoppel," 5th Edition, page 520, it is stated that it is settled law that a tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without adopting one of these four courses. Here the lease did not expire till the end of *Fasli* 1312, and as between the first plaintiff and the defendant it must be treated as in full force and effect till the close of its period of six years. Here I may note that I agree with the Subordinate Judge that the second plaintiff was not a necessary party to the suit. For the theory that the establishment of a subsequent paramount title does not absolve a tenant from payment of rent during the continuance of the tenancy where enjoyment continued, reference may

be made to "Everest and Strode's Law of Estoppel," 2nd Edition, page 277, where the following observation occurs :—

"A tenant may dispute his landlord's title, if he has been evicted by title paramount, and by a party entitled to the immediate possession of the premises ; or if under threat of eviction by a party having a title paramount and entitled to the immediate possession of the premises, he has attorned tenant." A note is appended that the eviction must, it appears, be actual and not merely constructive, and authorities are cited. An unexecuted decree for possession would not, I think, amount to eviction. In the present case also there seems to be no danger of the tenant having to pay the rent twice over as the defendant has not attorned to the second plaintiff. It was only from the present first plaintiff that the second plaintiff as the rightful *dharmakarta* got a decree for the recovery of mesne profits in Original Suit No. 139 of 1901. The present defendant was *ex parte*.

The decree of the lower Appellate Court is set aside and that of the original Court restored with costs against the respondent in both Appellate Courts.

Decree set aside.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 3249 OF 1910.
April 16, 1913.
Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice H. N. Roy.
HARIFULLA GAIN AND OTHERS—DEFENDANTS—APPELLANTS
versus
BENODE BEHARY MONDOL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (*VIII of* 1885), *s.* 49—*Notice—Form of notice—Length of notice.*

Section 49 of the Bengal Tenancy Act prescribes no form of notice, nor does it give any indication as to the length of notice, because the Act itself protects the under-*raiyat* from ejectment until the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord.

Appeal from the decree of the Officiating Third Sub-Judge of 24 Pergannahs, dated July 27th, 1910, affirming that of the First Munsif of Basirhat, dated December 28th, 1910.

Babus *Sarat Chandra Roy Chaudhuri* and *Gobinda Chandra Chakravarti*, for the Appellants.

Babu *Atul Krishna Roy*, for the Respondents.

JUDGMENT.—It is in the circumstances of this case impossible for us in second appeal to question the propriety of the finding that the plaintiffs were *raiyats* and the defendants under-*raiyats*. Nor do I think it can be maintained that notice was not properly served. It is true the lower Appellate Court speaks of defendant No. 1 alone but that was because defendant No. 1 was the only defendant who contested the suit.

The only remaining point is whether the notice was bad because it indicated a very brief time within which the land was to be quitted.

Section 49 of the Bengal Tenancy Act prescribes no form of notice nor has it given any indication as to the length of notice, and this is for a very good reason. It would be deplorable to introduce into matters of this kind the intricacies of English Law or even the law as prevailing in the Presidency towns: Nothing is said as to the length of notice because the Act itself protects the under-*raiyat* from ejectment until the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. This provision of the law is that which indicates the time at which it becomes obligatory upon an under-*raiyat* to leave. In my opinion, the lower Appellate Court was right.

We must, therefore, confirm the decree with costs.

Decree confirmed.

MAHAMADGAUS DADASAHEB *v.* RAJBAX ROSHANBAX.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 140 AND 181 OF 1911.

August 22, 1912.

Present:—Sir Basil Scott, Kr., Chief Justice, and Mr. Justice Beaman.

MAHAMADGAUS DADASAHEB—DEFENDANT No. 1.

versus

RAJBAX ROSHANBAX—PLAINTIFF

AND

DILAWARKHA SIKANDARKHA—DEFENDANT No. 2.

versus

RAJBAX ROSHANBAX—PLAINTIFF.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 124, 134, 144—*Religious institution—Lease by holder of land to support services—Death of lessor—Suit for recovery of property—Civil Procedure Code* (*Act V of* 1908), *s.* 11—Res judicata—*First suit to recover property on allegation of mortgage—Suit dismissed—Second suit to recover property on allegation of mortgage.*

A. a *Fakir* of the Makan of Malapur, held the office of *Surguro*. Certain lands were assigned to support services rendered to the Makan and the religious community by successive holders. The property descended to the disciple of each holder of the office of *Surguro* in succession.

In 1891, *A.* alienated the lands to *C.* by way of a lease for a term of seventy-five years in satisfaction of an old debt. *A.* died in 1904, *B*, who was the disciple nominated by *A.* to succeed him, sued *C.* in 1907, through his next friend, for possession of the property alienated by *A.* free of incumbrance.

In this suit it was alleged that the document by way of lease was in reality a mortgage and that as an agriculturist *B.* was entitled to sue for redemption prior to the expiration of the agreed term. It was also alleged that the alienation was void after the death of *A.* In defence, *C.* set up the case that the document was not a mortgage but a lease, that the alienation was not void and that the suit was time-barred. The suit was dismissed on the ground that *B.* had failed to establish his contention as to the character of the document upon which he had elected to go to trial.

In 1909, *B.* sued for a declaration that he was owner of the lands leased and for possession, alleging that *A.* had no right to alienate the lands beyond his life-time. *C.* pleaded limitation and *res judicata* in bar of the suit:

Held, (1) that the plea of limitation failed as there was no adverse possession during the life-time of *A.*;

(2) that the suit was not maintainable owing to the bar of *res judicata*, as the matter of the retention of the possession of the land by *C.* upon terms assented to by him had been heard and finally decided in the first suit and could not be raised again.

Woomatara Debea v. *Unnopoorna Dassee*, 11 B. L. R., (P. C.) 158; 18 W. R. 163, relied upon.

Naro Balvant v. *Ramchandra Tukdev*, 13 B. 326, distinguished.

The holder of the lands, in the case of such an institution, may alienate them for his own life or any shorter period but cannot separate them permanently from the duties to which they are annexed so as to bind his successor.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, 2 Bom. L. R. 597; 23 M. 271; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29, distinguished.

An alienation by the holder for the time being is valid only during his life-time, and his successor can recover the property alienated within 12 years of his death.

In the case of a lease from the holder for the time being, time would begin to run not from the commencement of the tenancy of the person claiming to hold as tenant but from the date when the claims of the parties became openly and undoubtedly adverse.

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 6 A. L. J. 857; 11 Bom. L. R. 1234; 10 C. L. J. 284 (P. C.); 36 C. 1003; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148; *Ram Chunder Singh* v. *Shrimati Madho Kumari*, 12 C. 480; 12 I. A. 188 at p. 197, *Trimbak Ramchandra* v. *Sheikh Gulam Zilani*, 5 Ind. Cas. 965; 12 Bom. L. R. 208 at p. 218; 34 B. 329, relied upon.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, 2 Bom. L. R. 597; 23 M. 271; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29, distinguished.

First appeal from the decision of the First Class Subordinate Judge of Dharwar.

Mr. *Coyajee*, with him Mr. *K. H. Kelkar*, for Defendant No. 1.

Mr. *G. S. Mulgaonkar*, for Defendant No. 2.

Mr. *Nadkarni* (with him Mr. *A. G. Desai*), for the Plaintiff.

JUDGMENT.

SCOTT, C. J.—The only two points argued in this appeal are limitation and *res judicata*.

The property in suit consists of lands at Malapur and Dharwar which the plaintiff claims by right of succession to his deceased father and *Guru*, Roshan, who was a *Fakir* of the Makan of Malapur and held also the office of *Surguro*. The land in suit had been alienated by the previous holder of the office of *Surguro* in favour of the ancestors of defendant No. 1. The last alienation was made by Roshan in 1891 by way of lease in favour of defendant No. 1's father for a term of seventy-five years in satisfaction of an old debt of Rs. 7,000. The plaintiff's case is that Roshan had no power to alienate the property beyond his life-time and he claims to recover possession on the footing that since Roshan's death the lease is no longer binding.

It is admitted that the property descends to the disciple of each holder of the office of *Surguro* in succession, and that according to custom the son of the last holder is appoined disciple, successor and *Surguro*. It is found as a fact, and the finding is not challenged in appeal, that the plaintiff is the disciple nominated by Roshan to succeed him. It is also found that the lands in suit were granted for the support of the office of the *Surguro*. This finding also has not been seriously attacked. It is not now contended that the lease was granted by Roshan for a necessary purpose so as to bind the property in the hands of successive holders. Roshan died in 1904 and the plaintiff contends he is entitled to challenge the alienation at any time within twelve years of that date. The defendant contends that time ran in his favour, as lessee for a term, from the date of the lease and that the suit is barred. In support of this argument the defendant placed reliance chiefly upon the judgment of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1). That was a case of sales of an office which were void *ab initio* and it was held that time ran in favour of the purchaser from the date of the sales and the vendor's right and the right of his son, who would succeed to the office by inheritance, was barred after twelve years. In the present case, however, we have no sale of an office but a lease for a term of years by the holder for the time being of lands assigned to support services rendered to the Makan and a religious community by successive holders. The rule in such cases is that the holder of the lands may alienate them for his own life or any shorter period but cannot separate them permanently from the duties to which they are annexed so as to bind his successor: see Mayne's Hindu Law, section 401.

In a recent judgment in somewhat similar case the Judicial Committee held that a lease granted by a Mohunt, whose predecessor had received the land as a gift for the service of particular idols whose *shebait* he was, valid only during his life-time and was recoverable by his successor suing within twelve years of the death of the lessor Mohunt: *Abhiram Goswami* v. *Shyam Charan Nandi* (2).

It is contended for the defendant that this class of cases is distinguishable as here the property is heritable by sons subject only to their nomination by their father as disciples. The right of the plaintiff would then, however, be regulated by the rule, which has been applied in the case of Ghatwali tenures in *Ram Chunder Singh* v. *Srimati Madho Kumari* (3), and in the case of Saranjams in *Trimbak Ramchandra Pandit* v. *Sheikh Gulam Zilani Vaiker* (4), *viz.*, that time would begin to run not from the commencement of the tenancy of the person claiming to hold as a tenant but from the date: when the claims of the parties became openly and undoubtedly adverse. On this footing there was no adverse possession during Roshan's life-time. For these reasons, we think the plea of limitation fails.

It is otherwise, however, with the plea of *res judicata*.

In Suit No. 155 of 1907, the plaintiff by his next friend sued the defendants for possession of the lands now in suit free of incumbrances.

It was alleged that the document by way of lease under which the defendant claimed to retain the land was in reality a mortgage, that having regard to the fact that the defendant's father had been previously in possession of the lands as usufructuary mortgagee under an earlier mortgage, there was in fact nothing due by the plaintiff and, therefore, being an agriculturist he was entitled to sue for redemption prior to the expiration of the agreed term: his plaint then proceeded as follows: "Moreover the said lands being *Inam* lands and person who *took* (gave?) a mortgage of them in writing being dead, the defendant is bound to surrender them gratis under the Watan Act. Therefore this suit is filed."

The allegation of mortgage by an agriculturist was, no doubt, resorted to in order to avoid the plea that the suit was premature while the allegation that the alienation by way of mortgage was void after the death of the mortgagor was deliberately put forward as a second line of attack. Tha cause of action

(1) 27 I. A. 69; 2 Bom. L. R. 597; 23 M. 271; 4 C. W. N. 329; 10 M. L. J. 29.

(2) 4 Ind. Cas. 449; 36 I. A. 148; 6 A. L. J. 857; 11 Bom. L. R. 1234; 10 C. L. J. 284; 36 C. 1003; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

(3) 12 I. A. 188 at p. 197; 12 C. 484.

(4) 5 Ind. Cas. 965; 12 Bom. L. R. 208 at p 218; 34 B. 329.

was stated to have arisen on the 15th of March 1907 when the plaintiff demanded delivery free of incumbrances and the defendant refused. The written statement in that suit set up the case that the document in question was not a mortgage but a lease, that the alienation did not fall under the Watan Act and that the suit was barred as having been instituted more than twelve years from the date of the lease.

In the present suit the plaintiff's case is stated in paragraph 3 of the plaint as follows:—

"The said lands being Sarva Inam lands which are to continue with the plaintiff's family in the succession of disciples in the capacity of Malapur Makandar *Fakirs*, the deceased Roshan Baksh had not right and power whatever to pass in writing those lands by way of mortgage or lease or in any other manner so as to let them continue in force after his death. There is no reason for the land to continue with the defendant but if the dedfendant is asked to relinquish the lands he does not relinquish them. Therefore it became necessary to file this suit."

The complaint in both suits was the unlawful retention by the defendant of the lands after demand for delivery free of incumbrances. In both suits the point was put forward by the plaintiff that the alienation ceased to be effective after the death of Roshan Baksh. In the first suit the defendant expressly alleged that the document of alienation was a lease and not a mortgage, but the plaintiff who had the conduct of the proceedings deliberately declined to accept that view of the document or to assert his right in the alternative on that basis.

The first suit was dismissed by the Court on the ground that the plaintiff failed to establish his contention as to the character of the document upon which he had elected to go to trial. The matter of the retention of possession of the land by the defendant upon the terms asserted by him has been heard and finally decided in the first suit and cannot be raised again: see *Woomatara Debea* v. *Unnopoorna Dassee* (5).

It was argued by Counsel for the plaintiff that the Court had no jurisdiction by reason of the provisions of the Court Fees Act to try any issue in the first suit except the question of the plaintiff's right as an agriculturist to redeem. We have not been referred to nor are we aware of any authority for the contention. The plaintiff by his next friend was *dominus litis* and the Court Fees Act did not prevent him from having his case shaped in the way considered most advantageous to him.

The case of *Naro Balvant* v. *Ramchandra Tukdev* (6) relied upon for the plaintiff is clearly distinguishable. It presents none of the essential features of the present case. The two suits there were not concerned with the relations of the plaintiff and defendant arising under one and the same document. There was no alternative line of attack in the first suit deliberately abandoned by the plaintiff; on the contrary the plaintiff asked for and was refused in the first suit permission to change his suit to one in ejectment.

We are of opinion that this suit is not maintainable owing to the bar of *res judicata*. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

BEAMAN, J.—I entirely concur.

Decree reversed.

(5) 18 W. R. 163; 11 B. L. R. (P. C.) 158.

(6) 13 B. 326.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 807 OF 1912.

April 4, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Ryves.

SHEO GHULAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADRI NARAYAN LAL—PLAINTIFF—RESPONDENT.

Hindu Law—Gift executed by father on his own behalf and on behalf of his minor son—Void or voidable.

A gift executed by a Hindu father on his own behalf and on behalf of his minor son is voidable at the instance of the minor son.

Mir Sarwarjan v. *Fakhuruddin Mahomed Chowdhuri*, 13 Ind. Cas. 331; 39 I. A. 1; 16 C. W. N. 74; 21 M. L. J. 1156; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232 (P. C.), *Mohori Bibee* v. *Dharmodas Ghose*, 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 30 I. A. 114 (P. C.), referred to.

Second appeal from the decision of the Additional Subordinate Judge of Ghazipur, dated the 27th of February 1912.

SHEO GHULAM *v.* BADRI NARAYAN LAL.

Mr. *Iswar Saran* (with him Mr. *Brajnath Vyas*), for the Appellants.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—Oudh Behari and his son Mahabir constituted a joint Hindu family. They owned exclusively a dilapidated house and they had also certain rights over a compound adjoining the house in common with the owners of neighbouring houses.

Oudh Behari executed a deed of gift on the 22nd October 1910 which was duly registered, for himself and on behalf of his son, Mahabir, who was a minor, in favour of a relation Badri Narain Lal by which he conveyed to Badri Narain Lal all his own and his son's right in the house and court-yard. Badri Narain Lal obtained possession of the premises and made preparations for re-building the house, whereupon Sheo Gulam and his son, Ram Kumar Lal, took forcible possession of the property on the 2nd January 1911.

Badri Narain Lal then filed this suit for possession. He based his title on the deed of gift. He made three sets of defendants to the suit; (1) Sheo Gulam and his son, (2) various other neighbours and relations of Oudh Behari Lal who were interested in the court-yard; (3) Oudh Behari Lal and his son, Mahabir, through the guardianship *ad litem* of his father.

Some of the defendants disclaimed any interest in the property and were exempted.

The rest, with the exception of Oudh Behari Lal, denied Oudh Behari Lal's title in the property in suit, and claimed adverse possession for more than twelve years. Oudh Behari Lal admitted the gift on his own and his son's behalf. The Munsif found that the defendants' adverse possession was not proved, that Oudh Behari Lal and his son exclusively owned the property, and that it was their ancestral joint property. He, however, dismissed the suit on the ground that the deed of gift by Oudh Behari Lal was void because of the minority of his son and because it conferred no benefit on the son. On appeal the learned Subordinate Judge reversed this decree, and, holding that the deed of gift was not void but only voidable at the instance of the minor, decreed the suit.

In second appeal before us the only ground taken is that the gift in question is absolutely void and confers no title on the plaintiff in respect of the property in dispute. We have heard the learned Vakils of the parties at length and we have come to the conclusion that the decree of the lower Court must be affirmed.

We do not think the decisions of the Privy Council in *Mir Sarwarjan* v. *Fakhur-ud din Mahommed Chowdhuri* (1) and in *Mohori Bibee* v. *Dharmodas Ghose* (2) relied on by the appellants have any application to this case. The father of a joint Hindu family has, undoubtedly, the power to alienate the ancestral property of the family under certain circumstances, without the consent of the other members of the family. He can also in any circumstances alienate the joint family property with the consent of the other members. In the present case if Mahabir had been a major at the date of the gift, the validity of the gift would depend on whether Mahabir gave his consent and ratified the gift. In other words, the gift was voidable at the instance of Mahabir and not void *ab initio*. We do not think the fact that Mahabir happened to be a minor affected the validity of the gift. It will be open to Mahabir on attaining majority to repudiate or ratify the gift. We do not think that the contesting defendants, who have no title in the property and who are mere trespassers, can challenge the validity of the gift. We express no opinion on the legal effect, if any, of Mahabir having been made a party to the suit and of the admissions made on his behalf by his father who had been appointed his guardian *ad litem* by the plaintiff.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 13 Ind. Cas 331; 16 C. W. N. 74; 39 I. A. 1; 21 M. L. J. 1156; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232; (P. C.)

(2) 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 30 I. A. 114 (P. C.).

SERAMOT ALI *v.* SAMAD ALI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3849 OF 1910.

April 9, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

SERAMOT ALI—PLAINTIFF—APPELLANT

versus

SAMAD ALI—DEFENDANT—RESPONDENT.

Registration—Deed of sale—Non-payment of purchase money—When deed inoperative—Question of intention—Transfer of Property Act (IV of 1882), s. 54.

A deed of sale which is intended to be operative upon registration, does not become inoperative by reason merely of non-payment of the purchase-money, where payment is not made a condition precedent. But if the parties intend that no title shall pass till the consideration money is paid and the deed delivered, the law would give effect to such transaction.

The mere registration of a deed of transfer is not in itself sufficient to convey title, but the Court has to see what was the intention of the vendor, if no consideration passed. Intention may be presumed from circumstances.

Sheo Narain Singh v. *Darbari Mahton*, 2 C. W. N. 207; *Mauladan* v. *Raghunandan Pershad Singh*, 27 C. 7 and *Gostho Behary Ghosh* v. *Rohini Gowalini*, 4 Ind. Cas. 541; 13 C. W. N. 692, relied upon.

Baijnath Singh v. *Patto*, 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96, referred to.

Appeal from the decree of the Sub-Judge of Noakhali, dated August 13th, 1910, affirming that of the Munsif of Feni, dated February 30th, 1910.

Moulvi *Nuruddin Ahmed*, for the Appellant.

Babu *Dhirendra Lal Kastagir*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for possession of a certain piece of land on the basis of a *kobala* executed by the defendant No. 1 in favour of the plaintiff. The Courts below have dismissed the suit on the ground that no consideration was paid for the *kobala* and that the sale was not a completed transaction. The plaintiff has appealed to this Court and it has been contended on his behalf that the deed of sale having been registered, the mere non-payment of the purchase-money does not prevent the passing of the ownership of the property from the vendor to the purchaser and that the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. No doubt, when a deed of sale is intended to be operative, upon the registration of the deed of sale, the mere non-payment of the purchase-money where the payment of it is not made a condition precedent, does not render it inoperative; but the mere registration of the deed of sale may not be sufficient to pass a good title. If the parties intend that no title shall pass till the consideration money has been paid and the deed delivered, the law would give effect to such transaction. It is true, that, under section 54 of the Transfer of Property Act, the sale of immoveable property of the value of Rs. 100 and upwards can be effected only by a registered instrument; but it does not follow that the mere registration of the deed is conclusive to show that the title has passed. If it is intended by the parties that the title should pass only upon the fulfilment of a condition or upon the payment of the consideration no title will pass unless that condition is fulfilled or the payment is made.

It has been urged on behalf of the appellant that there is no finding that the intention of the parties was that the sale was to be operative only on the payment of the consideration. It is true there is no express finding to that effect but we think that is what the Courts below meant to find. Besides it seems to us, having regard to the case set up by the parties, that there was no question about that being the intention of the parties. The plaintiff alleged in his plaint—and that fact was also recited in the *kobala* itself—that Rs. 150 was paid in cash and a bond for Rs. 250 was given to the defendant, the price having been fixed at Rs. 400. The case of the defendant also was that that was the agreement. The plaintiff alleged that Rs. 150 had actually been paid in cash and a bond had been executed in favour of the defendant No. 1 and that subsequently the bond had been paid off. The finding, however, is that there was no payment in cash at all and that, although the bond was executed, it was not registered and the plaintiff made a false endorsement on it showing payment of the money due under it to the defendant No. 1. The *kobala*, no doubt, was in the possession of the plaintiff; but the plaintiff was the son-in-law of the defendant No. 1 and acted as his agent and that explains the possession of the bond by the plaintiff. The Court of first instance found that the conduct of the plaintiff was extremely fraudulent, and the Courts below have come to the finding that no consideration passed and that the sale

was not a completed transaction. The learned Pleader for the appellant has placed much reliance upon the case of *Baijnath Singh* v. *Pallu* (1) in support of his contention. In that case, the learned Judges do not appear to have taken into their consideration the view which has been taken by this Court in several cases, *Sheo Narain Singh* v. *Darbari Mahton* (2), *Mauladan* v. *Rughunandan Pershad Singh* (3), *Gostho Behary Ghosh* v. *Rohini Gowalini* (4), namely, that the question was one of intention, in a matter like this, if no consideration passed. But in the Allahabad case cited above, the Court apparently was satisfied that the transaction was complete. In the last case in this Court *Gostho Behary Ghosh* v. *Rohini Gowalini* (4) the learned Judges observed:—"The mere registration of a deed of transfer is not sufficient in itself to convey title but the Court has to see what was the intention of the vendor, if no consideration passed. The intention may be presumed from circumstances." Having regard to the findings arrived at by the lower Courts, we do not think we should interfere in this case. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.
(2) 2 C. W. N. 207.
(3) 27 C. 7.
(4) 4 Ind. Cas. 541; 13 C. W. N. 692.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1281 OF 1911.

March 4, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Bakewell.

KUMMATHA VITTIL KUNHI KUTHALAI HAJI—APPELLANT

versus

Reverend ANTONI GOVEAS AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 111, 116—*Malabar Compensation for Tenants' Improvements Act (I of* 1900), *ss.* 5, 6—*Tenant holding over—No adverse possession until tenant is paid for improvements—Limitation.*

The Transfer of Property Act does not apply to agricultural leases in Malabar.

According to the customary or common law of Malabar, a *Kuzhikanam* lease is a lease of waste land granted for 12 years (or such period as may be stipulated) on condition that the tenant shall make improvements and shall be paid for them before he is ejected.

The right to hold possession remains with the tenant until he has been paid the value of his improvements and till he is paid there can be no adverse possession.

Second appeal against the decree of the District Court of North Malabar, in A. S. No. 474 of 1910, preferred against that of the District Munsif of Cannanore, in O. S. No. 10 of 1910.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The plaintiffs sued to redeem a *kuzhikanam* demise made in 1862 in favour of 1st defendant's father.

The District Munsif gave the plaintiffs a decree for possession on payment of the sum ascertained as due to the defendants as compensation for improvements. On appeal, the District Judge held that tenancy created by the demise of 1862 terminated in 1874 by efflux of time, apparently under the provisions of section 111 of the Transfer of Property Act. He seems also to have held that section 116 does not protect the tenant, as there was no payment of rent, and, therefore, no holding over. He held that the plaintiff's suit was barred by Article 139 of the Limitation Act, not having been brought within 12 years of the termination of the tenancy, and he dismissed the plaintiff's suit with costs throughout. The 1st plaintiff now appeals to us against this decree, and with good reason. The Transfer of Property Act does not apply to agricultural leases in Malabar. If it did, section 116 would be a sufficient answer to the defendants' plea of limitation. According to the Customary or Common Law of Malabar, a *kuzhikanam* lease is a lease of waste land granted for 12 years (or such period as may be stipulated) on condition that the tenant shall make improvements and shall be paid for them before he is ejected. The right to hold possession remains with the tenant until he has been paid the value of his improvements. His tenancy does not cease unless and until he has been paid. He continues to hold on the terms of his lease except that when the 12 years or other period fixed in the lease for his benefit having expired, he must give up possession on receipt of reasonable notice and on payment of the compensation due for his improvements. This, which is the Customary Law of Malabar has been clearly enacted in sections 5 and

6 of the Malabar Compensation for Tenants' Improvements Act I of 1900 (Madras). In this case, therefore, there was no question of adverse possession.

The defendants continued to hold *as tenants*, until paid the compensation due to them, and time did not begin to run against the plaintiffs under Article 139 or any other Article of the Limitation Act.

The District Munsif has dealt with the plea of limitation correctly in paragraphs 10 and 11 of his judgment. We set aside the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

Decree set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 65 OF 1910.

July 26, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

HASSOMAL MANGHIR SING—APPELLANT

versus

KHUSHIRAM KHATANMAL—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15B—Decree in terms of award—Instalments—Inapplicability to filing of award.

A defendant, though an agriculturist, cannot, in execution of an award filed under section 525 of the old Code of Civil Procedure, get the benefit of section 15B of the Dekkhan Agriculturists' Relief Act.

Govindrao Narhar v. *Ambalal Mohanlal*, 11 Ind. Cas. 366; 13 Bom. L. R. 352; 35 B. 310, followed.

Appeal from the order of the Assistant Judge, Hyderabad.

Mr. *Dipchand Chandumal*, for the Appellant.

Mr. *Dharamdas Khushiram*, for the Respondent.

JUDGMENT.—The appellant prays for instalments in execution of an award filed under section 525, Civil Procedure Code. The appellant relies on section 15B of the Dekkhan Agriculturists' Relief Act. The award and the decree create a mortgage on the appellant's property and give the respondent a right to recover the decretal amount by sale of it on certain conditions. Nevertheless

there was no suit of the description mentioned in section 3 clause (*y*) or clause (*z*) of the Dekkhan Agriculturists' Relief Act nor was the decree passed in such suit so as to make the provisions of section 15B of the Act applicable. It is true that in *Ghulam Husssein's* case, *Ghulam Jilani* v. *Muhammad Hussain* (1) the Privy Council referred to the application under section 525 as being a litigious proceeding in the nature of a suit. But even if the application under section 525 be treated as a suit it would still be a suit for the purpose of filing the award and not a suit for foreclosure or redemption. Although, therefore, the defendant is an agriculturist, he cannot in these proceedings get the benefit of section 15B of the Dekkhan Agriculturists' Relief Act. In coming to this conclusion we agree with the recent case of *Govindrao* v. *Ambalal* (2). We confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 29 C. 167; 29 I. A. 51; 4 Bom. L. R. 161; 12 M. L. J. 77; 25 P. R. 1902.

(2) 11 Ind. Cas. 366; 13 Bom. L. R. 352; 35 B. 310.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3846 OF 1910.

March 28, 1913.

Present:—Mr. Justice Stephen and Mr. Justice Holmwood.

NAGENDRA KUMAR RAKHIT—PLAINTIFF—APPELLANT

versus

APARNA CHARAN CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Patni—*Sale—Arrears of rent—Purchase by* zemindar *—Suit to set aside sale on ground of fraud—Sale set aside—Decree for mesne profits against* zemindar—Zemindar's *suit for rent for period of possession, whether maintainable—Original arrears for which sale held and subsequently set aside, suit for—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2, cl. iii* (b).

The first *kist* of rent for the year 1264 M. E. in respect of a *patni taluq* was due to the plaintiff, the *zemindar* who put up the *taluq* to sale and himself purchased it. He then remained in possession of the *patni* till the year 1270 M. E. when the sale by which he acquired the *patni* was set aside on the ground that it was brought about by fraud, and it was held that defendants Nos. 1 and 2 who were the owners of two-thirds share of the *patni* were in collusion with the plaintiff, and, therefore, the Court granted mesne profits to defendant No. 3, the owner of the

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remaining one-third share alone against the plaintiff. The plaintiff has brought this suit for rent upon the ground that as defendant No. 3 recovered mesne profits he is liable for rent payable by him in respect of the years during which the plaintiff was in possession:

Held, that the suit must fail, *first* because it was not known how the mesne profits had been calculated, and *secondly*, because although the plaintiff was in possession of the property of defendant No. 3 for seven years he had accounted for only one-third of the mesne profits that he received during that time, and it was likely that he had already received from the property more in the way of profits than any rent which would have accrued due from the defendants had they remained in possession:

Held, also, that the rent for the first half year's *kist* of 1264 M. E. was barred by limitation.

Mahomed Majid v. *Mahomed Ashan*, 23 C. 205, relied upon.

Appeal from the decree of the Officiating First Sub-Judge of Chittagong, dated August 10th, 1910, modifying that of the Second Munsif of Satkania, dated January 24th, 1910.

Babu *D. L. Kastagir*, for the Appellant.

Babu *Atul Krishna Roy*, for the Respondents.

JUDGMENT.—In this suit the plaintiff seeks to recover rent in regard to a *patni taluq* for the years 1264 to 1270 from the three defendants. The facts of the case are that one *kist* was due for the year 1264, the plaintiff put up the *taluq* to sale in respect of this *kist* and himself purchased it. He then remained in possession of the *patni* till the year 1270 when the sale by which he acquired the *patni* was set aside on the ground that it was brought about by fraud, and it was held that defendants Nos. 1 and 2 had colluded. Defendant No. 3 who is the only defendant who has appeared in this suit obtained a decree for mesne profits against the plaintiff. We may assume that he recovered the mesne profits. The plaintiff now makes a case that whereas defendant No. 3 recovered mesne profits he is liable for rent payable by him in respect of the years during which the plaintiff was in possession. To this there are several answers. In the first place we do not know how the mesne profits have been calculated and we cannot in this suit have that matter discussed. In the second place, it appears that the plaintiff was in possession of the property of defendant No. 3 for seven years and he has only accounted for one-third of the mesne profits that he received during that time. He professed willingness to pay to the non-appearing defendants Nos. 1 and 2 but he has not proved any payment to them, and there is no reason to suppose that his offer was really a substantial one. Under these circumstances, it appears likely that he has already received from the property more in the way of profits than any rent which would have accrued due from the defendants had they remained in possession. Under these circumstances his claim seems to be one which it is not open to him to enforce, for it is a simple principle that a landlord cannot demand rent from a tenant during the period for which he keeps him out of possession and the restitution of the state of things before the sale has not been made out in this suit as a reason for compelling the payment of rent for the period in question. There remains a question as to rent for the first half year's *kist* of 1264 in respect of which the sale took place. The sale, of course, was at the time taken to be as wiping out the tenant's obligation to pay this *kist*. On the sale being set aside the obligation to pay revives but a suit to enforce it is barred by the period of limitation provided by the Bengal Tenancy Act. It is argued that the period during which the plaintiff was in possession should be taken out of the period of limitation. The decision in the case of *Mahomed Majid* v. *Mahomed Ashan* (1), is an authority for saying that it is not so. Consequently, the plaintiff's claim as to this must fail.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) 23 C. 205.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28 OF 1910.

August 16, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

FAKIR SHAH BULDIN *walad* FAKIR KHUDABUX—APPELLANT

versus

SECRETARY OF STATE FOR INDIA —RESPONDENT.

Evidence Act (*I of* 1872), *s.* 110—*Possession—Burden*

FAKIR SHAH BUDDIN *v.* SECRETARY OF STATE.

of proof, shifting of—Judicial possession—Non-interference by State—Ownership—Presumption of surrender of ownership—Cause of action—Notice sent under section 80 of the Code of Civil Procedure—Bombay Land Revenue Code (Act V of 1879), s. 37—Ultra vires order—Suit to set aside—Limitation Act (IX of 1908), Sch. I Art. 14—Applicability.

A. was in possession of a graveyard for a number of years. The Collector passed an order handing over the property to *B.* *A.* appealed to the Commissioner and his appeal was rejected His possession of the property, however, was not interfered with. He brought a suit for declaration that the property belonged to him and that Government had no right or interest in it, and for a perpetual injunction against the Secretary of State restraining the latter from entering into possession of the property or dispossessing *A.*; *Held*,

(1) that *A.* had failed to prove such juridical possession as would raise a presumption of title in his favour and shift the onus on to defendant.

(Per *Fawcett, A. J. C.*)—(2) that the notice sent by the plaintiff under section 80 of the Code of Civil Procedure could not constitute a cause of action giving plaintiff a right to sue for the relief sought by him: his right to sue accrued when the order by the Collector was passed;

(3) that the suit was in effect one to set aside the Collector's order; and under Article 14 of the Limitation Act it should have been brought within one year from the date of that order;

(4) that it not being necessary to sue to set aside an order that was *ultra vires*, Article 14 of the Limitation Act did not apply to the case.

Under section 37 of the Land Revenue Code the Collector can only dispose of lands which are not the property of individuals. The section cannot be construed as conferring upon the Collector the power to determine whether land is the property of Government or not.

Under section 110 of the Evidence Act, possession short of the statutory period, which may give a title by prescription, is sufficient to raise a presumption of ownership and shift the burden of proving title on to the other party. But where neither side can show title, the possession which attracts the presumption of ownership must be a possession founded on a *prima facie* right. Even if the mere wrongful possession is taken to be sufficient to shift the burden of proof, still the circumstances may show that such possession was merely that of a licensee and not of an owner.

Hanmantrav v. *The Secretary of State for India*, 25 B. 287 at p. 334; 2 Bom. L. R. 1111; *Kaikhusru Aderji* v. *Secretary of State*, 12 Ind. Cas. 117; 15 C. W. N. 909; (1911) 2 M. W. N. 23; 10 M. L. T. 97; 14 C. L. J. 268; 13 Bom. L. R. 788; 8 A. L. J. 1219; 21 M. L. J. 1100; 36 B. 1 (P. C.), referred to.

In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of ownership, or a grant from him do not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can be otherwise accounted for, on a presumption of a surrender of its ownership.

Bhaskarappa v. *The Collector of North Kanara*, 3 B. 452 at p. 586, referred to.

Appeal from the decision of the Joint Judge, Sukkur-Larkana.

Mr. *Tahilram Maniram*, for the Appellant.

Mr. *E. Raymond*, Government Pleader, for the Respondent.

JUDGMENT.

FAWCETT, A. J. C.—The plaintiff appeals from a decision of the Joint Judge, Sukkur-Larkana, dismissing his suit for a declaration that the property in suit belongs to him and that Government have no right or interest in it and for a perpetual injunction against the Secretary of State restraining him from entering into possession of the property or dispossessing the plaintiff.

It is contended that the lower Court erred in holding the suit to be time-barred under Article 14 of the Limitation Act and in his finding that the plaintiff was not the owner of the property and entitled to the declaration and injunction sought. It is admitted that the plaintiff has been in possession for a number of years and that the Collector has passed an order (apparently in about 1907) handing over the whole *Mukam*, (including the portion of which plaintiff is in possession) to the Anjuman-Islam of Larkana. Plaintiff appealed against this order to the Commissioner in Sind and his appeal was rejected on 20th February 1908. His possession of the property in suit has not, however, yet been interfered with.

In order to determine the point of limitation, the first question to consider is, what is plaintiff's cause of action? In the plaint this is stated as follows:—

"3. That the Collector of Larkana by calling the plaint property Government property, has attempted to oust plaintiff No. 1 forcibly and improperly which he has no right or authority to do.

"4. That the cause of action arose on 22nd February 1909 when a registered notice was under the provisions of Civil Procedure Code sent to the defendant preventing him from entering into possession of the property but he paid no heed to it."

The notice referred to in the latter paragraph is presumably one sent under section 80 of the Code, and clearly cannot constitute a cause of action giving plaintiff a right to sue for the relief sought by him. His cause of action to sue for a declaration of

his title arose when the defendant through his authorized agents first denied that title, Cf. *Dattatraya* v. *Ramchandra* (1) and *Vithal Moreshwar Desai* v. *Sitabai* (2). It, therefore, at any rate arose when the denial, referred to in paragraph 3 of the plaint, was made. That denial was made in an order of the Collector which was passed to the knowledge of the plaintiff and against which he unsuccessfully appealed to the Commissioner in Sind. His right to sue clearly accrued when that order was passed, as it constituted a direct interference with his alleged title, and the main point for determination is, whether the suit falls under Article 14, as being one to set aside the Collector's order, or under Article 120 of the Limitation Act, as in the case of the ordinary suit for relief by declaration and injunction.

Appellant's Pleader contends that this is not a suit for setting aside the Collector's order, but merely for declaration of title and injunction. But the effect of granting such relief will be to set aside that order, so far as the property in suit is concerned; and, in my opinion, the suit is *pro tanto* one to set aside that order. In support of this view I may cite the Privy Council case of *Malkarjun* v. *Narhari* (3), where though the plaintiffs deliberately refrained from suing to "set aside" a sale, it was held that the suit, which prayed for relief inconsistent with the validity of such sale and which had not been brought within one year after the sale was confirmed, was barred by Article 12 (*a*) of the Limitation Act, which provides that a suit to set aside a sale in execution of a decree must be brought within the period just mentioned. The following remarks of their Lordships, at page 352 of the report are pertinent:—

"The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such, however, seems to be the effect of the doctrine of subservience laid down by the Bombay High Court . . . . . What is the justification for refusing to construe Article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the Article." So, in this case the protection of persons acquiring rights under official acts and orders, provided for in Article 14, is exceedingly small, if it is to vanish directly the suit makes no formal prayer to set aside such act or order, but merely seeks a declaratory and preventive relief inconsistent with its validity. And as shown by paragraph 3 of the plaint, the main object of this suit is to get a decree which will supersede and render nugatory the Collector's order, so far as it affects the property in suit.

It is true that in *Malkarjun's* case (3), just cited, it was held that the plaintiff's suit was not in fact a suit to set aside the sale (page 349), but the remarks of their Lordships on this point show that this was because a prayer to set aside the sale would have required an amendment of the plaint, the addition of parties and different issues, and the plaintiffs had deliberately refused to make any such amendment. This does not apply to the present suit, where a formal prayer to set aside the Collector's order would affect neither the parties before the Court nor the issues. In this case for the reasons already given I am of opinion that the suit is in effect one to set aside the Collector's order.

It remains to be seen whether this general conclusion is affected by the various rulings in regard to Article 14 which were cited in argument. In *Balwant* v. *Secretary of State* (4) it was held (at page 489) that where a plaintiff seeks a declaration of title to certain land *and possession of that land*, an

(1) 24 B. 533 at p. 538; 2 Bom. L. R. 354.
(2) 3 Bom. L R. 181 at p. 184.
(3) 25 B. 337; 5 C. W. N. 10: 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.)

(4) 29 B. 480; 7 Bom. L. R. 497.

official act of dispossession would fall under Article 142 of the Limitation Act, and the case would not be one "not otherwise provided for" in the Schedule as contemplated in Article 14. This does not affect the present case where plaintiff has not been dispossessed, and Article 142 cannot, therefore, be applicable to the suit. The only Article under which appellant's Pleader seeks to bring the suit is Article 120, and this can only apply if Article 14 is not applicable. This also disposes of the *obiter dictum* in *Agha Sultan Mahomed* v. *Secretary of State* (5), which is based on the above case, but states the effect of it (in my opinion) rather too broadly.

In the same case of *Balwant* v. *Secretary of State* (4) the opinion is expressed that Article 14 is applicable to acts or orders done in the exercise of powers legally exerciseable by the executive subject to conditions, the fulfilment of which is denied by the party impugning the act or order, or invested with no finality by the empowering enactment. The order of the Collector in this case falls within the latter class, as is plainly shown by section 135 of the Bombay Land Revenue Code, 1879, which contemplates a suit to set aside an order passed by the Collector (as this was) under section 37 of the Code. Even, therefore, accepting the restriction placed by this opinion on the general words of Article 14, it affords no ground for holding that Article inapplicable to the present suit.

Again in the case of *Surannanna Devappa* v. *Secretary of State* (6), it was held by Parsons, J., (at page 455) that the orders contemplated by Article 14 are orders which interfere with the plaintiff's possession so as to give rise to a cause of action, and not simply administrative orders which need no setting aside. In the present case the plaintiff himself speaks of the Collector's order as an attempt to oust him forcibly and improperly, and there is evidence believed by the lower Court, and not controverted before us, that the plaintiff's possession has been constantly interfered with by the Revenue Authorities. The plaintiff also himself appealed against this order. I do not think, therefore, that it can, even from the point of view adopted by Parsons, J., be said not to be an order of the kind contemplated by Article 14.

Then there are the numerous cases such as *Ananda Kishore Chowdhry* v. *Daiie Thakurani* (7) which lay down that an order made without jurisdiction is a nullity and need not be set aside, so that to an order of this description, Article 14 has no application. It is, no doubt, arguable that if, the Collector has disposed of land belonging to plaintiff as if it were Government property, his order is *pro tanto* without jurisdiction, but this contention is in any case met by the conclusion of Parsons, J. in *Surannanna's* case (6) (at pages 454-55) under which his order disposing of the whole "*Mukam*" should under section 37 of the Land Revenue Code be treated not as a nullity, but as a perfectly legal and valid order granting the land *subject to the rights of the plaintiff over it.* No doubt, on the view there taken by Parsons, J., the plaintiff was under no obligation to sue to set aside the Collector's order and could wait till he is disturbed in his possession and then sue on his title to maintain or recover possession. But in this particular case the plaintiff has himself decided not to wait till he is dispossessed, and has brought this suit complaining of the Collector's order and otherwise framed in a manner which, for the reasons already given, makes it a suit to set aside that order. I think, therefore, that (even supposing plaintiff's title to the property in suit is good) he should have brought this suit within one year of the Collector's order under Article 14, and that the decisions which turn on the point of the order being a nullity, if made without jurisdiction, have no application to the case. The order was one that, apart from the question of title, could be and presumably was, properly passed under section 37 of the Land Revenue Code.

In the recent case of *Malkajeppa* v. *Secretary of State for India* (8) the view is adopted that "If a Collector purports to deal with land which is *prima facie* the property of an individual, who has been in peaceful

(5) 10 Ind. Cas. 223; 5 S. L. R. 46.
(6) 24 B. 435; 2 Bom. L. R. 261.
(7) 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189.
(8) 15 Ind. Cas. 517; 36 B. 325; 14 Bom. L. R. 332.

occupation thereof and not of the Government, and passes an order with reference thereto, he is not dealing with that land in his official capacity, but is acting *ultra vires*," so that the order is not one passed by "an officer of Government in his official capacity" within the meaning of Article 14. As to this, it is submitted with deference that the view is entirely opposed to that adopted by the Full Bench ruling of *William Allen* v. *Bai Shri Dariaba* (9), which overruled a similar view and where Parsons, J., in delivering the judgment of the Full Bench says (at page 772):—

"It has been argued before us that the acts of the defendants were wholly illegal and unjustified by any Act or Regulation, and that, therefore, they cannot be official acts. This argument, however, begs the whole question. An official act is not necessarily a legal act; it may be a most illegal one."

In this case the Collector in passing his order clearly acted in his official capacity and it is begging the whole question to say that his order was illegal or unjustifiable.

Of all the various views expressed on the question in the reported cases, the only one, the adoption of which would seem to be opposed to the above conclusion, is that expressed by Sir L. Jenkins, C. J., in *Surannanna's* case (6), *viz.*, that Article 14 has no application to orders passed under section 37 of the Land Revenue Code, unless the land disposed of admittedly belongs to Government. This is based on the view already mentioned that the Collector's disposition is a mere nullity not needing to be set aside, if in fact the land disposed of is not the property of Government. In my opinion this view is one which is not justified having regard to the ancient rule under which Government is the general landlord in India, *Cf. Bhaskarappa* v. *The Collector of North Kanara* (10) and the provisions of the Land Revenue Code. As I read section 37 of the Code, it impliedly authorizes the Collector in any particular case to determine, after such inquiry as he may deem necessary under section 197, whether any land is the property of Government or not. He has, therefore, jurisdiction to decide that point, and in view of the provisions of the Code, which allow an appeal from his decision, and authorize him to take action on it, it is, I submit, unjustifiable to treat his order as a nullity, merely because his decision may be wrong. The case falls under the general principle mentioned in the following observation in the judgment in *Mulkarjan* v. *Narhari* (3) where the Privy Council overruled the view that a sale was a nullity on a similar ground:—"He contended that he was not the right person, (*i. e.*, against whom execution should issue), but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

In this particular case the plaintiff admits (Exhibit 31) that he applied to the Collector, claiming the land in suit as his, and that his statement and evidence were recorded before the Collector made the order complained of—on the inquiry the Collector decided against him, and though he was not technically a "Court," yet the same principles apply, and his decision, even if wrong, cannot properly be treated as a mere nullity. Parsons J., who gave the deciding judgment in *Surannanna's* case (6) did not adopt this extreme view of Jenkins, C. J., but distinguished between orders interfering with the plaintiff's possession and so giving rise to a cause of action and simply administrative orders which need no setting aside. In this particular case as already pointed out, the Collector's order clearly falls in the former category. The land in question was admittedly part of an old grave-yard, which has been shown in the survey records as "*Mukam*" since 1881, and the order clearly fell within the scope of the Collector's authority *ratione materiae*. I would adopt the reasoning of Candy, J., on this point in *Surannanna's* case (6) at pages 450-52. In my opinion it is not unreasonable that a person adversely affected by an order of a Collector under section 37 of the Land Revenue Code at any rate when it is passed

(9) 21 B. 754.
(10) 3 B. 452 at p. 586.

after due inquiry and consideration of his claim and to his knowledge, should be required (as I think the Legislature intends,) to bring a suit within one year from the date of that order, if he wishes to get that order superseded by a Civil Court's decree, just as a person bound by an order against him under the Mamlatdar's Courts Act, 1906, must sue within 3 years from the date of such order (Article 47 of the Limitation Act). This is, I think, the more so in this Province, where extreme care is taken in all matters relating to the grants of land, as shown by the Commissioner's Special Circulars at pages 379-385 *d* of the Circular Book.

In the course of the arguments the case of *Tirbhuwan Bahadur Singh* v. *Rameshor Bakhsh Singh* (11) was referred to, as supporting the view that Article 14 would not bar a suit brought on title. That decision, however, expressly does not purport to overrule the decision of *Jagadamba Chaudhrani* v. *Dakhina Mohun Roy Chaodhri* (12) that Article 129 of Schedule II of the Indian Limitation Act of 1871, using the expression "suit to set aside an adoption" denoted a suit bringing the validity of the adoption into question; and that the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession and this even though the adoption was brought into question less than 12 years after the plaintiff's titles (if any) had accrued at the death of the surviving adopting widow. That decision was approved by the Privy Council again in the cases of *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (13) and *Malkarjun* v. *Narhari* (3) both of which support the construction of the words "suit to set aside" which I have placed on these words in Article 14 in the present case. All that the decision in *Tirbhuwan's* case (11) says is that the Privy Council "do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to an acquisition of title within the meaning of section 2 of the Limitation Act of 1877." This does not affect the construction put on Article 129 of the Indian Limitation Act, 1871, in *Jagadamba's* case (12). Nor does the admission of appellant's Counsel in *Tirbhuwan's* case (11) that, if the Act of 1877 applied, his client was out of Court do so, because the wording of the corresponding Article 118 in that Act is different from that of Article 129 in the Act of 1871. [It may also be noted that this admission conflicts with Mr. Cohen's contention that the principle in *Jagadamba's* case (12) applied equally to Article 118 in the Act of 1877, see the report of his arguments in *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (11) and it is somewhat difficult to believe that the Privy Council mean in this summary way to overrule the Bombay Full Bench decision to that effect in *Shrinivas Murar* v. *Hanmant Chavdo* (14) and other similar rulings]. I, therefore, hold that there is nothing in *Tirbhuwan's* case (11) to affect the conclusion I have come to.

I would add that, if the question arose in this case, I would be prepared to differ from the view taken in *Balwant* v. *Secretary of State* (4) that in a case of dispossession Article 142 would exclude the application of Article 14, though the dispossession was in pursuance of an order passed to the knowledge of the plaintiff, and giving him a cause of action, as in this case. In my opinion, the words "not herein otherwise expressly provided for" are meant only to refer to articles which in terms deal with "acts or orders of an officer of Government in his official capacity," such as Articles 1, 12 (*b*), (*c*) and (*d*), 15, 16, 45, 46 and 47, and not to a general provision of the kind contained in Article 142. Otherwise no force is given to the word "*expressly*" in Article 14.

I, therefore, hold that the lower Court was correct in its decision that the suit was time-barred under that Article. As, however, the learned Judicial Commissioner does not concur in this view, I proceed to discuss the second point *viz.*, whether the lower Court erred in holding that the plaintiff's possession of the land in suit was not such as to create a right in his favour and that he had failed to prove his title.

The mere fact that plaintiff has not shown adverse possession for more than 60 years

(11 28 A. 727; 8 Bom L. R. 722; 33 I. A.) 156 (P. C.); 3 A. L. J. 695; 10 C. W. N. 1065; 16 M. L. J. 440; 4 C. L. J. 05; 1 M. L. T. 265; 9 O. C. 377.

(12) 13 C. 308; 13 I. A. 84.

(13) 20 C. 487 at p. 495; 20 I. A. 30.

(14) 24 B. 260; 1 Bom. L.R. 799.

prior to the institution of the suit clearly does not suffice to put him out of Court, as the Joint Judge held, it did. Under section 110 of the Evidence Act, possession short of the statutory period which may give a title by prescription, is sufficient to raise a presumption of ownership and shift the burden of proving title on to the other party. But where neither side can show title, the possession which attracts the presumption of ownership must be juridical possession obtained *nec vi*, *nec clam*, *nec precario*, *ab adversari*[v] or in other words it must be a possession founded on a *prima facie* right, *Cf. Hanmantrav* v. *The Secretary of State for India* (15), *per* Ranade, J. Even if the view taken by Sir L. Jenkins, C. J., in that case is correct, *viz.*, that mere wrongful possession is sufficient to shift the burden of proof under section 110, Evidence Act, and that it makes no difference if the possession were not only without title, but obviously wrongful (see at pages 290-294), still the circumstances may show that such possession was merely that of a licensee and not of an owner, *Cf. Kaikhusru Aderji* v. *Secretary of State* (16). In this particular case the plaintiff cannot say how his father came to be in possession; and the circumstances are more consistent with his being allowed to stay on it as a mere licensee, without his putting forward any claim to it as an owner, than to his setting up any adverse title. As it was the site of a grave-yard, it is natural that plaintiff's father, Khudabux, should have been allowed to occupy a portion of this Survey number as a holy man who would take care of the trees and do other acts for the convenience of the mourners and others who visited it; and plaintiff's own witnesses bear out this view. On the other hand the evidence clearly shows that the moment the plaintiff attempted to assert any right of ownership, he was successfully resisted by the Revenue Authorities. So far as regards the non-interference with the mere occupation of the land by the plaintiff and his father, the case falls within the general principle that "In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of ownership, or a grant from him, do not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can be otherwise accounted for on a presumption of a surrender of its ownership." *Bhaskarappa* v. *The Collector of North Kanara* (10).

In these circumstances I am of opinion that plaintiff's possession does not afford any presumption that he and his father were owners of the land in suit. His suit accordingly fails in any case on its merits, and the appeal must be dismissed with costs.

PRATT, J. C.—I concur in the conclusion of the learned Additional Judicial Commissioner that the plaintiff has not proved such juridical possession as raises a presumption of title in his favour; and that the suit must fail on the merits.

I do not agree, however, that the suit is time-barred under Article 14 of the Limitation Act. If the Collector's order under section 37 of the Land Revenue Code were *intra vires* and had any legal effect on the plaintiff's title so that it was necessary for plaintiff to set it aside before establishing his title, then I agree that the suit though a suit on title would be barred by Article 14. This is the logical result of the decisions of *Malkarjun* v. *Narhari* (3), and *Raghunath Prasad* v. *Kaniz Rasul* (17). But under section 37 the Collector can only dispose of lands which are not the property of individuals. If, therefore, the land in suit is the property of the plaintiff the Collector's order under section 37 is *ultra vires*.

Is Article 14 to be applied when the order of the officer of Government is *ultra vires*?

Reference has been made to *Jagadamba's* case (12) where a suit on title by a reversioner was held to be barred under Article 129 of Act IX of 1871 as the plaintiff had not sued within twelve years of the date of the apparent adoption. That Article ran as follows:—"To establish or set aside an adoption twelve years from the date of the adoption or at the option of the plaintiff the date of the death of the adoptive father." If, therefore, a widow made an adoption twelve years after the death of her husband the

(15) 25 B. 287 at p. 304; 2 Bom. L. R. 1111.

(16) 12 Ind. Cas. 117; 15 C. W. N. 909; 36 B. 1; (P. C.; (1911) 2 M. W. N. 23; 10 M. L. T. 97; 14 C. L. J. 268; 13 Bom. L. R. 788; 8 A. L. J. 1219; 21 M. L. J. 1100.

(17) 24 A. 467; A. W. N. (1902) 116.

reversioner had only one period of limitation that is, 12 years from the date of the adoption. If the widow survived the adoption twelve years the reversioner could not sue for possession at her death. Even though the adoption may have been a sham and may have been kept secret the reversioner had no remedy unless he filed a declaratory suit in the life-time of the widow. This unsatisfactory result was remedied by amendment of the limitation law and by the recent decision of the Privy Council in *Thakur Tribhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*(11). But even *Jagadamba's* case (12) is not authority for the proposition that it is necessary to sue to set aside that which is of no legal effect, *e. g.*, an invalid adoption. The case turned merely on the wording of Article 129 and the Privy Council interpreted the phrase, suit to set aside an adoption as meaning any suit that brings the validity of an alleged adoption under question.

It seems hardly necessary to quote authority for the proposition that it is not necessary to sue to set aside an order that is *ultra vires*. If authority is wanted I cannot do better than quote from the judgment of West, J., in *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri* (18). "There are other orders not within the scope of the authority of the official who makes them, *ratione materiae*. He affects to deal with some thing in its nature or legal character beyond the range of his functions. In the case of such an order carried out in the way of dispossession, we do not think that the person injured is deprived of his remedy, or restricted in his resort to the Law Courts merely by the orders being signed by a Collector or other official. The order is, in the case supposed, legally a nullity; the dispossession is an act of force, as if it had been effected by a mere private individual." There has been no dispossession here, but the principle is the same. The plaintiff sues to disperse a cloud on his title and it makes no difference that the defendant who denies his title happens to be the Collector. I concur in the decisions on this point of *Surannanna's* case(6), and *Hanmantrav's* case (15), followed in the recent case of *Malkajeppa* v. *The Secretary of State* (8). I cannot construe section 37 of the Land Revenue Code as conferring upon the Collector the power to determine whether land is the property of Government or not. This appears also to be the view of the Legislature for Bill No. 11 of 1912 (Bombay Government Gazette 1912 Part VII, page 3) proposes an amendment of the section which, if passed, will give effect to the view of my learned colleague.

Appeal dismissed.

(18) 11 B. 429.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1633 OF 1910.
February 24, 1913.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
RAHIMUDDIN MUNSHI—PLAINTIFF—APPELLANT
versus
BHABANGANA DEBYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Additional evidence, taking of, by lower Appellate Court—Documents filed in first Court 12 days before judgment—Not dealt with by judgment of either Court—After remand, taking of documents which make new case for defendants—Reason for taking additional evidence not given by Court—Peculiar circumstances of case, whether any reason for taking additional evidence—Supplying lacuna *in evidence—Civil Procedure Code (Act V o* 1908)—*Evidence Act (I of* 1872), *s.* 83.

A suit for possession was dismissed by the first and the lower Appellate Courts as barred by limitation. In second appeal the case was remanded by the High Court for decision on the merits. The lower Appellate Court did not send the case back to the first Court as all the evidence had been recorded. The lower Appellate Court, however, allowed a *mehalwari* register and a map of the disputed estates to be filed as documentary evidence "under the peculiar circumstances of the case." These documents were filed 12 days before the original decision in the Court of first instance but they were not dealt with in either of the judgments before remand for they were not accepted as evidence in the first Court; they made out an entirely new case for the defendants and the lower Appellate Court took them in appeal:

Held, that the lower Appellate Court ought not to have received the documents as evidence; because *first*, no reason was given for admitting them, the reference to the peculiar circumstances of the case cannot be taken as any reason, and *secondly*, because such a case depending on new and important evidence could only be taken by way of review and not as supplying any lacuna in the evidence necessary for the decision of the case.

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115, relied upon.

RAHIMUDDIN MUNSHI *v.* BHABANGANA DEBYA.

A map prepared by private arrangement by a Deputy Collector for the settlement of the silted bed of a river, does not fall within the purview of section 83 of the Evidence Act.

Kanto Proshad Hazari v. *Jagat Chandra Dutta*, 23 C. 335, relied upon.

Appeal from the decree of the District Judge of Pabna and Bogra, dated March 29th, 1910, modifying that of the Sub-Judge of that District, dated December 13th, 1905.

Babus *Umakali Mukherjee* and *Shyama Charan Roy*, for the Appellant.

Mr. *Caspersz*, Counsel, Babus *Mohini Mohun Chakravarti* and *Purna Chandra Roy*, for the Respondents.

JUDGMENT.—The facts which it is necessary to set out for the determination of this second appeal can be best stated in the way they are in the judgment of remand of this Court dated the 12th January 1909.*

This suit relates to a Chur known as Chur Bawsa which appears originally to have been an accretion to the village Bawsa situated in estate No. 6 called Dihi Fatepur. Government surveyed the Chur, found that a certain portion fell within estate No. 6 and released it to the proprietors of that estate. The remainder was formed into a separate estate, numbered 407, and settled with the then proprietors of estate No. 6.

Subsequently various separate accounts were opened in No. 407 and ultimately the residuary or *ejmali* share of 6 annas odd fell into arrears and was sold under Act XI of 1859. It was purchased by the plaintiff. The plaintiff also obtained a *patni* of another share of 3 annas odd from the defendants Nos. 8 to 10, who are said to be the *maliks* of that share. The plaintiff has brought this suit for possession, praying that estate No. 407, may be ascertained, and that when it has been ascertained he may obtain his share in it by partition.

The lower Courts dismissed plaintiff's suit as barred by limitation, both on the grounds of adverse possession and of want of proof of plaintiff's possession within 12 years of their becoming fit for enjoyment.

A Division Bench of this Court held in second appeal that the suit was in no way barred by limitation and remanded the case for decision on the merits.

The judgment of the District Judge on remand is what we now have before us in appeal. As all the evidence had been recorded he did not send the case to the first Court to record evidence and try the issues on the merits but he says he allowed certain papers, *viz.*, a *mahalwari* register and a map of the two estates to be filed as documentary evidence under the peculiar circumstances of the case. It is pointed out to us by the learned Counsel for the respondents that these papers were filed 12 days before the original decision in the Court of first instance but they certainly were not dealt with in either of the judgments before remand and they make an entirely new case for the defendants which we shall deal with later on. The appeal is argued before us on the ground that the learned Judge in the Court below has decided the case on entirely wrong principles.

The plaintiff's title to 10 annas share of Chur Bawsa being proved and admitted and his claim not being barred by limitation the only question of fact for determination was whether the disputed land appertained to the Survey area of *Mauza* Bawsa which had been originally surveyed as one estate with Chur Bawsa.

If the 1478 *bighas* found *in situ* by the Commissioner belonged to that survey area and the plaintiffs by reason of lapse of time and by the conduct of the defendants were unable to identify the boundaries between the two estates enclosed in that area, the rule laid down by Sir Barnes Peacock, C. J., in *Khemamoyee* v. *Shushee Bhoosun Gangooly* (1) will apply and the Court will proceed to determine the original boundaries not by actual identification but by defining and fixing them in such a manner that the produce of the total land in each estate should bear the same proportion to the *jama* payable for such estate as the produce of the whole of such lands bears to the total of the *jamas* payable on account of the two estates.

There can be no doubt that the plaintiff when he purchased and otherwise acquired a ten annas share in Chur Bawsa as opposed to *Mauza* Bawsa became liable to pay the revenue actually settled by Government on that estate and the defendants could not take advantage of a private arrangement made by them with the Deputy Collector when they were proprietors of both the

See 1 Ind. Cas. 81—*Ed.*

(1) 9 W. R. 94.

estates, to call 14 acres odd Chur Bawsa and the remainder of the lands *Mauza* Bawsa.

The learned Judge in the Court of Appeal below has relied entirely on this arrangement which raises no presumption under section 83 of the Evidence Act as was held in the case of *Kanto Prashad Hazari* v. *Jagat Chandra Dutta* (2).

Even, therefore, if the learned Judge was entitled to use this evidence on the ground that it had been filed 12 days before judgment was passed in the Court of first instance, it would not be of any avail against the plaintiff's title. But there is nothing to show that the papers evidencing this arrangement were tendered and accepted as evidence in the first Court. On the contrary the learned Judge tells us in his judgment that he took them in appeal.

This he was not competent to do upon two grounds. *Firstly* because he gives no reason for admitting them, for his reference to the peculiar circumstances of the case cannot be taken as any reason, and *secondly* because such a case depending on new, and important evidence could only be taken by way of review and not as supplying any lacuna in the evidence necessary for the decision of the case. This was very clearly laid down by their Lordships of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (3).

The Revenue Settlement is what binds the purchaser and it is open to plaintiff to show that even this is wrong. That Settlement is evidenced by Exhibit S, a document filed by the defendants themselves as their title-deed. It is dated 24th October 1851 and clearly shows that out of the whole survey area of 870 odd *bighas* by a 23 $\frac{3}{4}$ inch cubit measurement equivalent to 1515 standard *bighas*, five hundred and ninety-six *bighas* odd was declared in accordance with the order of the *Khas* Commissioner's Court which was a final judicial order binding both Government and the proprietors, to be also Bawsa land of the respondents and released to them while the remainder 274 *bighas* odd was resumed by Government.

(2) 23 C. 335.

(3) 31 B. 381 p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115.

Government re-settled this resumed area with the defendants as a separate estate and it is idle to contend that they could affect the rights and liabilities of future purchasers of this separate estate by getting a private adjustment of the revenue of the two estates and a nominal change of areas before a Deputy Collector, an arrangement which never went before a judicial tribunal nor even to the Collector and was without the sanction of the Commissioner or the Board of Revenue.

The only real question that arises in this case is whether the lands that the Commissioner has plotted out as Bawsa are the original survey area that went under that name or not. It seems to us that it is too late to re-open that question in second appeal. Learned Counsel has drawn our attention to the remarks of Mr. Nurul Huda, the District Judge, who heard the appeal before remand as to the suspicious character of the Chitta of 1849 upon which the Commissioner's map was based and it has been strenuously argued that there is nothing to show that Chur Bawsa was included in the plotting of 1849. Except the heading of the Chitta where the words "Chur Bawsa" are a subsequent interpolation. But the subsequent addition of these words need not be suspicious or fraudulent. It was not till 1851 that it was discovered that there was a Chur Bawsa liable to resumption and the words may have been put in in the old record to show the new estate of things after that date and to show that the Chitta included lands afterwards found to be a separate estate.

This would be a natural and probable explanation and as the lower Courts accepted the Chitta as it stands and acted upon it and the District Judge from whose judgment this appeal comes before us has not suggested anything against it, we are concluded by the findings of fact as well as by the pleadings upon which the parties went to trial from holding that the lands in dispute are other than the lands now found *in situ* by the Civil Court Commissioner. Of this area on the point of title which is a question of law and the only question now before us, limitation being eliminated by the previous decision of this Court, the plaintiffs are entitled to their 10 annas share in so much of the western portion of the Chur as

is left after the defendants have obtained the 596 *bighas* odd equal to 1046 *bighas* odd, standard measurement which appertain to their *Mauza* Bawsa.

Although the plaintiffs have established their title to 469 *bighas* odd the original area of Chur Bawsa, as the exact boundary is not now ascertainable and as the river is at present covering the extreme western portion of this estate where 14 acres is admitted by the defendants to be Chur Bawsa. We must take it that that portion of these estates measuring approximately 37 *bighas* is at present unfit for occupation.

It is a remarkable coincidence that this comes within five *bighas* of the 14 acres which the Judge finds is admitted as their estate showing that the Commissioner's measurements are very nearly accurate. The plaintiffs' estate being admittedly to the west and the lands being identified as a whole on the findings of the Courts below the appeal must be allowed. The judgment and decree of the lower Appellate Court set aside and the plaintiff's suit decreed declaring his right to 10 annas 12 *karas* 2 *kags* share of the western portion of the lands depicted on the Commissioner's map after demarcating 1046 *bighas* odd the equivalent of 596 *bighas* $7\frac{1}{2}$ *cottahs* measured by the 23 $\frac{3}{4}$ inch cubit by a perpendicular dropped from north-east to south-west across the disputed area approximately parallel with the west bank of the Jamoona Kali. The appellants are entitled to their costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 668 OF 1911.

February 6, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

R. G. BROWN—DEFENDANT—APPELLANT

versus

MAFIZUDDIN CHOWDHURY—PLAINTIFF—RESPONDENT.

Injunction—Suit to set aside revenue sale on ground of fraud—Restraining defendant from taking out certificate of sale—Point of insufficiency of notice not made before Revenue offices.

In a suit brought to impugn a revenue sale on the ground of fraud, the plaintiff obtained an *ex parte* injunction against the defendant restraining him from accepting a certificate under the Revenue Sale Act, section 28, because the plaintiff apprehended that the defendant would be in a better position for the purposes of proof of service of the notices, having regard to the provisions of the Land Revenue Sale Act of 1868. The ground of insufficiency of the notices had never been advanced in the Revenue Offices, and no such point was advanced before the Commissioner:

Held, that the question of notice was one that could not be agitated in the present suit, under section 33 of the Revenue Sale Law, 1859, and that the injunction should, therefore, be discharged as it will have the effect of withholding from the defendant the certificate which, in the words of the Act, should now be given to him.

Appeal from the order of the Sub Judge of Backergunj, dated November 30th, 1911,

Babus *Mohendra Nath Roy* and *Gunoda Cahran Sen*, for the Appellant.

Babus *Dwarka Nath Chakravirti* and *Kali Kinkar Chakravrti*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Backergunj refusing to discharge an injunction in these circumstances. The suit is one brought to impugn a revenue sale on the ground of fraud. In the course of the suit the plaintiff obtained on the last day of the term an *ex parte* injunction against the defendant-appellant, the purchaser at that sale, restraining him in effect from accepting a certificate under the Revenue Sale Act, section 28. The materials in which that injunction was granted appear to me to be of the flimsiest kind. As soon as the Court re-opened, that is to say, on the 4th of November the defendant applied to have this *ex parte* interlocutory injunction discharged. It is on this application that the Subordinate Judge has made the order of which complaint is now made. In my opinion, the Subordinate Judge should have discharged his injunction. The reason why the plaintiff is so anxious to retain the injunction is that he apprehends that the defendant will be in a better position for the purposes of proof of *sernai*, having regard to the provisions of the Land Revenue Sales Act of 1868. The case has already been before the Revenue Authorities, that is to say, before the Collector in the first instance, and before the Commissioner on appeal. The judgment of the Commissioner has been read to us, and there is no trace in that judgment of any argument having been addressed to that officer as to the insufficiency

of notice. When the learned Vakil for the respondent was asked, he had candidly to admit that he could not say that this point had ever been advanced before the Revenue Officers. It is important to recollect in this connection that whereas section 33 vests in Civil Courts jurisdiction to annul sales, it provides that no such sale shall be annulled on the ground there indicated, unless such grounds shall have been declared and specified in appeal made to the Commissioner under section 2 of the Bengal Land Revenue Sale Act (1868). At the threshold, therefore, we have the difficulty that it is not shown that the question of notice is one that can be agitated in this suit. More than that, we have, as I have said, the indication of the Commissioner that no such point was made before him. Then, what is the affidavit on which the respondent relies as entitling him to the injunction. It is, so far as notice is concerned, in the vaguest possible terms, and in making the statements he does in that affidavit the deponent does not pledge his knowledge but relies only on his belief. On the other hand, I find that the affidavit of the appellant who seeks to have the order discharged asserts as a matter of knowledge and belief that the notices were served. In all the circumstances of this case I do not think that we should be right in upholding any order that may have the effect of withholding for the appellant before us the certificate which, in the words of the Act, should now be given to him. On the terms of the Act, the sale in his favour is *final* and *conclusive*, and the result is that he has to pay revenue; but notwithstanding this he is kept out of possession. This is not a state of affairs which it is desirable to maintain and, in my opinion, the proper course is to discharge the *ex parte* injunction obtained on the 20th of September 1911, and to allow this appeal with costs, hearing fee three gold *mohurs*.

Appeal allowed.

ALLAHABAD HIGH COURT.
CIVIL REVISION PETITION No. 10 OF 1913.
April 17, 1913.
Present:—Mr. Justice Banerji.
LALMAN SHUKUL—PLAINTIFF—APPELLANT
versus
Lala GAURI DAT—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), *s.* 2 (*a*), (*b*), (*d*)—*Offer by advertisement—Acceptance without knowledge—Contract—Consideration.*

There can be no acceptance unless there is knowledge of an offer.

The nephew of *A.* absconded from home and no trace of him could be found. *A.* sent his servant *B.* to search for the boy. After *B.* had gone, *A.* offered a reward to any one who found the boy. *B.*, who had no knowledge of *A.*'s offer, found the boy and claimed the reward on the basis of a contract:

Held, (1) that there was no contract between *A.* and *B.*;

(2) that, though it was not the duty of *B.* as a servant to search for the missing boy yet, having undertaken the task before the offer, he was bound to perform it and, therefore, his search for the boy could not be regarded as a consideration of *A.*'s promise.

Civil revision against the decree of the Small Cause Court Judge of Cawnpore, dated the 19th November 1912.

Mr. *S. Mushran* (for the Hon'ble Dr. *Tej Bahadur Sapru* with him Mr. *R. K. Malviya*), for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.— The facts of this case are these: In January last the nephew of the defendant absconded from home and no trace of him was found. The defendant sent his servants to different places in search of the boy and among these was the plaintiff who was the *munib* of his firm. He was sent to Hardwar and money was given to him for his railway fare and other expenses. After this the defendant issued handbills offering a reward of Rs. 501 to any one who might find out the boy. The plaintiff traced the boy to Rishikesh and there found him. He wired to the defendant who went to Hardwar and brought the boy back to Cawnpore. He gave to the plaintiff a reward of two sovereigns and afterwards on his return to Cawnpore gave him Rs. 20 more. The plaintiff did not ask for any further payment and continued in the defendant's service for about six months when he was dismissed. He

then brought this suit, out of which this application arises, claiming Rs. 499 out of the amount of the reward offered by the defendant under the handbills issued by him. He alleged in his plaint that the defendant had promised to pay him the amount of the reward in addition to other gifts and travelling expenses when he sent him to Hardwar. This allegation has been found to be untrue and the record shows that the handbills were issued subsequently to the plaintiff's departure for Hardwar. It appears, however, that some of the handbills were sent to him there.

The Court below having dismissed the claim, this application for revision has been made by the plaintiff and it is claimed on his behalf that as he traced out the boy he is entitled to the reward offered by the defendant.

The learned Advocate for the defendant contends that the plaintiff's claim can only be maintained on the basis of a contract, that there must have been an acceptance of the offer and an assent to it, that there was no contract between the parties in this case and that in any case the plaintiff was already under an obligation to do what he did and was, therefore, not entitled to recover. On the other hand, it is contended on behalf of the plaintiff, that a privity of contract was unnecessary and neither motive nor knowledge was essential. The learned Counsel for the plaintiff relies on the cases of *Williams* v. *Carwardine* (1) and *Gibbons* v. *Proctor* (2). These cases, no doubt, support the contention of the learned Counsel and the result of them seems to be that the mere performance of the act is sufficient to entitle the person performing it to obtain the reward advertised for. These cases have, however, been adversely criticised by Sir Frederick Pollock (Law of Contracts, 9th Edition, pages 15 and 22) and by the American author Ashley in his Law of Contracts (pages 16, 23 and 24). In my opinion a suit like the present can only be founded on a contract. In order to constitute a contract there must be an acceptance of the offer and there can be no acceptance unless there is a knowledge of the offer. Motive is not essential but knowledge and intention are. In the case of a public advertisement offering a reward, the performance of the act raises an inference of acceptance. This is manifest from section 8 of the Contract Act, which provides that "Performance of the conditions of a proposal. . . . .is an acceptance of the proposal." As observed by Ashley in the work on Contracts, already referred to, "If there is intent to accept, the contract arises upon performance of the requested service during the continuance of the offer and the offeree is then entitled to the reward promised" (page 23). Where, therefore, an advertisement, offering a reward for the performance of a particular act, is published, and the act is performed, there is a complete contract and a claim for the reward arises on the basis of a contract.

In the present case, however, the claim cannot be regarded as one on the basis of a contract. The plaintiff was in the service of the defendant. As such servant he was sent to search for the missing boy. It was, therefore, his duty to search for the boy. It is true that it was not within the ordinary scope of his duties as a *munib* to search for a missing relative of his master but when he agreed to go to Hardwar in search of the boy he undertook that particular duty and there was an obligation on him to search for and trace out the boy. Being under that obligation, which he had incurred before the reward in question was offered, he cannot, in my opinion, claim the reward. There was already a subsisting obligation and, therefore, the performance of the act cannot be regarded as a consideration for the defendant's promise. For the above reasons I hold that the decision of the Court below is right and I dismiss this application with costs.

Application dismissed.

(1) 4 B. & Ad. 621; 1 N. & M. 418; 2 L. J. (N. S.) K. B. 101; 5 Car. & P. 566; 38 R. R. 328; 110 Eng. Rep. 590.

(2) 64 L. T. 594; 55 J. P. 616.

In re AN ARTICLED CLERK.

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL SIDE.

May 8, 1913.

Present:—Mr. Justice Fletcher.

In re AN ARTICLED CLERK—PETITIONER.

Articled clerk—Clerk articled to Attorney—Holding other office or employment—Single Judge, if has power to dispense with general order of High Court—Original Side Rule 98.

The terms of rule 98 of the Original Side of the High Court prohibiting articled clerks of attorneys from holding other office or engaging in any employment, are very stringent. An articled clerk cannot hold any employment during the term of his articled clerkship.

An articled clerk who had four months and twenty days more to complete the period of his service wished to become the Secretary of a Limited Company the shares of which were owned by the members of the clerk's family and the property which the Company was formed to hold and manage was a certain *zemindari* belonging to the family or lately belonging to the family of the clerk, and applied for permission to enter into the service:

Held, that the application must be refused.

Ex parte Peppercorn, 1 C. P. 473; 1 H. & R. 487; 35 L. J. C. P. 239; 12 Jur. (N. S.) 761; 14 L. T. 252; 14 W. R. 693, distinguished.

Ex parte Greville, 9 C. P. 13; 43 L. J. C. P. 58; 29 L. T. 542; 22 W. R. 160, followed.

It is doubtful whether a single Judge of the High Court has power to dispense with the general order of the Court.

This is an application by a clerk articled to an Attorney for liberty to accept the office of Secretary of a Limited Company which is a joint family business. He had only four months and twenty days more to complete the period of his service. The joint family property to which the petitioner was willing to serve as Secretary was a *zemindari* concern. The petitioner is a member of the Hatkhola Dutt family and he is a member of the joint family concern.

Mr. *Avetoom*, for the Petitioner.

FLETCHER, J.—This was an application by an articled clerk for liberty to accept the office of Secretary of a Limited Company before his articles of clerkship had expired, he having still four months and twenty days more to serve to complete the period of five years, which he was bound to serve under the rules and orders of the Court.

[His Lordship then referred to rule 93* of Belchamber's Book and said.] The words there are very stringent. It was not easy to see how an articled clerk can hold any employment during the terms of his articled clerkship, the reason being that for the good of the profession it had been considered that during the five years the articled clerk was appointed to his master he should be exclusively engaged in learning the profession to which he would be ultimately admitted Mr. Avetoom in support of his application has cited the case of *Ex parte Peppercorn* (1). The words of the Statute in England† practically did not depart from the terms of rule 98. But the case of *Ex parte Peppercorn* (1) was a very different one. That case seems to be distinguishable from the present one. The other case that has been cited is the case of *Ex parte Greville* (2). That case, in my opinion, cannot be distinguished from the present one. It is quite true in the present case that the Company to which the articled clerk wishes to become the Secretary is a Company the shares of which are owned by the members of the articled clerk's family and the property which the Company has been formed to hold and manage is a certain *zemindari* belonging to the family or lately belonging to the family of the articled clerk. It seems to me that this case is covered by the case of *Ex parte Greville* (2) and the articled clerk is not entitled to accept this office as Secretary. As to how far I have got the power to grant the concession order, I do not know, because the employment proposed to be accepted by the articled clerk either falls within the terms of rule 98 or does not. So far as I can see it does fall within the terms of rule 98 and, therefore, I am not able to grant him this concession order. I am very much in doubt as to whether a single Judge has power to dispense with the general order of the Court. The present application is, therefore, refused.

(1) 1 C. P. 473: 1 H. & R. 487; 35 L. J. C. P. 239; 12 Jur. (N. S.) 761; 14 L. T. 252; 14 W. R. 693.

(2) 9 C. P. 13; 43 L. J. C. P. 58; 29 L. T. 542; 22 W. R. 160.

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* ARTICLED CLERK NOT TO HOLD OTHER OFFICE OR EMPLOYMENT.

Rule 98.—No person who shall be articled to serve as clerk to an attorney for the purpose of being admitted as an Attorney shall, during the period of such service, hold any office or engage in any employment whatsoever other than the employment of clerk to such Attorney and his partner or partners (if any) in the business, practice, or employment of an attorney; and every such person shall, during the whole period of service under articles, continue and be really and actually employed in the proper business, practice, or employment of an Attorney.

† 23 & 24 Vict. c. 127, section 10.

Mr. *Avetoom*:—If your Lordship thinks that an application ought to be made to the Chief Justice for him to appoint a Bench, I can make that application. I made this application before your Lordship as the senior Judge sitting on the Original side.

MR. JUSTICE FLETCHER.—I am not prepared to recommend such a course.

Mr. *Avetoom*:—Would your Lordship grant me leave so far as my client is concerned that he should discontinue the articled clerkship now and continue hereafter and complete four months and twenty days.

MR. JUSTICE FLECHER:—No.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS PETITION No. 2455 OF 1910.
March 10, 1913.
Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.
LOGADAPATTI CHINNAYYA—
DEFENDANT—PETITIONER
versus
KOTLA RAMANNA—RESPONDENT.

Fraud, decree obtained by—Res judicata—Decree to be vacated for fraud—What constitutes fraud on Court—Discretion of Court.

It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. But an unsuccessful party cannot be allowed to get round the rule of *res judicata* and to prove that the judgment was wrong; because the Court came to a wrong conclusion on the evidence before it.

The mode of rectifying an erroneous judgment is by appeal or by review.

A fraud to vacate the judgment must be extraneous to everything which has been adjudicated upon by the Court and not any fraud which has been already dealt with by the Court. The rule allowing the vacating of judgment for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. The judgment of Court includes the decision of the questions whether the testimony of any witnesses is true or false and whether the document produced in evidence is genuine or not.

The power of Court to set aside a judgment on the ground of fraud is discretionary.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct the Government Agent at Godavari to review his judgment in A. S. No. 3 of 1910 on the file of this Court.

Mr. *P. Somasundarm*, for the Petitioner.

Mr. *K. V. L. Narasimham*, for the Respondent.

ORDER.—This is an application made under rule 8 of the rules applicable to the Godavari agency asking us to direct the agent to review his judgment in an appeal by which he confirmed the decree of the Assistant Agent of Bhadrachalam. The facts which led up to the case may be very briefly stated. The appellant, who was the defendant in the first Court, instituted Original Suit No. 16 of 1906 in that Court for the recovery of a sum of Rs. 643-9-0 from the present plaintiff alleged to be due on dealings between the parties. The present plaintiff filed a written statement alleging that some items in the account sued on had been wrongly debited against him and denying the accuracy and reliability of the accunts put in by the present defendant. A Commissioner was appointed to scrutinise the accounts and to report on the result. The present plaintiff did not put in appearance on the day fixed for the hearing of the suit. The present defendant was examined as a witness and a decree was passed in his favour for the amount sued for. An appeal was preferred by the present plaintiff to the agent, but the decree was confirmed by him and this Court also refused to interfere with the appellate decree of the agent. The present suit has been instituted to set aside the former decree on the ground that it was obtained by fraud and for an injunction to restrain the defendant from executing it. The only allegation of fraud that was insisted on at the hearing was that the defendant having bought from the plaintiff timber worth Rs. 1,026-14-0 did not give him credit for the whole amount but only for Rs. 610-2-0. It will be observed that this allegation is at variance with the defence made by the present plaintiff in Original Suit No. 16 in which his allegation was that certain items were wrongly debited against him in the defendant's account. In answer to the present suit, the defendant alleged that the contract for the sale of timber referred to by the plaintiff was made on his behalf by his son in his absence, that it was a part of the agreement, that the timber should be of a certain quality, that what was supplied by the plaintiff was not of the quality agreed to, that he in consequence refused to ratify the sale and that the plaint-

iff agreed to an arrangement whereby the defendant sold the timber at Rajahmundry and credited the actual sale proceeds, Rs. 610-2-0 after deducting the expenses, to the plaintiff's account. The assistant agent at first dismissed the suit on the ground that it was barred by the rule of *res judicata* in consequence of the previous judgment and that the ground alleged by the plaintiff for setting aside the decree did not amount to such fraud as would entitle him to get the previous judgment vacated. On appeal the agent set aside that judgment on the ground that the plaintiff's allegation in the plaint that the defendant fraudulently kept back certain accounts from examination by the Commissioner was an averment of fraud which would entitle him to have the previous judgment vacated, if he could prove the allegation. After remand witnesses were examined on both sides. The defendant also put in two documents in support of his case. The assistant agent, however, came to the conclusion that the defendant did not succeed in proving the arrangement set up by him. He did not find that any accounts were withheld by the defendant from the Commissioner at the trial of Original Suit No. 16 as alleged in the plaint. Having thus found that the defendant ought to have given credit for Rs. 1,026-14-0 and not for Rs. 610-2-0 to the plaintiff, he observed "To this extent, therefore, the entry in defendant's accounts was fraudulent and defendant was not entitled to the decree he obtained in Original Suit No. 16 of 1906 against the plaintiff on the strength of these accounts." He, therefore, set aside the decree and granted an injunction restraining the defendant from executing it. He concluded with a somewhat unintelligible observation: "As there is good reason to conclude that the litigation in this suit is merely fictitious each party will bear his own costs throughout". On appeal the agent modified the assistant agent's judgment by restraining the appellant from executing the decree in Original Suit No. 16 only to the extent of Rs. 416-12-0, the amount of the loss which the plaintiff suffered by the incorrect entry in the defendant's account. His finding of fraud was expressed in these terms: "As appellants swore to the accuracy of the accounts and they have been proved inaccurate to the extent of Rs. 416-12-0 he must be said to have obtained his original decree fraudulently and respondent was entitled to have it set aside to that extent." The learned Vakil for the petitioner in this Court contends that no fraud such as would entitle the plaintiff to get the decree in Original Suit No. 16 set aside has been proved, that all that has been found by the lower Courts is that the decree in Original Suit No. 16 was incorrect and that this finding is based on evidence let in by the plaintiff which he might and ought to have let in Original Suit No. 16 and which he by his own carelessness failed to adduce then. The respondent contends that on the finding of the lower Courts, the evidence given on oath by the defendants at the trial of Original Suit No. 16 was perjured testimony and a decree obtained by perjured evidence may be set aside on the ground of fraud. It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of the judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. The allegation of fraud for vacating a judgment, therefore, must be extraneous to every thing which has been adjudicated on by the Court and not any fraud which has already been dealt with by the Court. The rule allowing the vacating of a judgment

for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. In the *Duchess of Kingston's* case (1), Sir William De Grey, Lord Chief Justice, observed with regard to the judgment of a competent Court, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court and not to be impeached from within, yet, like all other acts of the highest judicial authority it is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal. [see *Duchess of Kingston's* case (1)]. The effect of this pronouncement is that the correctness of the judgment of a Court of competent jurisdiction cannot be impeached; but it may be shown that the value of the judgment, assuming it to be correct, is destroyed by collateral or extrinsic fraud in the obtaining of it. Now the judgment of a Court includes the decision of the questions whether the testimony of any witness is true or false and whether a document produced in evidence is genuine or not. These questions are not extraneous or collateral to the judgment, but are steps which led to the final adjudication of the Court, quite as much as its opinion as to the effect of the evidence adduced and the inference to be drawn from it. The parties in a suit are entitled to convince the Court that the evidence given by their respective witnesses is true and proves the contentions they urge. It stands to reason, therefore, that the unsuccessful party cannot be allowed to resort to a fresh suit in order to make a fresh attempt to show that the evidence which was insisted on by his opponent as true was, in reality, false and to characterise such insistance as fraud in obtaining the judgment. Nor can he be permitted to do so by adducing fresh evidence for the purpose, for it was his duty to place all his evidence, before the Court at the former trial. In *Patch* v. *Ward* (2) Lord Cairns, L. J. observed. "Now, it is necessary to bear in mind what is meant and what must be meant by fraud, when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, the *Duchess of Kingston's* case (1)." Then, his Lordship cites the passage already quoted above and proceeds to explain it. "The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." There can be no undue advantage taken of another by a party in putting any matter before the Court to be adjudged by it to be true or false. Both parties are entitled to invoke the judgment of the Court and to convince it of the truth of the evidence adduced by them respectively. It is true that parties ought not to let in false evidence, and that it is highly improper and immoral to do so. But it is the function of the Court to decide whether the evidence is true or false. If the adducing of false evidence can be spoken as a fraud, then the Court, in deciding the case, must be taken to have adjudged whether such fraud has been committed or not, and what it has once adjudged it cannot be called upon to decide again. The test to be applied is "is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court; but where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards, claim to show that the allegation of his opponent was false. Assuming that he could prove the charge

(1) 2 Sm. L. Cas. 731 at p. 738; 20 How. St. Tr. 537; 34 H. L. (Joo.) 655; 1 Leach. C.C. 146; 1 East (P C.) 468.
(2) L. R. 3 Ch. 203; 18 L. T. 134; 16 W. R. 441.

that would not amount to proving fraud on the part of his opponent because the Court has already decided that his opponent's allegation was true and not false. If he could show that his opponent prevented him by an independent collateral wrongful act, such as by keeping his witnesses in confinement, or by stealing his documents, from adducing his evidence, that would be an act of fraud which would entitle him to get the Court's decree set aside. Fraud must be something which would destroy or seriously impair the value of the judgment by showing that one of the parties was prevented by the other from conducting his litigation fairly or by being deprived of the materials which he was entitled to place before the Court. Black in his Article on 'Judgments' in 23 Cyclopædia of American Law and Procedure includes the following acts in fraud which would vacate a judgment, misrepresentation or tricks practised upon defendant, keeping him away from the trial, preventing him from claiming his rights in the premises or setting up an available defence; acting contrary to an agreement between the parties that the case should not be continued or that defendant's time to answer should be extended or that the action should be dismissed as the result of compromise or settlement, or that the case would not be pressed to a judgment. The same learned author says in his treatise on 'Judgments' Vol. 1 section 321: "There may well be cases of fraud in the cause of action or in the manner of procuring the instrument in suit, where the Courts would not withhold relief on motion: as where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defence, and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time." But a judgment cannot be set aside for fraud on the ground that one of the parties to the suit acted improperly in the conduct of it when such conduct falls within the province of adjudication by the Court. The right of a party to insist on his opponent acting with truth and honesty in the conduct of the suit must, in the interests of finality of litigation be taken to be exhausted with the adjudication by the Court. He may, for instance, compel his opponent to produce all documents relevant to the suit, but it would be dangerous to hold that he may set aside the Court's judgment on the ground of fraud because his opponent did not produce them. He may compel him to give evidence in his behalf, but he must be satisfied with what he can do for this purpose in the course of the suit itself. The law has prescribed means for the punishment of a person who perjures himself or fails to produce documents which he is legally bound to produce but there would be no end to litigation, if his improper conduct in these matters can be made the means of setting aside the judgment of the Court by a fresh suit. He might go on re-agitating the same matter by successive suits to the end of his life, and his heirs might then take it up as an inheritance. Moreover, he might, after a superior Appellate Court has adjudicated against him, institute a suit in an inferior Court to set aside the superior Court's judgment, as he would be entitled to institute his suit in the lowest Court competent to try it; see *Nistarini Dassi* v. *Nundo Lal Bose* (3), and *Sarthakram Maiti* v. *Nando Ram Maiti* (4). It must be admitted that there is a conflict in the opinions of eminent Judges as to what exactly would constitute fraud in any particular case for the purpose of the vacating of a judgment. But the principle appears to be laid down with clearness in the *Duchess of Kingston's* case(1) as something which is collateral to the matters adjudged by the Court. In the *Bank of Australasia* v. *Nias* (5), a decree was obtained in Australia on a contract. The decree-holder then brought a suit in England on the judgment of the Colonial Court. The defendant pleaded that the alleged contract on which the decree was passed was not true, and that, if true it was obtained and procured by fraud by the plaintiffs and others in collusion with them. Lord Campbell delivering the judgment of the Court of the Queen's Bench disallowed these pleas, holding that they do not amount to an averment of fraud. He observed: "The pleas demurred to might have been pleaded, and, if there be any foundation for them, they ought to have been pleaded in the original

(3) 30 C. 369; 7 C. W. N. 353.
(4) 11 C. W. N. 579.
(5) 16 Q. B. 717; 20 L. J. Q. B. 284; 18 Jur. 967; 117 E. R. 1055; 83 R. R. 698.

action. They must now be taken to have been in due manner decided against the defendant. . . . We are bound to take judicial notice that by the law and constitution of this Empire there is an appeal from it (that is, the decision of the Australian Court) to Her Majesty, who would refer the appeal to the Judicial Committee of Her Privy Council. I will not take notice of the fact of there having been an appeal; but I may say that either there has or there has not been an appeal; in either case, it seems contrary to principle and expediency for the same questions to be again submitted to a Jury in this country. A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued. Before the Judicial Committee, the Judges there presiding would fairly examine the judgment, and only set it aside if it was unjust. But, although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a Jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the Company never made the promises which were the foundation of the judgment, or that, these promises were obtained by the fraud and ccvin of the plaintiffs."

Flower v. *Lloyd* (6) is an important case on the question. There the plaintiffs brought an action against the defendants to restrain alleged infringements of a patent process. It was ultimately dismissed by the Court of Appeal. They then instituted another action to have it declared that the judgment on appeal had been obtained by fraud and for consequential relief. The alleged fraud consisted in the defendant's keeping back from an expert, who had been appointed to inspect the defendant's process, certain materials relating to the process in his possession and in making a false statement relevant to the matter of the inquiry. The Court of Appeal held that the plaintiff had failed to prove his allegation, but James, L. J., with the concurrence of Thesiger, L. J., proceeded to make certain important observations as to the nature of the fraud to be proved in such a case. He observed: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed, before it is answered in the affirmative; where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds,....." Baggally, L. J., did not agree in these observations but reserved for himself an opportunity of fully considering the question of law. In *Ex parte Alice Cockerell* (7) an application to set aside on the ground of fraud an order obtained by a married woman for permission to convey her interest in the

(6) (1879) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

(7) (1878) 4 Com. Pleas. Dn. 39; 27 W. R. 366.

property bequeathed to her was dismissed. Lord Coleridge, C. J., observed: "If it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will, undoubtedly, set aside the order." The decision cannot be taken to lay down that every party is bound to bring voluntarily before the Court all matters that have a material bearing on the questions at issue and that every suppression of information by a litigant would make a decree in his favour liable to be set aside. It does not appear whether any notice was given to the husband before the order was passed. If the wife was entitled to an *ex parte* order, it was her duty to place certain facts before the Court, her suppressing them would be a ground for setting the order aside. Generally an *ex parte* order could be re-called on sufficient grounds being shown by the opponent, apart from any question of fraud. *Abouloff* v. *Oppenheimer and Company* (8) perhaps marks a departure from the view taken in *Flower* v. *Lloyd* (6). A suit was filed in England on a judgment obtained in a Russian Court. The judgment was one directing the defendant to return to the plaintiff certain goods belonging to him or in default, that the plaintiff should recover their value. The defendants did not admit that judgment was obtained in Russia by the plaintiff, but alleged that, if it was, it was obtained by the gross fraud of the plaintiff and of her husband because the goods in question were, at the time of the suit and of the judgment, in the possession of the plaintiff, and of her husband and that fact was concealed from the Court. The Court held that the plaintiff was entitled to have this plea tried. It is not quite clear how far the judgment of Coleridge, C. J, was due to the fact that the suit was on a foreign judgment. Brett, L. J., and Baggallay, L. J., were apparently of opinion that the same rule would be applicable whether the action was on the judgment of a Court in England or upon a foreign judgment. It will be observed that the question raised in the action in the English Court was whether goods belonging to the plaintiff were really detained by the defendant at the time of the action in the Russian Court. That is, whether the claim adjudged by the Russian Court to be a good one was in reality a fraudulent claim, and that no collateral fraud was alleged. Brett, L. J., observed "It has been contended that the same issue ought not to be tried in an English Court which was tried in the Russian Courts, but I agree that the question whether the Russian Courts were deceived, never could be an issue in the action tried by them. That question may be raised in the Russian Court in order to determine the matters which were in issue; but I think it true to say that the judgment of Knight Bruce, V. C., in *Barrs* v. *Jackson* (9) does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues therein raised. In the present instance, the issue in the Russian Courts would be whether the defendants were wrongfully detaining the goods of the plaintiff. The question of fact whether the plaintiff had the goods in her possession at the moment when the action was commenced, would be a circumstance very material to be considered in order to determine that issue, but in the present action, upon this paragraph of the defence the only issue is whether the judgment of the Russian Courts was obtained by the fraud of the plaintiff successfully perpetrated on those Courts. The issues in the two actions are not the same; and, therefore, the defendants are not estopped from setting up in this action the same evidence that was adduced at the trial of the action in the Russian Courts. I wish to say, however, that I am strongly of opinion that in the present action no question can be raised whether the judgment of the Russian Courts was erroneous; ..... the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it." There can be no doubt that, if the issue in the two actions was different, there would be no question of

(8) (1883) 10 Q. B. D. 295; 52 L. J.Q.B. 1; 47 L. T. 325; 31 W. R. 57.

(9) 1 Ph. 582; 14 L. J. Ch. 433; 9 Jur. 609; 65 R. R. 457.

res judicata, although the same evidence might bear upon both the issues but were the issues different? The question in Russian action was whether the plaintiff's goods were wrongfully detained by the defendant. If they were not, the plaintiff's claim was fraudulent. The only fraud complained of in the English action was that the claim was fraudulent in that it sought to recover goods which were really in the plaintiff's own possession. That was the identical issue tried by the Russian Court. That Court decided that the claim was not fraudulent. There was no fraud on the Court unless the making of fraudulent claim is a fraud on the Court. Brett, L. J., distinguishes *Flower* v. *Lloyd* (6) on the facts of the case. One distinction drawn is that, in *Flower* v. *Lloyd* (6), fraud was committed not before the Court itself at the trial of the action but previously to the case being brought to a hearing before the Court. But is this the right test to be applied? Is not the proper test whether the fraud complained of was or was not adjudged by the Court in the previous suit itself to be not made out? Coleridge, C. J., appears to have based his judgment in part at least on the ground that a judgment when impeached was a foreign judgment, with respect to which it has been often held that it is only *prima facie* evidence of the fact established by it. See *Ochsenbein* v. *Papelier* (10).

This is the view taken of *Abouloff* v. *Oppenheimer and Company* (8) by the Supreme Court of the United States in *United States* v. *Thorckmorton* (11). In *Vadala* v. *Lawes* (12), *Abouloff* v. *Oppenheimer and Company Ltd.*, (8) was accepted as correct; but apparently only on the ground that it was binding on the Court. Lindley, L. J., observed that there was no distinction between a foreign judgment and a domestic judgment when it was impeached on the ground of fraud. The facts relied on in the case as constituting fraud were not quite similar to those in *Abouloff* v. *Oppenheimer and Company* (8). Lindley, L. J., observed that there were two rules which ought to be borne in mind. *First* that a party to an action can impeach a judgment in it for fraud, and *secondly*, the merits of an action which have been tried cannot be re-opened. The question was which rule was to prevail. He went on and observed: "Until *Abouloff's* case (8) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff* v. *Oppenheimer and Company* (8) and it was decided. I cannot fritter away that judgment and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the facts that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case, even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon.....The Counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying, that you cannot re-try the merits." Referring to the judgment of Brett, L. J., he said that the proposition laid down by his Lordship can only be applicable to cases where there is what is called extraneous fraud, such as imposition on the Court itself, but he held that the effect of the judgment in that case was to enable the defendant to re-open the judgment by showing that it was based on false evidence. He observed, referring to the judgment of Baggally, L. J: "That is to say, not only where there has been a fraud on the Court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence that is such a fraud as would enable the defendant to impeach the foreign judgment." His Lordship concluded as follows:—"It appears to me, therefore, impossible, in the face of that case, to differ from the view taken

(10) (1873) 8 Ch. App. 695; 42 L. J. Ch. 861; 28 L. T. 459; 21 W. R. 516.

(11) 98 U. S. 93; 8 Otto 61; 25 Law. Ed. 93.

(12) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

by the Divisional Court". In *Baker* v. *Wadsworth* (13), on the other hand, the Court refused to set aside the decree on the ground that it was obtained by perjured evidence. Wright, J., observed "There is no authority that the mere proof that a verdict and judgment have been obtained by perjury is sufficient to induce the Court to set the judgment aside and the expressions of the Lords Justices in *Flower* v. *Lloyd* (16) are strongly against such a proposition." In *Cole* v. *Langford* (14) where judgment had been given in default of pleading by the defendant, the plaintiff made a motion to set aside the judgment on the ground of fraud. The allegation of fraud was that the judgment was obtained by exhibiting to the Court and the Jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action. The judgment was set aside. Ridley, J., gave no reasons for doing so. Phillimore, J., relied on the case of *Priestman* v. *Thomas* (15). But that case merely decided that the question whether a Will was a forgery or not was *res judicata* by a judgment passed in prior proceedings between the parties, setting aside on the ground of fraud. The result of the English cases is that, until *Abouloff* v. *Openheimer and Company* (8) it was held that the fraud complained of should not be a matter already adjudged by the Court but should be collateral to it. But, in that case, it was held that, notwithstanding a prior adjudication that the fraud complained of was not true or not proved, a subsequent complaint of the same fraud without any further allegation raised a new issue whether the previous judgment was obtained by fraud. This rule was not acted upon in *Baker* v. *Wadswarth* (13) at any rate, so far as fraud consisting in perjured testimony being put before the Court was concerned. In the American Courts although there appears to be some conflict of judicial opinion on the question whether perjured testimony of the party to the litigation or subornation of perjury by him could be regarded as fraud for the purpose of vacating a judgment, the Supreme Court held, in the case of *United States* v. *Throckmorton* (11) that it could not be so regarded. (See 23 Cyclopædia of American Law and Procedure page 921, Note 75). Mr. Justice Miller, delivering the opinion of the Court, expounded the scope of the rule that a judgment may be set aside for fraud thus, "in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from Court, a false promise of a compromise; or where the defendant never had knowledge of the suit being kept in ignorance by the acts of the plaintiff; or where an Attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the Attorney regularly employed corruptly sells out his client's interest to the other side —these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." The learned Judge has reviewed both the English and the American authorities on the question. *Greene* v. *Greene* (16) explained the position thus: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted." In America it has also been held that a decree cannot be set aside for fraud on the ground that the successful party bribed his witness to swear falsely. (See Black on Judgments, Vol. I, section 323, Note 204 with regard to the bribing of witnesses to swear falsely).

(13) (1898) 67 L. J. Q. B. 301.
(14) (1898) 2 Q. B. 36; 67 L. J. Q. B. 698; 14 T. L. R. 427.
(15) 53 L. J. P. 109; 9 P. D. 210; 51 L. T. 843; 32 W. R. 842.
(16) 2 Gray 361; 61 Am. Dec. 454 at p. 458.

In *Mahomed Golab* v. *Mahomed Sulliman*(17) Sir Comer Petheram, C. J., and Ghose, J. were of opinion that a decree could not be set aside for fraud on the ground that it was obtained by perjury committed by, or at the instance of, the other party. The learned Judges followed *Flower* v. *Lloyd* (6). Petheram, C. J., observed: "Where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed, to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case, and, in my opinion, it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is, of course, fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well." The reasons why this cannot be the case are very clearly stated by James, L. J., in the passage I have quoted." *Abouloff* v. *Oppenheimer and Company* (8) and *Vadala* v. *Lawes* (12) do not seem to have been brought to the notice of the learned Judges. But the case is valuable as indicating the correct principle of law to be applied in their opinion. This decision has been followed in *Abdul Huque Chowdhree* v. *Abdul Hafiz* (18) and in *Moruful Huq* v. *Surendra Nath Roy* (19) though a different view was taken in *Lakshmi Charan Shaha* v. *Nur Ali* (20), *Venkatappa Naik* v. *Subbi Naik* (21) deliberate perjury committed by the successful party was regarded by Boddam and Moore, JJ., as a ground on which the judgment might be set aside on the authority of *Abouloff* v. *Oppenheimer and Company* (8) and *Vadala* v. *Lawes* (12), *Baker Wadsworth* (13) was not brought to the notice of the Court. The correctness of the decision was questioned in *Kamaraswamy Chetty* v. *Kamakshi Ammal* (22) but the point did not arise for decision. There appears to be no decision of the Privy Council bearing on this question in *Khagendra Nath* v. *Pran Nath Roy* (23) the Judicial Committee held that where an *ex parte* decree is attached, not merely on the ground of irregularity or insufficiency of the service of summons but also on the ground that the plaintiff prevented the defendant from defending the suit by getting him declared a lunatic and forcing him by his threats to leave his home and stay elsewhere in secrecy, it could be set aside on the ground of fraud, but there no attempt was made to impeach the judgment on the ground of any fraud which formed the subject of prior adjudication by the Court. In *Tika Ram* v. *Daulat Ram* (24), *Mahomed Golab* v. *Mahomed Sulliman* (17) was approved, though the case itself was one in which the only substantial complaint was taken to be that summons had not been properly served on him.

In this state of the authorities, if it were necessary to decide whether a judgment could be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury we might have to consider whether it is desirable to refer the question to a Full Bench of the Court for an authoritative pronouncement. But, we do not think that it is necessary in the circumstances of this case to decide that broad question. In the first place, the fraud alleged in the plaint was that some items were wrongly debited in the defendant's account against

(17) 21 C. 612.
(18) 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636.
(19) 15 Ind. Cas. 893; 16 C. W. N. 1002.
(20) 11 Ind. Cas 626; 38 C. 936; 15 C. W. N. 1010.
(21) 29 M. 179; 16 M. L. J. 59.
(22) 16 Ind. Cas. 843; (1912) M. W. N. 805; 12 M. L. T. 186; 23 M. L. J. 187.
(23) 29 C. 395; 29 I. A. 99.
(24) 4 Ind. Cas. 596; 32 A. 145; 7 A. L. J. 74.

the plaintiff. The judgment of the lower Court, on the other hand, is based on the fact that the defendant failed to prove that there was an agreement between him and the plaintiff, that the timber alleged by the defendant to have been sold to the plaintiff for Rs. 1,026-14-0 should be taken at the price for which they were sold by the defendant. *Secondly*, it can hardly be held that the lower Courts have found that the defendant was guilty of deliberate perjury in obtaining the judgment in Original Suit No 16. They have, no doubt, held that the defendant failed to prove the agreement set up by him, considering the evidence adduced for the purpose to be insufficient. But, this is considerably short of finding deliberate perjury on his part. As laid down in *Patch* v. *Ward* (2) what the Court has to find is " malicious and fraudulent design to mislead the Court." See also *Jagun Proshad* v. *Posun Sahoo* (25). *Abouloff* v. *Oppenheimer and Company* (8) does not lay down that the mere fact that the evidence as formerly believed is found on the strength of the evidence of other witnesses to be unacceptable is sufficient to set aside the judgment on the ground of fraud. *Thirdly* the power of the Court to set aside a judgment on the ground of fraud is a discretionary one. [See *Baker* v. *Wadsworth* (13)] Black observes that to entitle a party to have a judgment vacated, he must show a sufficient reason why he did not assert and enforce his rights at the proper time and in the regular manner and that his whole conduct throughout has been free from fraud or any turpitude, and he must free himself from all imputation of laches for the judgment will not be disturbed if it appears to have been entertained as a result of his own heedlessness, sloth or lack of diligence in protecting his own interests. Here the assistant agent found that the plaintiff was absent at the hearing of Original Suit No. 16 without due cause. It would have been extremely undesirable to allow such a person to prove under the guise of an allegation of fraud, but the claim of the defendant was unsupportable and the finding of the Court wrong. We allow the petition and direct the agent to reveiw his decree in the light of this judgment. The respondent will pay the petitioner's costs in this Court.

Petition allowed.

(25) 8 C. W. N. 172.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2424 OF 1911.

April 18, 1913.

Present:—Mr. Justice Chapman and Mr. Justice Mullick.

GURU CHARAN HAJAM—PLAINTIFF—APPELLANT

versus

SUKLAL HAJAM—DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (*Beng. Act VI of* 1908), *ss.* 4, 41—*Under*-raiyat—*Non-occupancy* raiyat—*Difference between—Ejectment of under*-raiyat *by* raiyat—*Notice in writing if necessary—Tenancy from year to year—Notice given in previous* Pous, *whether sufficient.*

An under-*raiyat* must, for the purposes of the Chota Nagpur Tenancy Act, be treated as belonging to a class of tenants quite distinct from the class of non-occupancy *raiyats*. And as there is no provision in the Act dealing separately with the class "under-*raiyats*," only those provisions of the Act which deal with tenants generally can be applied to under-*raiyats*.

Consequently, for the purpose of deciding the questions raised in a suit for the ejectment of an under-*raiyat* by a *raiyat*, the Court can have regard only to the relations established between the parties either by contract or by custom. In the absence of a lease the tenancy would ordinarily be held to be a tenancy from year to year.

There is no statutory provision that the tenancy of an under-*raiyat* in Chota Nagpur can be terminated only by a notice in writing.

Therefore, where the *raiyat* plaintiff asked the under-*raiyat* defendant to give up possession in *Pous* of the previous year:

Held, that the tenancy was terminated according to law and that the plaintiff should succeed in his suit for ejectment of the defendant.

Appeal from the decree of the Judicial Commissioner of Chota Nagpur, dated July 15th, 1911, reversing that of the Deputy Collector of Khunti, dated August 3rd, 1910.

Babu *Shib Chandra Palit*, for the Appellant.

Babu *Khetra Mohun Sen*, for the Respondent.

JUDGMENT.—The appellant is a *raiyat*. He sued the defendant who is an under-*raiyat* in ejectment. The learned District Judge has in appeal dismissed the appellant's suit upon the ground that the provisions of section 41 of the Chota Nagpur Tenancy Act had not been complied with that section provides that non-occupancy-*raiyat* shall not be ejected except upon certain grounds and the learned District Judge holds that an under-*raiyat* has at least the rights of a non-occupancy *raiyat*. This view is, in our opinion, erroneous. It is clear from the definitions

in section 4 of the Act that an under-*raiyat* must for the purposes of the Act be treated as belonging to a class of tenants quite distinct from the class of non-occupancy *raiyats*. It is true that there is no provision in the Act dealing separately with the class "under-*raiyats*" defined in section 4 but that does not do away with the effect of the definitions in section 4 which is that where the Act refers to non-occupancy *raiyats* the reference must not be taken to include under-*raiyats*. The result is that only those provisions of the Act which deal with tenants generally can be applied to under-*raiyats*.

The result is that for the purpose of deciding the questions raised in a suit for the ejectment of an under-*raiyat* by a *raiyat* the Court can have regard only to the relations established between the parties either by contract or by custom. Where there is evidence of a lease (oral or written) the matter must be decided by reference to that evidence. Where there is no evidence of a lease the tenancy would, no doubt, be ordinarily held to be a tenancy from year to year (section 106 of the Transfer of Property Act by analogy). The year for this purpose being held to be the agricultural year. It is also necessary to bear in mind that before a suit in ejectment of a tenant of any kind can rightly succeed, it must be shown that the tenancy has been terminated. But there is no statutory provision that the tenancy of an under-*raiyat* in Chota Nagpur can be terminated only by a notice in writing.

In the present case it may be taken that the under-*raiyat* is a tenant from year to year. The appellant asserted that he asked the defendants to give up possession in *Pous* of the previous year.

This assertion was not denied in the written statement and no point in connection with the sufficiency of the notice was raised in either of the Courts below. No custom of right to notice for any particular period was ever alleged, and it was never suggested that the time given to suit was unreasonably short or that the period of the notice did not expire with the periodic year of the tenancy. We take it, therefore, that the tenancy was terminated before the suit was brought. The appellant was, therefore, entitled to succeed. The appeal is allowed. The judgment and decree of the learned Judicial Commissioner is set aside. The suit is decreed with costs in all Courts. The appellant is entitled to *khas* possession.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2058 OF 1910.

March 14, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

VEERAPPUDAYAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUTHU KARUPPA THEVAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Attestation—Writer, when an attestator—Onus of proof—Res judicata.

The mere statement by the writer of a document that he wrote it cannot be regarded as an attestation of it by him. The question whether, when the writer has signed his name below the executant's he can be regarded as an attestator himself must depend on the facts and circumstances of each case. It is not necessary that the writer should describe himself as a witness or that there should be a testimoniam clause. All that must appear is that he intended to attest the execution and where he subscribes his name at the time of execution it would not be improper to presume such intention.

The description of him as the writer cannot show that he was not also an attestator.

Where the fact of the attestator having been present at the time of execution is not put in issue in the lower Courts, it cannot be raised in the second appeal. If properly raised the onus will be on the plaintiff.

Plaintiff mortgaged the suit properties to defendant and executed a subsequent mortgage to another who obtained a decree for redemption but did not execute the same and to which both the plaintiff and defendant were parties. The plaintiff paid the decree amount and brought the present suit for redemption:

Held, that it was *res judicata* by reason of the previous suit.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in A. S. No. 22 of 1910, preferred against that of the Court of the Additional District Munsif of Paramakudi, in O. S. No. 40 of 1909.

Mr. *S. Srinivasa Iyengar*, for the Appellants.

Mr. *T. V. Gopalasami Mudaly*, for the Respondent.

JUDGMENT.—The plaintiffs are purchasers of the whole or a part of the equity

of redemption on certain properties. They executed a mortgage for a period of nine years to one Karuppu Udayan which authorised him to redeem an alleged prior mortgage in favour of the family of defendants Nos. 1 to 7. He obtained a decree for redemption against that family but failed to execute it. The plaintiffs were also impleaded as defendants in that suit (Original Suit No. 388 of 1906) as persons, having an interest in the mortgaged property. The plaintiff subsequently paid off Karuppu Udayan's mortgage. They now seek to redeem the mortgage in the defendants' favour. The original mortgage deed has not been produced by the defendants, but the plaintiffs have put in Exhibit L a registration copy of it. The defendants denied the mortgage set up by the plaintiff and contended that they were themselves the owners of the property. An issue was, therefore, framed in these terms "whether the plaint mentioned mortgage is true." Both the lower Courts have held it proved. Two contentions have been argued in second appeal. *First* that the mortgage is invalid in law because it was not attested by two witnesses but only by one witness, and also because it is in any event not proved that two witnesses witnessed the execution of the mortgage deed. *Secondly* that the suit is barred by the rule of *res judicata* in consequence of the previous suit of Karuppu Udayan (Original Suit No. 388 of 1906). With regard to the first contention the first point is whether the writer of the document, Veerabadra Pillai, can be regarded as having attested it. Mr. Srinivasa Iyengar, the learned Vakil, for the appellant contends Veerabadra Pillai did not sign the document as an attesting witness, but only as its writer. It is true that the mere statement by the writer of a document that he wrote it cannot be regarded as an attestation of it by him. The question whether, when the writer has signed his name below the executant's he can be regarded as an attestator himself must depend on the facts and circumstances of each case. See *Radha Kishen* v. *Fateh Ali Ram* (1) where the writer was taken to be an attestor and *Ranu* v. *Laxmanrao* (2) where he was not so regarded as the statement by the writer that he wrote the document was a part of the document itself and was made above the signature of the executants. It is not necessary that the writer should describe himself as a witness, *Bryan* v. *White* (3) or that there should be a testimoniam clause, *Burdett* v. *Spilsbusy* and *Skinner* v. *Spilsbury* (4). It must, no doubt, appear that he intended to attest the execution but where he subscribes his name at the time of execution, it would not be improper to presume such intention. We are at some disadvantage in deciding the question in this case, as we have not the benefit of seeing the original. But this disadvantage must be put down to the defendants' conduct in not producing it. What appears from Exhibit L. is that after the executant's signature two persons signed it. Kuppu Udayan and Veerabadran. Before Kuppu Udayan's name we have the expression, * * or 'I know' used, no doubt, to denote the fact of attestation by the person to whom the expression refers. We cannot say from Exhibit L that the expression was intended to refer only to Kuppu Udayan and not to the writer Veerabadran also. The fact that Veerabadran has signed his name is, as already observed, not without importance in deciding the question whether it was not intended to make him an attestor. It is hardly necessary to observe that the description of him as the writer of a document cannot show that he was not also an attestor. We are of opinion that we must hold on the materials available to us that he signed the document as an attestor. It is next urged that it is not proved that Veerabadran was present at the execution of the mortgage, and reliance has been placed on the decision of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rawuthan* (5) in support of the contention that a person cannot be regarded as an attestor of a document unless he witnessed its execution. But on examining the pleadings and the judgment of the District Munsif we must hold that the defendants did not raise this contention in the Munsif's Court nor did they do so in their

(1) 20 A. 532; A. W. N. (1898) 148.
(2) 1 Ind Cas. 464; 33 B. 44; 10 Bom. L. R. 943.
(3) 2 Rob. Eccl. 315.
(4) 10 Cl. & F. 340; 59 R. R. 105; 8 Eng. Rep. 772; 7 Scott. N. R. 66; 6 Man. & Gr. 386.
(5) 16 Ind. Cas. 250; (1912) M. W. N. 935; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596; 39 I. A. 220 (P. C.).

memorandum of appeal to the lower Appellate Court. If they had done so the plaintiffs might have proved that the writer was present at the execution of the mortgage especially as it is extremely likely, that he was present. If that contention had been raised, the onus would, no doubt, have been on the plaintiffs to prove that Veerabadran witnessed the execution of the document. But the defendants confined themselves to the denial of execution altogether and to the contention that Veerabadran, though present, could not be regarded as an attestor. We must, therefore, decline to entertain this contention at this stage.

The second contention is also, in our opinion, bound to fail It is admitted that in Original Suit No. 388 of 1906 there was no decree in favour of the present plaintiff entitling them to redeem the mortgage. They were not bound to claim a right to redeem before the expiration of the period of nine years fixed in the mortgage they had given to Karuppu Udayan. It is indeed doubtful whether such a claim, if made, would have been entitled to succeed. The case of *Kuttisseri Illath Raman Namboodri* v. *Achutha Pishurodi* (6) is a decision in support of the plaintiffs' contention that they are not barred by the judgment in Original Suit No. 388 of 1906. We do not think that the fact that the 8th and 9th defendants were parties to the previous suit makes any difference. They were impleaded only because they had an interest in the mortgaged property and were, therefore, necessary parties to the suit. We cannot accept the contention that the Court, in deciding that suit was bound to determine the rights of all persons who were parties to the suit to redeem the mortgage in question. It is further argued that as the period of nine years for which the mortgage deed in Karuppu Udyan's favour was executed had not elapsed at the time of the institution of this suit, the plaintiffs could not sustain the suit. But Karuppu Udayan did not convey his mortgage rights to the plaintiffs and the suit is not instituted by virtue of any title vested in the plaintiffs as Karuppu Udayan's representatives-in-interest. His mortgage was paid off and extinguished, and the basis of the plaintiffs' claim is the equity of redemption vested in them. We dismiss the second appeal with costs. Time for redemption will be extended up to 31st July 1913.

Appeal dismissed.

(6) 14 Ind. Cas 415; 35 M. 42.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 12 OF 1912.

December 13, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

NARAYAN ANANDRAM MARWADI—DEFENDANT—APPELLANT

versus

GOWBAI DHONDIBU JAGTAP—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22—Execution of decree—Attachment of immoveable property of agriculturist—Sale without object—Right to recover property by subsequent suit barred—Burden of proof—Presumption—Proceedings of Court—Civil Procedure Code (Act V of 1908), s. 60—Evidence Act (I of 1872), ss. 101, 102, 103, 114, ill. (e).

In 1885, *A.* mortgaged to *B.* certain property for 16 years. In 1888, *C.* obtained a money-decree against *A.* in the Vinchur Court. In execution of this decree, the right, title and interest of *A.* in the mortgaged property was put up to sale and purchased by *D.*, who subsequently sold the interest purchased to *B.*

In 1908, *A.* sued *B.* for possession by redemption of the property, alleging that as he was an agriculturist the sale in execution was illegal and of no effect. It was found that *A.* had been an agriculturist since the date of mortgage. There was no evidence to show whether or not *A.* was known to be an agriculturist in the Vinchur Court at the time of the hearing or of the execution proceedings; nor was it shown that *C.* had instituted his suit after obtaining the certificate of a conciliator:

Held, (1) that the suit must be dismissed as there was no reason to treat the immoveable property sold by the Vinchur Court as the property of an agriculturist, as *A.* had not proved in the first suit that he belonged to the privileged ciass of an agriculturist;

(2) that it could not be assumed that the Judge of the Vinchur Court acted contrary to law in passing orders for a sale of *A.*'s property.

The maxim of law which must be followed in the absence of evidence is that everything which ought to have been done was done by the Court. The ordinary rule is that property belonging to the judgment-debtor is liable to attachment and sale. An agriculturist, in order to resist the application of that general rule, must show that he belongs to the privileged class so as to render section 22 of the Dekkhan Agriculturists' Relief Act applicable to his case.

In Courts of law, only those facts can be taken to exist which are proved. In the absence of proof, the exemption from liability to attachment or sale cannot be held to exist for the purposes of the execution proceedings.

Letters Patent Appeal from the following judgment of

BATCHELOR, J.—The facts upon which this appeal falls to be decided are these: In July 1885 the lands in suit were mortgaged by three brothers, one condition of the mortgage being that the mortgagee was to have possession for sixteen years. He has had that possession and enjoyment, but he now resists the mortgagor's suit to redeem him. His resistance is sought to be justified from the following circumstances :—

Three years after the execution of the mortgage, that is to say in 1888, a money-decree against the mortgagors was obtained in the Vinchur Court by one Tikaram Uderam. At the Court sale which ensued in August 1888, the property was bought for Tikaram by his brother. In May 1896 the mortgagee-appellant became the purchaser, though it is not agreed who sold to him, whether Tikaram or a subsequent holder.

It is conceded that the mortgagors now are agriculturists, have always been agriculturists, and, therefore, were so at the time of the suit and subsequent proceedings in the Vinchur Court. Since that was then their position, it is contended on their behalf that the order made by the Vinchur Court for the sale of their immoveable property was invalid by virtue of section 22 of the Dekkhan Agriculturists' Relief Act. To that the reply made by the mortgagee is that the mortgagors' status as agriculturists was never pleaded in the Vinchur Court, and that being so, the Court had jurisdiction to order the sale of the immoveable property. If that is so, then it is argued that Tikaram, through his brother, obtained a good title, and in consequence the mortgagee has also obtained a good title. It appears to me, however, that the basis of fact which alone could justify the submission of the appellant's argument is wanting in this case. There is nothing before me to show what happened or did not happen in the Vinchur suit, which was heard and decided by the Chief of Vinchur, exercising for that purpose the special powers of a Subordinate Judge. What the pleadings were in that suit, what the issues were, what the findings were, what was claimed on one side and denied on the other, of all this we know nothing. All that Mr. Bhat can point to is a copy of the sale certificate. It is doubtful whether such a copy would be admissible. But assuming that it would be admissible, its mere omission to describe the present respondents as agriculturists seems to me a totally insufficient basis from which to infer that at the trial of the suit or during the execution proceedings the mortgagors omitted to plead their status. *Non constat* that the Vinchur Chief's decision was not arrived at in spite of the agricultural position of the mortgagors being brought to the knowledge of the Court and in simple inadvertence or forgetfulness of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act; and in that case the decision would be null and void. I think, therefore, that the question ought to be decided against the appellant on the ground that the legal argument upon which he seeks to rely is wanting in the necessary substratum of fact. In this view, it is unnecessary for me to express any opinion as to what ought to be the answer in law if the facts assumed by the appellant had been shown to exist.

The appeal is dismissed with costs.

Mr. *Nadkarni*, (with him Mr. M. *V. Bhat*), for the Appellant.

Mr. *P. D. Bhide*, for the Respondent.

JUDGMENT.—The facts which give rise to the present appeal are that the plaintiff's predecessor-in-title executed a mortgage in 1885 in favour of the defendant's predecessors-in-title under which the mortgagee was to be entitled to possession for a period of sixteen years. During the currency of that period, in the year 1888, a Marwari creditor of the mortgagor filed a suit on a simple money claim in the Vinchur Court and obtained a decree. In execution of that decree the equity of redemption of the mortgagor, that is to say, the subsisting right, title and interest of the mortgagor, in the mortgaged property was put up for sale and purchased by a person Bandu Uderam who is not a party to these proceedings. In the

year 1896, the mortgagee took a conveyance from Tikaram Uderam who described himself as the brother of Bandu Uderam in whose name the Court-purchase had taken place of the interest purchased at that sale. Then at the end of the year 1908 the plaintiff filed this suit for redemption of the mortgaged property alleging in his plaint that the defendants resist redemption on the ground that the right, title and interest of the plaintiff Kondaji in the land in suit was attached and sold in execution of a simple money-decree at the instance of one Magniram Marwadi; that Magniram himself was the auction-purchaser in execution; that Magniram's heir sold that right to defendant No. 1 and the defendant No. 1 resists the plaintiff's right to sue on the ground of his being a purchaser of the land in suit. The plaint proceeds: "The plaintiff contends that he being an agriculturist could not be deprived of his right in the land by any attachment of his right in execution of a simple money-decree, that the sale in execution is illegal and of no effect whatever, and that Magniram (the auction-purchaser) and defendant No. 1 could not be said to be the owners of the said land as against the plaintiff No. 1, and that the plaintiff's right of redemption is not in any way affected by the sale."

On those allegations in the plaint the learned Subordinate Judge assumed that the Vinchur Court had sold the right, title and interest of the plaintiff and that the certified copy of the certificate of sale, Exhibit 11, was good proof of that sale; but he held that the sale was inoperative by virtue of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act.

An appeal was preferred to the learned District Judge who decided upon the facts that the plaintiff and the original mortgagor had always been agriculturists from the date of the mortgage, and he adopted the conclusion of the Subordinate Judge that the sale was inoperative under section 22 of the Dekkhan Agriculturists' Relief Act.

A second appeal was preferred from that decision to this Court and was tried by Mr. Justice Batchelor sitting alone as a Division Court. Upon the findings of fact of the District Court, it was taken for the purpose of the decision that the plaintiff and his predecessor had been agriculturists from the date of the mortgage in 1885. The learned Judge held that there was nothing to show what happened or did not happen in the Vinchur suit. What the pleadings were in that suit, what the issues were, what the findings were, what was claimed on one side and denied on the other, nothing was known, and the mere omission to describe the respondent as an agriculturist was an insufficient basis from which to infer that at the trial of the suit or the hearing of the execution proceedings the mortgagors omitted to plead their status, and that it did not follow that the Vinchur Chief's decision was not arrived at in spite of the agricultural position of the mortgagors being brought to the knowledge of the Court in simple inadvertence or forgetfulness of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act; and on these grounds the learned Judge held that the sale was a nullity under section 22 and affirmed the decision of the District Court.

It is quite clear from the judgments of the lower Courts that there was no evidence adduced in the case to show whether or not the defendant in the Vinchur Court was known to be an agriculturist at the time of the hearing or of the execution proceedings.

The plaintiffs have been unable to show that the suit was instituted by the Marwari creditor after obtaining a certificate of a conciliator under the Dekkhan Agriculturists' Relief Act, which, if the defendant was an agriculturist, would be necessary before the suit could be entertained. In the absence of evidence, therefore, the question is, what is the proper inference which will be drawn in law?

Now the provisions of section 22 of the Dekkhan Agriculturists' Relief Act are provisions conferring upon members of a certain class great privileges in litigation. The section confers upon a person who is shown to be a member of the privileged class the right to resist the attachment or sale of any of his immoveable property and to contend that if an attachment or sale took place in violation of the provisions of the section, such attachment or sale shall be held to be void.

How then is the Court to know when it is authorized to attach and sell property and when it is not? The ordinary rule is that

set out in the Civil Procedure Code, section 60, which reproduces section 266 of the Code of 1882. It provides that property liable to attachment and sale in execution of a decree is lands, houses, etc., belonging to the judgment-debtor. An agriculturist in order to resist the application of that general rule must, we think, show that he belongs to the privileged class so as to render section 22 of the Dekkhan Agriculturists' Relief Act applicable to his case. That conclusion seems to follow from the provisions of sections 101, 102 and 103 of the Evidence Act. In the absence of proof we, therefore, hold that there was no reason to treat the immoveable property sold by the Vinchur Court as the property of an agriculturist.

A further presumption may be applied to the case. The learned Judge of the Division Court says:—"It does not follow that the Vinchur Chief's decision was not arrived at in spite of the agricultural position of the mortgagors being brought to the knowledge of the Court". But maxim of law which must be followed in the absence of evidence is that everything which ought to have been done was done by the Court: see section 114, illustration (*e*), of the Evidence Act and the judgment of Lord Justice Lindley in *Harris* v. *Knight* (1). It cannot, therefore, be assumed that the Judge of the Vinchur Court acted contrary to the law in passing orders for a sale of the judgment-debtor's property.

On behalf of the respondents reliance has been placed upon the judgment of this Court in *Mahalaxu* v. *Kusaji* (2), which is, no doubt, a case on the facts very much resembling the present. It is, however, evident from the report that the point which we have been considering was not presented to the Court at the time of the argument and was not discussed in the judgment, unless we assume that the finding of the Subordinate Judge that the plaintiff was an agriculturist was a finding that the plaintiff was a proved agriculturist at the time of the original decree of 1875 mentioned in the report. If the finding went to that length, then the judgment would not be applicable to the facts of the present case. If the finding did not cover that point, then the point upon which we are deciding this case is a point that was not present to the mind of the Court at the time of the decision. But there is a more recent decision of this Court upon an almost exactly a similar point in which the view which we are now taking was adopted. That is the decision reported as *Pandurang Balaji* v. *Krishnaji Govind* (3) the section under consideration being not section 22 of the Dekkhan Agriculturists' Relief Act, but section 266 (*c*) of the Code of 1882, which provides that the following particulars shall not be liable to attachment or sale, namely the materials of houses and other buildings belonging to and occupied by agriculturists. In that case Sir Lawrence Jenkins said: "The house, apart from clause (*c*) of section 266, clearly could be attached and sold in execution of the decree, and it was only if it were shown that it fell within clause (*c*) that it could not be attached and sold. But admittedly the judgment-debtor never suggested, much less proved, that clause (*c*) had any application to the case. It is a general rule that in Courts of law only those facts can be taken to exist which are proved; so that it is manifest that in the absence of proof the exemption from liability to attachment or sale did not exist for the purposes of the execution proceedings. Therefore the executing Court had complete jurisdiction to make the order it did."

For these reasons, we set aside the decree of the lower Court and dismiss the suit with costs throughout.

Decree reversed.

(1) (1890) 15 P. D. 170 at p. 179; 62 L. T. 507.
(2) 18 B. 739
(3) 28 B. 125; 5 Bom. L. R. 799.

CALCUTTA HIGH COURT.
CIVIL RULE No. 7506 OF 1912.
March 19, 1913.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.
PEARY LAL GHOSH—DECREE-HOLDER—PETITIONER
versus
ANIL CHANDRA GHOSH—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Exe-

cution sale—Application to set aside—Rejection of application as time-barred by first Court—Order set aside on appeal—Point of law—Question of jurisdiction.

The fact that a District Judge has taken an erroneous view of the law does not amount to the exercise of a jurisdiction not vested in him by law, or the exercise of jurisdiction illegally or with material irregularity.

Rule against the order of the District Judge of 24-Pergunnahs, dated September 9th, 1912, reversing that of the Munsif of Basirhat, dated September, 1st, 1911, rejecting the application of the judgment-debtor as time-barred.

Babus *Baidya Nath Dutt* and *Karunamoy Bose*, for the Petitioner.

Babu *Debendra Chandra Mallik*, for the Opposite Party.

JUDGMENT.

JENKINS, C. J.—This is an application to us under section 115 of the Code of Civil Procedure complaining of an order of the District Judge, and we, therefore, have to be satisfied that the District Judge exercised a jurisdiction not vested in him by law or that he failed to exercise a jurisdiction not vested in him by law or that he acted in the exercise of his jurisdiction illegally or with material irregularity. I am disposed to think that the District Judge took an erroneous view of the law, but he could do that, while exercising his jurisdiction. It cannot be said that he exercised a jurisdiction that was not vested in him by law. It is not pretended that he failed to exercise his jurisdiction, and finally the fact that he came to a particular decision on a point of law does not lay him open to the charge that he acted in the exercise of his jurisdiction illegally or with material irregularity. All that can be said was that he came to an erroneous conclusion. In my opinion, therefore, section 115 does not justify the present application.

A very gloomy picture was painted by Mr. Baidya Nath as to what his client would suffer. His client is a decree-holder who has purchased, and if he suffers he suffers for his own wrong. The argument seems to assume that the sale would be set aside: but the only matter that is at present set at large is an investigation as to whether the decree-holder, purchaser, acted with reference to the sale in such a way that it ought to be set aside. I make these remarks for the purpose of indicating my view that no case has been made out for our interference under the Charter.

The result is that, in my opinion, this Rule should be discharged with costs, hearing fee, one gold *mohur*.

MULLICK, J.—I agree.

Rule discharged.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2227 OF 1909.

October 19, 1910.

Present:—Mr. Justice Johnstone.

M. ABDUL HAQ—DEFENDANT—PETITIONER

versus

DAS MAL—PLAINTIFF—RESPONDENT.

Companies Act (VI of 1882), ss. 7, 41, 61—Contract Act (IX of 1872), s. 230—Civil Procedure Code (Act V of 1908), O. XXIX—Pleadings—Suit for salary due from an incorporated Company.

A suit to recover salary or wages due from a Company lies against the Company and is not maintainable against its Secretary or the Managing Director [Sections 7, 41 and 61 of Act VI of 1882, section 230 of Act IX of 1872 and Order XXIX of the Civil Procedure Code (Act V of 1908)].

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 12th July 1909, decreeing plaintiff's claim.

Messrs. *Obedullah* and *Herbert*, for the Petitioner.

Mr. *Vishnu Singh*, for the Respondent.

JUDGMENT.—Plaintiff sued for his wages and for the wages of a *chaprasi* employed by him at the instance of, and for the benefit of, the defendant-Company, both for two months at Rs. 40 and 8 per mensem, respectively, and in doing so impleaded as defendants the Secretary and the Managing Director of the Company and not the Company itself. When this was pointed out to the Small Cause Court Judge by way of objection, he overruled the plea and decreed the claim. Against this decree, judgment-debtors come up here on revision.

The point is quite clear, as perusal of section 230, Contract Act, Order XXIX, Civil Procedure Code, and sections 7, 41 and 61 of the Companies Act shows. It is not sufficient, as the District Judge seems to think, that defendants are sued as Secretary and Managing Director. They should not have been made defendants at all. The Company is the proper defendant.

The petition is allowed and the decree of the lower Court is set aside, with costs. I do not allow amendment of plaint, because plaintiff, notwithstanding objection taken, insisted on suing defendants and not the Company. Plaintiff to pay defendant's costs throughout.

Petition allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 28 OF 1909.

March 3, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

RAJA RAJESWARA DORAI *alias* MUTHU RAMALINGA DORAI, RAJAH OF RAMNAD—PLAINTIFF—APPELLANT

versus

A. L. A. R. R. M. ARUNACHELLAM CHETTIAR AND OTHERS—DEFENDANTS RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 91—Lease-deed registered—Suit for possession—Scope of Trusts Act (II of 1882), Ch. IX—Repudiation in pais—Impartible zemindari—Alienability—Burden of proof.

Article 91 of the Limitation Act applies to a suit to set aside an instrument on the ground of undue influence.

If a sale is to be rescinded it must be by judicial rescission or a written instrument.

Sadasiva Aiyar, J.—The onus of proving a custom of inalienability in the case of impartible *zemindaris* lies heavily on the person who alleges it.

Section 96 of the Trusts Act was intended only to make provision consistent with the law in force for certain cases in which English Courts of Equity fastened a constructive or resulting trust upon holders of property and for which there was no statutory provision till then. Ownership and obligation should not be confounded in applying this rule.

Chapter IX of the Trusts Act sets down only the principles that should govern Courts in ascertaining the rights and obligations of parties in certain cases and not to relieve a party from any obligation to take the necessary steps required by the substantive or adjective law before a trust could be validly established and created in his favour.

A mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

A suit for possession of immoveable property when that relief is inconsistent with a registered lease-deed executed by plaintiff's predecessor-in-title is governed by Article 91 of the Limitation Act as it is necessary that the document should be first set aside.

For the application of the Article the cessation of the undue influence is not the period when time begins to run.

Appeal against the decree of the Court of the Subordinate Judge of Madura (East) in Original Suit No. 30 of 1904.

Mr. *K. Srinivasa Iyengar*, for the Appellant.

Mr. *F. H. M. Rorbet*, for the Respondents.

JUDGMENT.

MILLER, J.—This appeal arises from a suit in which the Rajah of Ramnad (the present sole plaintiff) prays the Court to hold that two leases executed by his father, one on the 5th of November 1889 and the other on the 2nd of June 1893, are not binding upon him and to direct the defendant to deliver to him possession of the property affected by them.

The principal ground on which the suit is based is that the lessee obtained the leases by the exercise of undue influence. That is denied by the defendants, who also raise many other pleas and, among them, a plea that the suit is barred by Article 91 of the second Schedule of the Limitation Act.

The original lessee died in 1899, and the plaintiff's father was then alive. The suit was instituted in 1904, and it is not contended before us, though it was contended in the Court below, that the undue influence continued, after the death of the lessee, to be exercised by his sons.

For the appellant it is argued that Article 91 is inapplicable to the case, *first* because it cannot, in any case, be applied to a suit founded on an allegation of undue influence, and *secondly*, because the suit is not a suit to cancel or set aside an instrument. As to the first contention, the 1st column of Article 91 does in terms apply to the suit because in no other Article is provision made

for setting aside a deed executed under undue influence, but it is argued that the language of the 3rd column, the column in which the starting point of limitation is set out, is inapplicable to a case of undue influence and consequently the article must be held inapplicable. It is doubtless true that cases can be imagined in which the undue influence may continue for three years after the victim has become fully aware of all the facts entitling him to avoid the consequences of its exercise and may so prevent his taking action, but that possibility does not seem to me to indicate that the starting point is wholly inapplicable, it shows only that there may be cases in which its application would be a hardship. In very many, if not in most, cases of undue influence, the influence is utilised to distort or misrepresent material facts, and, though it must be confessed that there may be cases in which it will be difficult satisfactorily to apply Article 91, it cannot be said that on its language it is altogether inapplicable, and there is authority for its application which I am unable to disregard. In *Janki Kunwar* v. *Ajit Singh* (1), the Privy Council applied it to what, on their Lordships' statement of facts at page 64 of the report in the Calcutta series of the Indian Law Reports, was, it seems to me, clearly a case of undue influence; it was applied also by Subrahmania Aiyar, J., in *Roop Lal* v. *Lakshmi Doss* (2), to a case of undue influence, and, though his view on the question of limitation was not accepted by the Full Bench, the applicability of Article 91 to the case as a case of undue influence was not questioned. It was held that it did not operate to prevent a defendant in possession from pleading the undue influence to protect his possession. The case in *Hasan Ali* v. *Nazo*, (3) to which the Article was applied, seems also to have been a case of undue influence.

An observation of Subrahmania Aiyar, J., in *Roop Laul* v. *Lakshmi Doss* (2) suggests that the starting point might be held to be postponed till cessation of the undue influence; that is a question which he had not to decide, and which it is unnecessary for us to decide, for even if that be so, this suit of 1904 was instituted more than three years after the cessation of the undue influence, which we may assume for the present purpose to have continued down to the death of Ramaswami Chetty in 1899.

I think Article 91 must, on its language and on authority, be held to be applicable to a suit to set aside an instrument on grounds of undue influence.

The second contention on behalf of the appellant is that the plaintiff, having elected to terminate the leases on the ground of undue influence, is now entitled to ask the Court for possession without any further setting aside of the instruments. The lease is terminated, the interest transferred to the lessee is re-vested in the lessor, and nothing remains but to give effect to his right to immediate possession. In *Janki Kunwar* v. *Ajit Singh* (1) the Privy Council, dealing with this question, observed that it was necessary to bring a suit to set aside the sale on payment of Rs. 1,25,000 before possession could be recovered; but it is argued that that observation assumes the necessity and is not to be taken as laying down a rule of law that an instrument of transfer which is voidable by the transferor for undue influence can be avoided only by a decree of the Court; or, if it was intended to lay down such a rule, that rule cannot be applied to a transfer made after the enactment of the Trusts Act and the Transfer of Property Act.

I do not feel justified in deciding that that is unnecessary which the Privy Council has declared to be necessary, unless it is quite clear that these enactments, which, it may be, did not apply to the sale dealt with in *Janki Kunwar* v. *Ajit Singh* (1) have altered the law upon this subject.

Mr. K. Srinivasa Aiyangar did not rest his case on any distinction between an 'ancillary' and a 'substantial' relief prayed for in the suit. I do not think he could do so in the face of the decision to which I have just referred. Then their Lordships lay it down that the immoveable property (in that case) could not be recovered until the deed of sale had been set aside, and so far as this point is concerned, that case cannot be distinguished from the one before us. I think it, therefore, unnecessary to discuss the cases in India in

(1) 15 C. 58; 14 I. A. 148.
(2) 29 M. 1.
(3) 11 A. 456; A. W. N. (1889) 109.

which attempts have been made to distinguish *Janki Kunwar* v. *Ajit Singh* (1) and which in some cases proceed, as Mr. K. Srinivasa Aiyangar was prepared to admit, on differences which are without much substance.

It was necessary, then, in the present case to set aside the leases before possession could be recovered by the Raja, and we have to consider the question whether he has already effectively set them aside, or whether the Court has to do so for him by its decree. In the latter event, the suit is barred by limitation.

Reliance was placed by Mr. K. Srinivasa Aiyangar on sections 64 and 66 of the Indian Contract Act and section 126 of the Transfer of Property Act and section 86 of the Trusts Act as showing that, whatever may be the case elsewhere, the law of India does not require the intervention of the Court to make effective an avoidance by the transferor, against the Will of the transferee, of a transfer voidable at his option.

It is, I think, clear that neither the Indian Contract Act nor the Transfer of Property Act is inconsistent with a rule requiring a decree to set aside a transfer. Sections 64 and 66 of the Contract Act were in force before the transfer dealt with in *Janki Kunwar* v. *Ajit Singh* (1), and, besides, do not provide for the method of rescission of a contract, and section 126 of the Transfer of Property Act does not lay down the method to be adopted to effect the revocation of a gift; these provisions may well co-exist with a rule of law that a transfer which can be effected only by a registered instrument can be avoided only by a formal re-transfer, or by the Court's decree, which may be a sufficient substitute for an instrument of re-transfer. And such a rule would, I conceive, be entirely in accordance with the policy of the law as indicated by the fourth proviso to section 92 of the Evidence Act; that proviso forbids proof of an oral agreement to rescind a contract, grant or disposition of property in cases in which the law requires the contract, grant or disposition to be effected by an instrument in writing. This rule has been said to be rule of positive law rather than of evidence; the law will not enforce the agreement and so will not allow it to be proved; but whatever be the foundation on which the rule is based, it has the effect of preventing the rescission, by oral agreement, of a transfer which cannot be effected by oral agreement, but not of other transfers. The inference is that the law desires the same publicity and the same safe-guards in the case of a re-transfer as were required to support the original transfer, for, if a writing was unnecessary for the transfer, then it is unnecessary for the re-transfer, and consequently the rule cannot be put merely on the ground that documentary evidence is better than oral evidence. And the fact that the transferor has been wronged and is, therefore, in a position to compel the re-transfer seems to me to make no difference from this point of view: it is a concession to him if the decree of a Court under the Specific Relief Act is allowed to suffice to re-vest the transferee's interest in him, instead of the registered instrument required by the Transfer of Property Act. The English cases [*Clough* v. *London and North-Western Railway Co.* (4), *Oakes* v. *Turquand* (5) and *Reese River Silver Mining Co.*, v. *Smith* (6)] cited by Mr. K. Srinivasa Aiyangar do not touch this particular question, and the analogy of the forfeiture of a lease, suggested by him, is not exact, for the title in that case is re-vested by virtue of a provision in the contract itself.

So far then as the provisions of the Transfer of Property Act and the Contract Act are concerned, I am unable to see any reason why I should hold that the observation of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1) does not bind me or that the law is not in accordance with it. Mr. K. Srinivasa Viyangar argued that, if that is so, *Lakshmi Doss* v. *Roop Laul* (7), and the cases which have allowed defendants in possession to plead undue influence after the time prescribed by Article 91, must be held to have been wrongly decided. That is not a question which we have to decide

(4) 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.
(5) 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808; 15 W. R. 1201.
(6) 4 H. L. 64; 39 L. J. Ch. 849; 17 W. R. 1024.
(7) 30 M. 169; 2 M. L. T. 4; 17 M. L. J. 19.

in this case, but, unless we are to hold that in each case a plea of undue influence is a counter-suit for setting aside the instrument, the conclusion we are asked to draw does not necessarily follow. The defendant is required to get the Court to set aside the instrument, but, if he can do so without a suit of his own, it is possible that he need not do it within the period provided by Article 91.

Section 86 of the Trusts Act raises a somewhat different question ; by that enactment, a transferee in possession under a voidable transfer must, on receipt of notice of rescission, hold the property for the benefit of the transferor, subject to repayment of the consideration actually paid.

The contention is that no further avoidance is necessary ; the transferor, as a constructive *cestui que trust*, has the right to compel the transferee, as constructive trustee, to surrender the property.

It is not at all clear to me that the plaintiff in this case can base any claim on this section. I do not find in the plaint any allegation that a notice of rescission was given to the defendants or their father before the suit, and the plaint itself is, therefore, the only notice available to the plaintiff wherewith to satisfy the requirements of the section. But the plaint is primarily a prayer to the Court to adjudicate upon a statement of claim, and can only operate as a notice to the defendants under section 86 of the Trusts Act when a copy is served on them in due course, and that, in this country, is after the suit is duly instituted; (*Vide*, Order V, rules 1 and 2, Civil Procedure Code). The defendants, therefore, were not trustees under section 86 at the date of the suit, and the right to immediate possession had not then vested in the plaintiff by virtue of that section.

But if I assume the section to be applicable at all or if section 89 can be held applicable, then section 96 will, I think, operate to prevent their application here. For, as I have held, I am bound by the Privy Council decision to hold that there is a rule of law requiring that, if a sale is to be rescinded, it must be by judicial rescission, or a written instrument, and that rule will apply to the present case. Now, in order to obtain a judicial rescission, the plaintiff must invoke the aid of the Court within the time allowed by Article 91 of the second Schedule of the Limitation Act. This he has not done, and to allow him now to rely on section 86 of the Trusts Act would be to place on the defendants an obligation of which they have been in effect relieved by Article 91—an obligation in evasion of that provision of the law. Again, section 96 shows that Chapter IX of the Trusts Act was not intended to alter any provision of the law, but merely to make provision, so far as that could be done consistently with the laws already in force, for certain cases in which Courts of Equity in England fastened a constructive or resulting trust upon holders of property and for which in India, before the Trusts Act, there was no statutory provision. It follows that Chaper IX does not repeal the rule of law laid down by the Privy Council.

For these reasons I think Article 91 must be applied to the present case.

The question whether there is a custom in the Ramnad *zemindari* by which the alienations made by one *zemindar* are void as against his successor, was raised and presented to us for our consideration, but the evidence clearly negatives it, as my learned brother shows in his judgment, which I have read.

The appeal must be dismissed with costs.

SADASIVA AIYAR, J.—While I fully concur in the judgment just now pronounced by my learned brother, I consider that it is due to the strenuous and able arguments advanced by the appellant's learned Vakil that I should state in my own language my views on the question of limitation arising in this case. Though sixty-eight grounds are mentioned in the appeal memorandum as valid grounds for attacking the lower Court's judgment, it is unnecessary for the decision of this appeal to consider more than a few, as the other grounds relate to certain questions of fact and law, such as whether the defendants' father really exercised undue influence over the late Rajah and so on, which might all be assumed as decided in the plaintiff's favour, without actually deciding them. The 60th ground

was abandoned, the appellant's learned Vakil conceding that the Privy Council decision in *Ramasami* v. *Bhaskarasami* (8) was against the contention raised in that ground (the contention being based on section 11 of the Rent Recovery Act). Grounds 56 to 59 raised the contention that, by the custom of the estate the leases in question (one being a lease for 50 years and the other being a perpetual lease) were invalid beyond the late Rajah's life-time, the late Rajah having died in December 1903, about 4 months before the suit was brought. But the plaintiff in his plaint (paragraphs 4 and 5) admits the power of his father (the late Rajah) to settle the *zemin* by a trust-deed on the plaintiff so as to be valid beyond the late Rajah's life; the case of *Vijayasamy Thewar* v. *Sasivarna Thevar* (9) shows that in the Sivaganga *Zemindari* (carved out of Ramnad) no such custom, as contended for, against inalienability exists, and the decisions in *Sartaj Kuari* v. *Deoraj Kuari* (10), *Sivasubramania Naicker* v. *Krishnammal* (11) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (12) clearly establish that the onus of proving a custom of inalienability in the case of these impartible *zemindaris* lies heavily on the person who alleges it. (After the coming into force of the Madras Impartible Estates Act, the question of the right to alienate, of course, stands on an entirely different footing). Far from there being any evidence of such custom in this case, the evidence is almost wholly against the existence of any such custom. (See Exhibits CIII, CXL series, CXLIA, CXLIE, etc.) That before the decision in *Sartaj Kuari* v. *Deoraj Kuari* (10) it was erroneously thought by the Court, by the Revenue Officers and by the litigant public as a matter of law that impartible estates were inalienable, cannot constitute evidence of the custom of inalienability, which ought to be proved by cogent evidence as in the *Sivasubramania's* case (11). In fact, the contention raised by the grounds Nos. 56 to 59, though not abandoned by the appellant's learned Vakil, was only very slightly pressed before us and it must be decided against the appellant.

I have thus sufficiently cleared the ground for the consideration of the point of limitation, which was strenuously argued before us. The proper decision of that point depends on the answers to be given to the following questions:—

1. Is the plaintiff bound to have the leases in dispute set aside by a judicial pronouncement before obtaining the relief of possession and mesne profits claimed in this suit? (It is admitted, if I understood the respondent's Vakil right, that the relief of setting aside the leases might be given in the same suit in which the relief as to possession is claimed, and as ancillary to the relief awarding possession). Or is no such judicial pronouncement necessary, and whether the mere bringing of the suit by the plaintiff, alleging in the plaint that he or his father has repudiated the lease, or a mere oral declaration by the plaintiff or his father that he has repudiated the leases, is sufficient to put an end to the lease and to give a right to the plaintiff to obtain the relief as to possession and mesne profits? Whether even a repudiation is unnecessary, on the ground that the provisions of the Trusts Act entitled the plaintiff to treat the defendants as trustees of the plaint property for the plaintiff and to recover possession of the same from the defendants?

2. If a mere repudiation *in pais* (before or at the time of the plaint) would suffice, can it be made at any time (however long) after the date of the lease, or ought it to be made within the time fixed by law for the bringing of a suit to set aside the leases, or, at least, within the time fixed by law for possession of the property?

3. Is Article 91 of the Limitation Act inapplicable to a suit which seeks such a declaration of the invalidity of the lease, on the ground that the plaint in the suit prays also for possession of immoveable property?

I am unable to accept the contention that, because Chapter IX of the Indian Trusts Act attempted to enunciate, in the form of sections, the principles which the Courts of Equity in England had established for their own guidance in order to fix wrong-doers with obligations to be fulfilled in favour of wronged persons, substantive

(8) 2 M. 67.
(9) 28 M. 560; 15 M. L. J. 469.
(10) 10 A. 272; 15 I. A. 51.
(11) 18 M. 287; 5 M. L. J. 168.
(12) 22 M. 383; 3 C. W. N. 415; 26 I. A. 83; 9 M. L. J. Sup. 1.

rights and obligations were at once created by those sections without the person who invokes those principles in his favour being obliged to obtain the establishment of those rights by first invoking the aid of the Court in the manner indicated and provided for by law. The appellant's Vakil relies on sections 86 and 89 of the Trusts Act which are as follows:—

"Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to re-payment by the latter of the consideration actually paid."

"Where by exercise of undue influence any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced."

The wide phrases "hold the property" (section 86) or "hold the advantage" (section 89) "for the benefit" of the transferor, cannot be held to create at once an enforceable as distinguished from an establishable trust in favour of the transferor. The Chapter itself in which these sections occur, is headed thus: "Of certain obligations *in the nature of trusts.*" If a trust obligation has to be created and if the law requires that the creation of the trust itself (not an inchoate obligation in the nature of a trust) should be the act of the Court regularly invoked for that purpose the person who wants to benefit by the provisions of the Trusts Act ought to so invoke the aid of the Court for the effective creation of the trust within the time limited by law. I entirely agree with my learned brother that that is the effect of the last clause in section 96 of the Trusts Act. That the contention on the appellant's side would lead to startling and anomalous results which could not have been intended by the Legislature, might be shown easily by a reference to section 91 of the Trusts Act. That section is as follows:—

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

Can it be argued on this section that, because *A*, the purchaser under a registered deed of sale with notice of a previous contract of sale in favour of *B*. "must hold the property for the benefit" of *B*. (the prior promisee from the vendor), *A*. became a complete trustee for *B*. on the date of *A*.'s sale-deed itself, and hence *B*. need not bring a suit for specific performance within three years of the date fixed for the performance (Article 113 of the Limitation Act), but might bring a suit within 12 years, nay, after any length of time, for possession of the lands against *A*. (the subsequent purchaser) as if *A*. had been created an express trustee for *B*. by the effect of section 91 of the Trusts Act from the date of *A*.'s sale-deed? If such construction of section 91 of the Trusts Act is correct, section 12 of the Specific Relief Act, which gives a discretion to the Court to give specific relief (in the above case, the relief would be the compelling of *B*. to execute a registered conveyance to *A*.), the provisions of the Transfer of Property Act requiring a registered conveyance to transfer property [see *Immudipattam Tirugnana Kondama Naick* v. *Periya Dorasami* (13)] the provisions of the Evidence Act, section 92, excluding oral proof of the setting aside of a registered document and requiring proof of such to be in writing, the provisions of section 26 of the Specific Relief Act, requiring the Court to decree specific performance only subject to a variation in certain circumstances, might all be evaded and set at naught, as the Trusts Act, section 91, merely uses the general expression that, if specific performance could be enforced (with or without variation and with or without conditions), *A*. must hold the property for the benefit of *B*. There might be cases coming under a few sections of Chapter IX, where a judicial declaration of trust might be unnecessary even when the beneficiary comes in as plaintiff, but the present is not such a case. Property in the

(13) 24 M. 377 at p. 386; 5 C. W. N. 217; 28 I. A. 46 (P. C).

hands of a mere constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of the trust. As said in Lewin on Trusts, Chapter X, paragraph 18; "Until some judgment or decree has been obtained, the money" (in the possession of the person who obtained a pecuniary advantage by unfair use of fiduciary relation) "cannot be said to be the money of the principal." As said by Lindley, L. J., in *Lister* v. *Stubbs* (14) of such an argument, "the unsoundness of it consists in confounding ownership with obligation."

As I said before, a perusal of the whole of Chapter IX of the Trusts Act has left the clear impression on my mind that it was intended only to lay down the principles which ought to govern the Courts in India in ascertaining the rights and obligations of parties in certain cases, and not to relieve a party from any obligation to take the necessary steps (required by the substantive or adjective law to be taken by him) before a trust could be validly established and created in his favour. Similar observations apply to the argument based on sections 64, 65 and 66 of the Contract Act. A unilateral expression of a rescission of a contract by one of the parties to the contract cannot be held to relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land and within the time allowed by statutory law, if he wants, as plaintiff, the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist. The case of *Reese River Silver Mining & Co.* v. *Smith* (6), quoted by the appellant's learned Vakil, does not (it seems to me) do away with the necessity of rescission by the Court in the case of a plaintiff. There are, no doubt, certain passages in Lord Hatherley's judgment tending in the appellant's favour, but the other learned Law Lords gave their verdict for the plaintiff only on the short ground that, as he had filed his bill in Chancery for rescission of his contract as a share-holder with the Company before the Company was ordered to be wound up, the rescission by Court related back to the date of the filing of the bill.

The argument of the appellant's learned Vakil, if I understood him aright, was that the law of the land does not require a judicial rescission of a contract or the judicial rescission of a registered lease-deed or conveyance in order to enable the party to a contract or the executant of a conveyance to sue for reliefs flowing from the rescission of the contract or setting aside of the conveyance, as the case may be, provided that he himself repudiates the contract or the conveyance, his own repudiation, if found, to be for good cause, having equal effect with a decree of Court rescinding the contract or setting aside the conveyance. In considering this question, we have to bear in mind that Courts of Equity in England were not bound by any law of limitation so far as the distinctive reliefs granted by such Courts were concerned. Equity, no doubt, tried to follow the law as much as possible and refused to grant equitable reliefs where the plaintiff was guilty of laches. Laches took the place of limitation but the ground covered by the two was not the same in many cases. For instance, the law of limitation never took note of the fact that a plaintiff was unable to bring his suit within the period prescribed owing to poverty, but the doctrine of laches allowed poverty to be a good excuse. Expressions, therefore, quoted from several of the cases decided by Court of Equity in England in which the effect of the repudiation by a party was not clearly distinguished from a judicial rescission, have not much force, because, where there is no question of limitation governing the power of the Court to grant a judicial rescission, repudiation for good cause by the party and judicial rescission for the same good cause by the Court when the matter comes before it can be practically put and talked of as if standing on the same footing. Again, even where the law of limitation affects the power of the Court to grant or declare a judicial rescission in *favour of a plaintiff*, the power of the Court to find *in favour of a defendant* that a proper rescission has taken place by the repudiation of defendant for good cause and the power of the Court on such a ground to non-suit the plaintiff, seem to be much larger as has been held

(14) 45 Ch. D. 1; 59 L. J. Ch. 570; 63 L. T. 75; 38 W. R. 548;

in the Full Bench case of *Lakshmi Das* v. *Roop Laul* (7). The defendant, though his right to bring a suit for rescission of a contract or lease may be barred, might be permitted to defend his possession of properties by showing that the contract or lease so voidable at his instance has been repudiated by him. Section 28 of the Limitation Act is as follows: —" At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." This shows that it is only where a person is under a necessity to institute a suit for possession of the property to which he lays a claim (and where the time for instituting such suit has lapsed), that his title to the property is extinguished. But if he is himself in possession and it is only his right to sue as plaintiff to set aside or declare invalid the deed or title set up by another man that is barred, he could defend his possession by pleading, as defendant, the voidability of the deed or title set up by the plaintiff who seeks possession. I am not sure that even the defendant, unless he has perfected his title by adverse possession, should not be deprived of his possession if there is a registered deed (corresponding to a deed under seal in English Law) which, *prima facie* has transferred title to the plaintiff, though it was voidable at the instance of the defendant, if the defendant had not brought the suit within the prescribed period to have that deed set aside. But the case of *Laksmi Doss* v. *Roop Laul* (7) has decided otherwise, though the learned Judges did admit the difficult nature of the question, and I do not wish to unsettle the law as fixed by that decision. A defendant who has properly repudiated a contract or a deed, might well be allowed to sit tight over his possession and defend his right to such possession by setting up by way of plea, such proper repudiation by him, though he might be barred if he seeks positive relief as plaintiff on the basis of such repudiation. [Even a defendant could not, however, retain possession, if he had only a right to obtain a title-deed from his vendor and had lost that right by limitation—see the judgment of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* (15). If, as the appellant's learned Vakil, Mr. K. Srinivasa Aiyangar, contends, the vendor became a trustee for the purchaser as soon as the contract for sale was made, and also gave possession to the beneficiary purchaser of the property held in trust, he could not recover possession from the purchaser who had neglected to obtain the registered conveyance]. But so far as a *plaintiff* seeking relief is concerned, the decision in *Lakshmi Doss* v. *Roop Laul* (7) does not help him; on the other hand, there are observations in that case to the effect that a plaintiff seeking relief cannot evade the statute of limitation like a defendant. The question is, therefore, now narrowed to this point. Is a litigant coming forward *as plaintiff* for a relief which he cannot get if a document executed by himself or his predecessor-in-title is in force on the date of suit, is such a litigant entitled to the relief of possession after the expiry of the time fixed by law for the setting aside of that document and simply on his allegation and proof that he has himself repudiated the document on proper grounds, assuming that the document is voidable at his instance? If he brings a suit for possession within the time limited by law for setting aside that document, that suit, of course, might be taken as brought for both the reliefs of possession and rescission, and there will be then no difficulty. The difficulty will arise only where the time fixed by law for a suit to set aside the document has lapsed, but the limitation for possession of the immoveable property dealt with under the document has not elapsed and also in cases where the suit was brought after the expiry of the period fixed by law for the recovery of the property, if calculated from the date when the plaintiff became entitled to repudiate the contract, but within such period, if calculated from the date when he actually repudiated the contract or deed. However, it must be admitted that there is no Indian Statute expressly, laying down that a person who comes in as plaintiff claiming relief against the effect of a deed voidable at his instance, should have it judicially rescinded before or at the time of his getting that relief. But if judicial decisions have laid down the common law of the land as requiring such judicial rescission, and if there are implications to be found in the statute law supporting the

(15) 29 M. 336; 1 M. L. T. 153 (F. B.); 16 M. L. J. 395.

judicial decisions as to the rules of the common law, we are bound to follow such decisions. The common-law being founded on common sense, many of its principles will be found laid down in English cases also. And if the principles so laid down by English decisions have been adopted by the Privy Council and by the Indian High Courts, they form part of the law, binding upon Indian Courts. Hence, though I do not wish usually to refer to the English Law, as numerous English decisions were referred to in the course of the arguments in this case, I shall very briefly refer to what I consider to be the result of those decisions. Isolated passages in several of those judgments can, no doubt, by ingenious interpretation be made to support the appellant's view. I do not mean, however, to enter upon an elaborate refutation of the arguments advanced by the appellant's learned Vakil based on such passages. I shall merely refer to what Lord Halsbury in his Laws of England (Vol. XX, S. 1745) says on this point:—

"Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and, if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the *status quo*. In the event of his demand not being complied with, he may, subject to certain conditions and affirmative defences, *maintain an action or analogous proceedings for the purpose of having the contract or transaction declared void and rescinded by the Court, in which event it is deemed to have been void* ab initio."

This shows that where the repudiation is by one party alone, he cannot, as plaintiff, get any relief except as consequent on getting a declaration and a rescission by the Court. Of course, if the repudiation is accepted by the other side in the mode allowed by law, then the contract or transaction might be properly rescinded by the act of both parties without the intervention of a Court. (See sections 62 and 63 of the Contract Act on this point). Or if the original contract or deed itself, by clauses of forfeiture or similar clauses, puts an end to the contract or transaction then also it is really determined by both parties, and the aid of the Court is not required. But in other cases, even though the contract or transaction is voidable at the instance of one party, its rescission is effectuated, not by the mere repudiation of one party, but by the decree or declaration of the Court. The form and extent of the relief are thus indicated in section 1755 of Halsbury's Laws of England, Vol. XX. "The ordinary form in which the aid of the Court is invoked is an action, or counterclaim for rescission, in which, on discharging the necessary burden of allegation and proof, unless countervailed by any affirmative plea successfully raised by the representor, the representee is entitled to relief of a nature to effectuate the objects already indicated—that is to say, to an order rescinding or setting aside the contract, with or without a prefatory declaration, and, in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled, or for rescission of the conveyance by which it was completed and to such further orders for re-payment of money with interest, re-conveyance and re-transfer, indemnity, not being in the nature of damages, injunction, accounts and inquiries, rectification of any entry in a statutory register which otherwise would or might import liability, and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purposes of complete *restitutio ad integrum*; which means that, in his part, the representee must also make all such corresponding re-payments, re-transfers, and re-conveyances as are necessary to restore the *status quo* on both sides. Where the representee has simply paid money to the respresentor under the contract, and has received neither money nor money's worth in exchange, and so has nothing to restore, the proceeding assumes the form of an action for money had and

received, which succeeds, or fails, *on precisely the same principles as if the action were for rescission*; and, similarly, where the representee has parted with property or an instrument, without receiving any money or other benefit, the action may be in trover, or for the mere delivery up of the instrument to be cancelled, in which case, again, the same principles apply." In Bigelow on Fraud at pages 75 to 79, the whole matter is put very lucidly: "There are three classes of cases in which rescission may be effected, each having a mode of its own. These classes, *nameless in the books*, may be severally termed 'rescission *in pais*,' 'judicial rescission,' and 'rescission by plea (or answer).'" Then the learned author says that rescission *in pais* is very rarely effective, that rescission by plea or answer [as in the case of *Lakshmi Doss* v. *Roop Laul* (7)] may be fully effectual in certain cases, and, lastly, that judicial rescission may fall under two sub-heads,one, where it is a mere substitute for a rescission *in pais*, and the other, where acts of repudiation *in pais* are insufficient to rescind the contract or transaction or to restore the *status quo*. Then the learned author says "It (that is, judicial rescission) is the remedy for fraud in transfers of real estate, according to the general common law doctrine, for specialities, according to some authorities, and for fraud in contracts generally where tender and demand are insufficient or inappropriate for the end sought, or where there is nothing to tender because nothing has been received, and yet where a defence alleging the fraud might not afford sufficient relief." This, again, is clear authority for the proposition that a mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

Now let us see whether the Indian Legislature has indicated, at least by implication, that contracts and deeds *prima facie* binding on the plaintiff, as entered into by himself or as executed by himself or his predecessor, ought to be judicially set aside as a necessary preliminary to the granting to the plaintiff of reliefs consequent upon the wiping out of the contract or deed. The Contract Act, section 2, clause (*i*), defines a voidable contract thus:—"An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract." Section 10 says: "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." Section 14 says: "Consent is said to be free when it is not caused by coercion, undue influence, fraud, mis-representation or mistake." Reading sections 10 and 14 together, therefore, an agreement to which consent is caused by coercion, etc., is not a contract. However, sections 19 and 19-A loosely call an agreement caused by coercion etc., as a *contract* voidable at the option of the party whose consent was so caused. Then section 19A is most important section ; it is as follows:—

"When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(*a*) *A.*'s son has forged *B.*'s name to a promissory note. *B.* under threat of prosecuting *A.*'s son, obtains a bond from *A.* for the amount of the forged note. *If B. sues on this bond, the Court may set the bond aside.*

(*b*) *A.*, a money-lender, advances Rs. 100 to *B.*, an agriculturist, and, by undue influence, induces *B.* to execute a bond for Rs. 200 with interest at 6 per cent. per month. *The Court may set the bond aside, ordering B. to re-pay the* Rs. 100 *with such interest as may seem just.*"

I think this section clearly indicates that, as regards a contract voidable by the plaintiff or the defendant on the ground of undue influence, the Legislature though it calls it a voidable contract, clearly intended that, in

order that the avoiding by the party might be effectual to set aside the contract, the bond, even when the defendant raises a plea in answer to the plaintiff's action on the bond as in the first illustration, and, of course, when the obligor is the plaintiff (which seems to be the meaning of the second illustration), ought to be set aside by the Court in favour of the defendant or the plaintiff as the case may be. Chapter IV, section 35, of the Specific Relief Act provides for the Court rescinding a contract voidable or terminable by the plaintiff, and also, where a contract of sale or lease, has been made and the purchaser or lessee makes default in payment of the purchase-money or the premium money after a decree for specific performance had been passed. Again, the Limitation Act prescribes a limitation of one year in Articles 11 and 11-A for suits to set aside certain judicial orders, in Article 12 (*a*) the same period to set aside sales in execution of a decree of a Civil Court or of a Revenue Officer or held for recovery of arrears of Government Revenue and so on, and in Articles 13, 14, and 15 for setting aside other similar orders of public authorities. Article 44 of the Act prescribes a period of three years for a suit by a ward (to set aside alienations by his guardian) calculated from the date when the minor attains majority. Article 91 provides a three years' limitation period for a suit to cancel or set aside an instrument not otherwise provided for. Article 95 gives again three years for setting aside a decree obtained by fraud or for other relief on the ground of fraud. Article 113 provides three years for specific performance of a contract. Article 114 provides three years for a suit for rescission of a contract. Let us take the case mentioned in Article 95. Supposing there is a decree obtained by *A.* through fraud, declaring against *B.* that *A.* is entitled to retain as against *B.* the suit land as absolute owner, though really *A.* was only a permissive tenant of *B.* in respect of the land, having obtained possession of the land as such permissive tenant one year before the decree was passed. *B.* knows of the fraud two years after the decree is passed. He keeps quiet for four years and then sues for possession of the land, he being then barred from bringing a suit to set aside the declaratory decree obtained through fraud by *A.* It seems to me clear that that fraudulently obtained decree, which has not been set aside, must stand in his way. Similarly, it seems to me that the other Articles, including the article relevant to this case *viz.*, Article 91 will stand in the way of a plaintiff suing for the relief claimed by him against the tenour of the decisions or instruments, as the case may be, to which he has been a party and which are binding on him till set aside by the Court. In a very recent Article in page 55 of the Madras Law Journal (February) Mr. Shephard says that section 36 of the Specific Relief Act indicates that "rescission imports a judicial decision" and that "rescission by a person entitled to rescind means that he, having resolved not to persist in demanding performance, is *in a position to sue for rescission* or to defend an action brought on the contract." If he allows the time (prescribed by the Indian Law of Limitation) to sue for rescission to pass, his rescission *in pais* cannot entitle him to sue for any other relief on the basis that the contract has been set aside, though, as a defendant, he may be allowed to defend his possession in a suit brought by the other party, provided his title to the property in dispute has not passed to the other party by the effect of a registered deed under the provisions of a statute giving such effect to such a deed. Even in the latter case, if he has acquired a title by prescriptive possession, he can, of course, successfully put forward that plea.

(I may add that, in this case, the 2nd lease sought to be set aside, though it is called a perpetual lease, is really a conveyance, as, though there is a sum nominally reserved as rent, that sum is wholly to be paid to the Government towards the revenue due upon the leased land and the late Rajah followed up that lease, which is dated 1893, by another instrument of 1894, Exhibit E, by the effect of which the defendants' father was even relieved of his obligation to pay the *peishkush* through or on behalf of the late Rajah and was allowed thereafter to pay it to Government direct. The Government, in accordance with the wishes of the Rajah, sub-divided the leased lands as a separate estate and registered it in the defendants' father's name. Whatever the parties may choose to call this transaction, effected by the deeds of 1893 and 1894 (Exhibits C2 and E), I am unable to entertain any doubt that

they constitute an absolute conveyance of the properties mentioned in them in favour of Ramaswamy Chetty. The late Rajah could not claim even a pepper-corn rent from the defendant's father after the document of 1894 and he retained absolutely no interest in those properties).

Having considered the common law and the implications of the statute law, I shall refer to a few of the decisions passed in Indian cases. Naturally the leading decision of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1) has to be first considered. That case arose out of a suit brought by the plaintiff on the 18th February 1884 to obtain the cancellation of a deed of sale, dated the 29th July 1872, (on the ground that it had been obtained from the plaintiff and her late husband by fraud and undue influence), and to have the property conveyed by the sale restored to the plaintiff's possession with mesne profits and costs upon certain conditions to be imposed on the plaintiff. Though the suit was brought within 12 years of the plaintiff's having lost possession of the conveyed property, the Privy Council held that the suit fell under Article 91 and was barred. Criticising the judgment of the lower Court, their Lordships say as follows:—"Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immoveable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Article 91 of the Act XV of 1877 and is, therefore, barred." The appellant's learned Vakil sought to distinguish this case by arguing that the Privy Council dealt with the case of a document voidable for fraud and not for undue influence. The facts of the case, however, clearly show that it was a case of undue influence. The word "fraud" is, no doubt, used in some places, but that word when used by Courts is not confined to its meaning as defined in section 17 of the Contract Act. Courts have always refused to define fraud exhaustively, as it is as hydraheaded as the devices of human ingenuity. Every unfair means used to obtain unconscionable advantage over another is spoken of as "fraud." In *Sundaram* v. *Sithammal* (16), the suit was brought in 1889 for possession of land conveyed away in 1883 by one of the plaintiffs. The conveyance was found to have been obtained by undue influence. The two learned Judges who formed the Bench upheld the plaintiffs' claim on the ground that Article 91 did not apply but Article 144. With the greatest respect I must dissent from the ruling in this case, as, in my opinion, it is clearly opposed to the decision of their Lordships of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (1). One of the learned Judges distinguished the case in *Janki Kunwar* v. *Ajit Singh* (1) on the ground that the plaintiffs in this latter case asked for a decree for their property being restored upon their paying to the defendants so much of the consideration money as might be found to be justly due under the sale-deed which was impugned and the plaintiffs did not ask for a decree for unconditional possession. I am (with the greatest respect) unable to appreciate the distinction. The other learned Judge sought to distinguish the case of *Janki Kunwar* v. *Ajit Singh* (1) on the ground that the plaintiffs in that case came into Court expressly asking that the deed should be set aside as obtained by fraud and undue influence, whereas in the case of *Sundaram* v. *Sithammal* (16) the plaintiffs did not pray for any such relief. I am equally unable to see how the ingenuity of a party in the wording of the reliefs claimable by him can affect the question of limitation. Their Lordships of the Privy Council in *Malkarjun* v. *Narahari* (17) dealt with some arguments employed by the Bombay High Court in *Bhagvant Govind* v. *Kondi* (18), similar to the arguments employed in *Sundaram* v. *Sithammal* (16) and remarked that they found it "impossible to grasp the reasoning behind such observa-

(16) 16 M. 311; 3 M. L. J. 144.

(17) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).

(18) 14 B. 279.

tions." The case in *Malkarjun* v. *Narhari* (17) arose out of a suit for redemption of the plaint property brought without setting aside a judicial sale under which the mortgaged properties had been sold away irregularly in satisfaction of a money-decree against the plaintiff's predecessor-in-title, the mortgagee having purchased the equity of redemption in such Court sale. I shall here quote some of the observations of their Lordships in this case. "A sale, valid until set aside, can be legally and *literally* set aside; and anybody who desires relief inconsistent with it *may and should* pray to set it aside." If a sale is a reality at all, it is a reality *defeasible only in the way pointed out by law.* "In the adoption case just cited from 13 Ind. App.,* this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe Article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold *that both the letter and the spirit of the Limitation Act* require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the Article."

I think the principle underlying these remarks of their Lordships apply as aptly to a suit for possession of immoveable property, when that relief is inconsistent with a registered lease-deed executed by the plaintiff's predecessor-in-title, and I hold that the plaintiff, who desires a relief inconsistent with the said document, may and should pray to set it aside, and that the letter and spirit of Article 91 of the Limitation Act require that such a suit should fall within the prohibition of the Article. In *Ranga Reddi* v. *Narayana Reddi* (19) a suit for possession of properties conveyed away by the minor's guardian, brought more than three years after the minor attained majority but within twelve years of the sale, was held to be barred by limitation, the learned Judges applying Article 44 and holding that Article 144 did not apply to that case. It seems to me that, if even a ward is obliged to have an alienation by his guardian set aside by a judicial declaration before he could recover the property, it is an *a fortiori* case where the alienation was made by an adult plaintiff himself or his predecessor-in title. An alienation by a guardian beyond his powers is really void, whereas an alienation by an adult is only voidable. The principle of the decision in *Ranga Reddi* v. *Narayana Reddi* (19) is accepted as correct in the cases in *Madugula Latchiaha* v. *Pally Mukkalinga* (20), *Sivavadevelu Pillay* v. *Ponnammal* (21) and *Chunder Nath Bose* v. *Ram Nidhi Pal* (22). I am, therefore, clear that Article 91 of the Limitation Act must be applied to this case.

Then there was the further argument of the appellant's learned Vakil that Article 91 should not be applied to cases of undue influence, as the period from which time runs is stated to be the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him; and, as in most cases the facts are not at once known to the person against whom the undue influence is exercised, the Legislature could not have intended that Article to apply to cases of undue influence. I need only say that the Privy Council did apply that Article to the case of undue influence in *Janki Kunwar* v. *Ajit Singh* (1) and even Sir S. Subramania Aiyar in *Roop Laul* v. *Lakshmi Doss* (2), applied that Article, though he thought that the time from which the period begins to run might be the cessation of undue influence and not the time when the facts become known to the plaintiff. I am, however, unable to hold that the cessation of undue influence can fix the time from which the period begins to run when the Legislature has clearly fixed another period. Formerly, in English Law, the period when a man was in prison was excluded from computation against him. All those rules are now obsolete and we have to look to the plain words of the statute, which is based

(19) 28 M. 423.

*See *Jagadamba Chowdarani* v. *Dakhina Mohan*, 13 C. 308; 13 I. A. 84.—*Ed.*

(20) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350.

(21) 15 Ind. Cas. 365; (1912) M. W. N. 383; 11 M. L. T. 198; 22 M. L. J. 404.

(22) 6 C. W. N. 863.

principally on considerations of public policy, and we cannot allow considerations as to hardship in the case of particular plaintiffs to override the plain provision of the Act. The Limitation Act provides exceptions on the ground of the plaintiff's disability or inability to sue in sections 7, 8 and 13 (the last section relating to the *defendants'* absence from British India and not to the plaintiff's and the first two relating to the plaintiff's being a minor, an insane man or an idiot). As Mitra says "The exceptions recognised by the Legislature are founded on its own idea of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience. The Judge and the lawyer arguing analogically from the reason of the law cannot engraft a new exception upon the rule." I am, therefore, clear that new exceptions based on the fact of the plaintiff's having been in prison or the plaintiff's having been out of British India or his having been under undue influence (or even wrongful restraint at the defendant's instance) for a long time cannot be grafted upon the Limitation Act. In the present case, even if Sir S. Subramania Aiyar's cautious *obiter dictum* as to the cessation of undue influence giving the starting point of limitation be followed, the suit is clearly barred.

I do not think it necessary to refer in detail to the contention of the appellants' learned Vakil that the repudiation *in pais* might be made by him any number of years after the date of the transaction (as the Limitation Act does not deal with repudiation *in pais*) and to his further contention that he has a period of 12 years to sue from such repudiation for possession of the lands. In fact his contention came to this, that he could indefinitely postpone the commencement of the limitation period at his pleasure. Even in the exceptional case of a Hindu reversioner, their Lordships of the Privy Council, while holding that he could repudiate the alienation without having it set aside by a suit, did not state that he could take his own time for the repudiation and have 12 years again from the date of repudiation. [See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (23)]. Their Lordships only held that the repudiation might be within the 12 years granted for bringing the suit for possession, the commencement of limitation for the latter relief having nothing to do with the date of repudiation.

In the result, I agree that the appeal must be dismissed with costs.

Appeal dismissed.

(23) 34 C. 329 (P. C.); 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L T. 133; 17 M. L. J. 154; 4 A. L. J. 32; 34 I. A. 87.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 992 OF 1911

January 8, 1913.

Present:—Mr. Justice Beadon.

BUTA—PETITIONER—APPELLANT

versus

Musammat BHAGAN AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 17—Competition between minor's maternal grandmother and paternal grandfather's brother—Effect of failure to give security.

A minor's maternal grandmother should be appointed guardian both of his person and property in the presence of his paternal grandfather's brother when the welfare of the minor so requires it.

The District Court is justified in superseding a guardian who does not furnish security within the fixed time.

Miscellaneous Civil appeal from the orders of the District Judge, Sialkot, dated 13th May and 15th July 1911, appointing Bhagan as guardian.

Mr. *Fazal Elahi*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—*Musammat* Barkat, a minor, is the daughter of Labhu deceased, *Musammat* Bhagan her mother, who has married again, is daughter of Rahima by his deceased wife Karambibi, Rahima is alive and has another wife *Musammat* Fatehbibi.

I see no reason to interfere with the appointment of *Musammat* Fatehbibi to be the guardian of the person of *Musammat* Barkat. She is the wife of the minor's maternal grandfather and is living with her, the minor will be living with her grandfather. Moreover, both the minor herself and her mother have expressed a wish that the minor should live with *Musammat* Fatehbibi.

The appellant Buta is brother of the minor's paternal grandfather. He was appointed guardian of the minor's property (consisting of a house and moveable property of small value in possession of her mother) subject to his furnishing security of Rs. 300.

WALIDAD KHAN *v.* JANAK SINGH.

This order was passed on 13th May 1911, and he was twice called upon to furnish the security. Finally on 15th July 1911 he failed to furnish security and consequently the conditional order appointing him guardian was set aside and *Musammat* Fatehbibi was appointed in his place.

There is no good ground for interference and I dismiss the appeal with costs Counsel's fee Rs. 16.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 764 OF 1912.

April 1, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Ryves.

WALIDAD KHAN AND OTHERS—PLAINTIFFS APPELLANTS

versus

JANAK SINGH—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 11—Minor—Sale executed in favour of minor—Minor deprived of property at the instance of third person—Suit by minor to recover the consideration money.

A sale-deed was executed in favour of a minor. The consideration was paid to the vendor and the vendee was put in possession of the property. Subsequently the vendee was dispossessed of the property at the instance of a third person:

Held, that the vendee, although he was a minor at the date of the execution of the sale, was entitled to recover the consideration money from the vendor.

Mir Sarwarjan v. *Fakhuruddin Mohamad Choudhri*, 13 Ind. Cas. 331; 21 M. L. J. 1156; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232, *Mohori Bibee* v. *Dharmo Das Ghose*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.), distinguished.

Second appeal from the decision of the District Judge of Farrukhabad, dated 15th March 1912.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Satya Charan Mukerji* (with him Mr. *Gulzari Lal*), for the Respondent.

JUDGMENT.—On the 17th of November 1905, the defendant Janak Singh sold certain *zemindari* property to the plaintiffs who were then minors. On a suit by third parties the plaintiffs were dispossessed. The plaintiffs, having been unable to obtain refund of the purchase-money from the defendant, brought this suit for its recovery and also for the costs incurred in the litigation with the third parties. In defence it was pleaded *inter alia* that the contract was null and void, the plaintiffs having been minors at the date of the execution of the sale-deed. The first Court decreed the suit in part, namely for the principal of the sale consideration Rs. 800, Rs. 119 in respect of the costs in the former litigation and Rs. 260 as interest on the purchase-money, at annas 8 per cent. per mensem. The defendant appealed, eight grounds being taken in the memorandum of appeal.

The lower Appellate Court disposed of the appeal on one ground only. In the opinion of that Court the case was concluded by the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhuruddin Mohamed Chowdhuri* (1). We think it desirable to set out exactly what was decided by their Lordships in that case inasmuch as the report of the case as it appears in the Allahabad Law Journal is not quite correct. Their Lordships state: "Without some authority, their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract." The lower Appellate Court dismissed the plaintiffs' suit. The plaintiffs come here in second appeal. Various grounds have been pressed before us. It appears to us that the decision of the Privy Council referred to above and the decision in *Mohori Bibee* v. *Dharmo Das Ghose* (2) do not support the decision arrived at by the Court below. In the latter case it was decided that a money-lender who had advanced money to a minor on the security of a mortgage, could not enforce the mortgage against the

(1) 13 Ind. Cas. 331; 21 M. L. J. 1156; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232.

(2) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.)

minor and their Lordships held that justice did not require an order for the return of the money advanced to him with full knowledge of his infancy. We must draw a distinction between the facts which were before their Lordships in *Mir Sarwarjan* v. *Fakhurddin Mahomed Chowdhuri* (1) and the facts of the present case. In the case before their Lordships they had to deal with an agreement to sell. Here we have before us a contract which has been executed. The sale has actually taken place. The plaintiffs have paid the consideration money. They obtained possession of the property but were subsequently dispossessed. It cannot be said that, in the altered state of affairs which has arisen since the deed of sale, the plaintiffs have not acquired a good cause of action for recovery of the purchase-money. So far as the case has been argued before us, we are unable to see any reason why the plaintiffs should be debarred from recovering from the defendant the purchase-money which the latter received from them as consideration for the property to which, it has been found he had no title. It would, it appears to us, be highly inequitable to allow the defendant to retain the plaintiffs' money in his possession, and to hold that the plaintiffs could not recover from the defendant simply because they happened to be minors at the date of the sale. It is quite possible that the transaction might have been of such a nature that the defendant made himself liable under the criminal law for cheating, and it would be strange indeed that a vendor who might have been held guilty of an offence of cheating should not be held liable to refund to the plaintiffs the money out of which they have been defrauded. The Court below decided the case on a preliminary point and as we are unable to agree with its decision, we allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal to its original number in the register and dispose of it according to law. Costs of this appeal including fees on the higher scale will be costs in the cause.

Appeal allowed;
Cause remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 31 of 1912.

August 30, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

GURDINOMAL HARDASMAL—APPLICANT

versus

WADHUMAL GURMUKHSINGH AND OTHERS—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 35, Sch. II, para. 13—Costs of arbitration—Court competent to order costs—Fees of arbitrator.

Where there is no sufficient provision in the award made in arbitration proceedings in a suit, or if the award has not been made, the Court has power to award the costs of the arbitration as costs of a proceeding incident to the suit under section 35 of the Code of Civil Procedure.

The power of Court to award the arbitrator's fees as costs is not limited to cases when an award has been made.

No appeal will lie merely as to costs unless there has been violation of an established principle.

Khushal Sadashiv v. *Punam Chand Jusrupji*, 22 B. 164, referred to.

Civil revision application against the order of the Sub-Judge, Hyderabad, Sind.

Mr *Dipchand Chandumal*, for the Applicant.

Mr. *Wadhumal Odharam*, for the Opponents.

JUDGMENT.—The contention raised in this application is that the arbitrator appointed by the Court is not entitled to his fee as costs because no award was made. It is said that rule 13 of Schedule II implies that the Court will only make an order as to costs when there is an award. We think no such implication arises out of rule 13. That rule merely implies that the Court will not make such an order if the award makes sufficient provision on that behalf. But, if there is no sufficient provision in the award, or if the award has not been made the Court has power to award costs of the arbitration as costs of a proceeding incident to the suit under section 35.

It is next contended that in any case, the costs should not have been saddled on the applicant. But the Court held that the applicant was responsible for the failure of the arbitration, and we see no reason for questioning the Court's exercise of its discretion. No appeal will lie merely as to costs unless there has been violation of an

established principle, *Khushal Sadashiv* v. *Punam Chand Jusrupji* (1) and that is not the case here.

Application dismissed with costs.

Application dismissed.

(1) 22 B. 164.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 793 OF 1910.

February 22, 1913.

Present:—Justice Sir Frederick Robertson, KT., and Mr. Justice Shah Din.

SANTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat DAROPTI—PLAINTIFF—RESPONDENT.

Succession—Hindu Law or Custom—Brahmins *of* Mauza *Bahtiwal, Tahsil Hoshiarpr—Right of daughter to succeed to self-acquired land in presence of collaterals of fifth degree—Ancestral land*—Hasilat.

Brahmins of *Mauza* Bahtiwal, Tahsil and District Hoshiarpur, in matters of succession follow Hindu Law although they have owned land for several generations and partly depend upon its produce; and among them daughters succeed to the self-acquired land of their father in the presence of collaterals related to him in the fifth degree.

Land not acquired by the common ancestor of a land-owner and his collaterals is not ancestral *qua* the latter.

The word '*hasilat*' does not mean land revenue, but the produce of the land.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 30th April 1910, affirming that of the Subordinate Judge, Hoshiarpur, dated the 25th May 1909, decreeing claim.

The Hon'ble *Rai Bahadur* Mr. *Shadi Lal*, for the Appellants.

Lala *Lajpat Rai*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Divisional Judge, Hoshiarpur, affirming that of the Subordinate Judge, Hoshiarpur, by which possession of certain land and houses left by one Bihari, a *Brahmin* of *Mauza* Bahtiwal, Tahsil Hoshiarpur, was granted to the plaintiff-respondent, *Musammat* Daropti, who is daughter of the said Bihari, against the defendants-appellants, who as collaterals of the deceased claimed to be entitled to his estate. The plaintiff came into Court upon the allegations that the succession to her father's estate was governed by Hindu Law and not by agricultural custom, that under that law she was entitled to succeed to the property in suit to the exclusion of the defendants whether that property was ancestral *qua* the defendants or self-acquired of the deceased; and that the defendants, who were collaterals of her father in the fifth degree, had no right to take possession of it. The defendants in their written statement denied that the plaintiff was a legitimate daughter of Bihari, and further pleaded, *inter alia*, that the parties were governed by custom in matters of inheritance and not by Hindu Law. They did not specifically say whether the property in suit was the ancestral property of Bihari or had been acquired by him. Issues were framed on the pleadings of the parties, the principal issue being whether agricultural custom or Hindu Law governed the succession to the property in dispute; but no issue was drawn as to the nature of that property.

The Sub Judge held that the parties being high caste *Brahmans* who had not discarded the sacred thread and did not allow re-marriage of widows were governed by Hindu Law, despite the fact that their community had owned land in the village of Bahtiwal for several generations and depended partly for their living on agriculture, he accordingly held that the plaintiff being the daughter of Bihari deceased excluded his collaterals the defendants from succession; and the plaintiff's suit was accordingly decreed. The Sub-Judge incidentally held in his judgment that the property in suit was ancestral *qua* the defendants. On appeal, it was argued before the learned Divisional Judge in support of the decree of the first Court that the property in dispute had been acquired by Moti Ram the great-grandfather of Behari deceased, and was not, therefore, ancestral *qua* the defendants, so that even if the parties were governed by custom the defendants could not exclude the plaintiff from succession to that property. This contention was overruled by the Divisional Judge on the ground that the plaintiff had never denied in the first Court that the land was ancestral, and that she could not be allowed to take up a new position at a late stage of the case. The learned Judge, therefore, declined to go into the question of the nature of the property

and its effect on the suit. Upon the other points argued before him, he was of opinion that the parties followed custom and not Hindu Law, but he held that the defendants had failed to prove that they, as collaterals of Bihari in the fifth degree, had a right to succeed to his estate to the exclusion of his daughter, the plaintiff. As a result, he maintained the decree of the Sub-Judge and dismissed the appeal.

A further appeal has been preferred to this Court by the defendants, and on their behalf Mr. Shadi Lal, has strenuously contended that the Divisional Judge, having found that the parties were governed by agricultural custom, ought to have held that the defendants being the collaterals of Bihari, no matter how remotely they were related to him, excluded his daughter, the plaintiff, from the succession to his estate. On the other hand, Mr. Lajpat Rai has urged that the parties are governed by Hindu Law, and not by custom, and that the plaintiff, therefore, must succeed to Bihari's estate to the exclusion of others. He has further contended that the property in suit has not descended from the common ancestor of Bihari and the defendants, that it was acquired by Moti Ram, the great-grandfather of Bihari, and that, therefore, the defendants are excluded from the succession by the plaintiff. After hearing arguments on this latter point we think that the question of the nature of the property must first be gone into this case, as, in our opinion, the Divisional Judge was not right in refusing to adjudicate upon this question on the ground that the plaintiff had never denied in the first Court that the property in suit was ancestral as between Bihari and defendants.

A reference to the plaint shows that the plaintiff claimed to succeed to her father's property, no matter whether it was his ancestral property *qua* the defendants or self-acquired; and in their pleas the defendants did not state specifically that the said property had come down from a common ancestor of themselves and Bihari. The allegation of the plaintiff, therefore, that the property was not ancestral *qua* the defendants cannot be taken to be shut out by the pleadings and the plaintiff cannot be tied down to the assumption that the property was ancestral. We have, therefore, heard full arguments as to the nature of the property, with special reference to the *muafi* file No. 448 of 1854; and, in our opinion, it is quite clear from that file that the land now in suit was granted by Sardar Jodh Singh on the 9th *Asauj Sambat* 1865 (1808 A. D.) to Misr Moti Ram, ancestor of Bihari, who admittedly was not the common ancestor of Bihari and the defendants. There is on the *muafi* file a *sanad* of that date evidencing the grant of the land to Misr Moti Ram, and the language of that *sanad* clearly indicates, in our opinion, that it was proprietary rights in the land which were granted by Sardar Jodh Singh to Misr Moti Ram and not merely, as contended by Mr. Shadi Lal, the right to receive land revenue in respect of that land. The word "*hasilat*" in the *sanad*, on which, stress is laid by Mr. Shadi Lal, does not mean land revenue, but it clearly means the produce of the land, the object of the *sanad* being to secure the grantee the right to receive the produce as owner of the land against any other possible claimants. The area of the land thus granted is, in one place, referred to as being 30 *ghumaons*, while, in two or three other places it is mentioned as 40 *ghumaons*; but it is not seriously disputed that the land now in suit is identical with the land which was granted in 1803 to Moti Ram. The mere fact that the village of Bhatiwal was founded by the original ancestor of the parties about 10 generations before the last Settlement is insufficient to show that the land in suit has come down in the family of Bihari, deceased, from the common ancestor. on the other hand, the *sanad* above referred to places beyond doubt the fact that the title of Misr Moti Ram, the greatgrand-father of Bihari, to the land now in dispute originated in that document, and since the defendants meet Bihari in the fifth generation it is clear that the land in suit was not his ancestral property *qua* the defendants. That being the case the defendants cannot exclude the plaintiff from succession to that property, for no authority was shown to us by the appellants' learned Counsel in support of his contention, which he put forward half heartedly, that even if the property in suit was not the ancestral property of Bihari *qua* the defendants, they had a right to exclude his daughter from succession to it.

For the above reasons, we maintain the

decree of the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 454 OF 1912.
February 15, 1913.
Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.
GANESHI LAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
CHARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage suit—Some of the mortgagors holding distinct shares in the property not made party to the suit—Decree for proportionate amount.

Where in a mortgage suit for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, the plaintiff has by an oversight omitted to implead some of the mortgagors, who owned a share in the property, distinct from the shares held by the defendant, a decree for the sum proportionate to the interest of the persons who were before the Court should be given.

Imam Ali v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 and *Gendan Lal* v. *Babu Ram*, 13 Ind. Cas. 197; 9 A. L. J. 86, referred to.

Second appeal from the decision of the Additional Judge of Agra.

Dr. *S. C. Banerji* (with him Mr. *J. N. Chaudhri*), for the Appellants.

Mr. *M. L. Agarwala*, (with him Mr. *Benode Behari*), for the Respondents.

JUDGMENT.—This was a suit on a mortgage made in favour of the first plaintiff in January 1891. Some of the defendants were the mortgagors and the remainder were impleaded on the ground that they had acquired interests in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first Court gave the plaintiffs a decree for 5/6ths of the amount due on the mortgage to be recovered, if necessary, by sale of 5/6ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of the owners of one-sixth of the property was fatal to the suit which he accordingly dismissed. In second appeal it is contended that the decision of the lower Appellate Court was erroneous. Reliance is placed on the decision in *Imam Ali* v. *Baij Nath Ram Sahu* (1) and some observations made by one of us in *Gendan Lal* v. *Babu Ram* (2). For the defendants-respondents it is contended that a mortgagee must sue for recovery of the whole of the mortgage money by sale of the whole of the mortgaged property and that if for any reason he is unable to ask for the sale of the whole mortgaged property his suit should be dismissed. In the present case the plaintiffs sued for recovery of the whole of mortgage money by sale of the whole of the mortgaged property. But by an oversight they omitted to implead certain persons who owned a share in the property distinct from the shares held by the other defendants. It seems to us that if the other questions in the case are decided in favour of the plaintiffs, so much of the claim should be decreed as is proportionate to the interests of the persons who are before the Court. There seems to be some question as to whether the defendants are the owners of 5/6ths or a smaller share. This matter may be determined by the lower Appellate Court. We allow the appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court to be restored to the pending file and disposed of according to law. Costs will be costs in the cause.

Appeal allowed; Cause remanded.

(1) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(2) 13 Ind. Cas. 197; 9 A. L. J. 86.

SIND JUDICIAL COMMISSIONER'S COURT.
SECOND CIVIL APPEAL NO. 54 OF 1910.
September 6, 1912.
Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.
AWATMAL SABILMAL—APPELLANT
versus
Seth GOKALSING SURATSING AND ANOTHER—RESPONDENTS.

Interest—Mortgage—Puisne mortgagee not party to prior mortgagee's decree—Reduction of interest in decree—Puisne mortgagee cannot get benefit of the reduction.

A puisne mortgagee suing to redeem a prior mortgage is not entitled to get the benefit of a reduction

in the contract rate of interest allowed in the prior mortgagee's decree to which he was not a party.

Thanappachettiar v. *Marimuthu Nanden*, 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293, *Umes Chunder Sircar* v. *Musammat Zahoor Fatima*, 18 C. 164; 17 I. A. 201, (P. C.), followed.

Gangadas v. *Jogendra Nath*, 11 C. W. N. 403; 5 C. L. J. 315, distinguished.

Appeal from the decision of the Sub-Judge, Sukkur.

Mr. *Lalchand Hassoomal*, for the Appellant.

Mr. *Rupchand Billaram*, for the Respondents.

JUDGMENT.—The only point raised in this appeal is whether a puisne mortgagee suing to redeem a prior mortgage is entitled to get the benefit of a reduction in the contract rate of interest from the date of the prior mortgagee's decree.

That reduction can only operate as between the parties to the decrees and the puisne mortgagee, not being a party, cannot claim that benefit. This was so decided in *Thenappachettiar* v. *Marimuthu Nandan* (1) following the Privy Council decision in *Umes Chunder Sircar* v. *Musammat Zahoor Fatima* (2). The equity referred to in *Gangadas* v. *Jogendra Nath Mitter* (3) does not arise here—for the puisne mortgagee sued the mortgagor first for redemption and although his bond recited the prior mortgage he did not make the prior mortgagee a party. He has, therefore, only himself to blame if he has to pay higher interest now—Nor can he get a benefit which the prior mortgagee was obliged by his conduct to seek in a separate suit. We confirm the decree of the lower Appellate Court and dismiss this appeal with costs—which, however, will not include Court-fee on the cross-objections—and we extend the period of redemption to six months from the date of decree of this Court—interest up to that period to be at the mortgage rate and after that at 6 per cent.

Appeal dismissed.

(1) 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293.
(2) 18 C. 164; 17 I. A. 201.
(3) 11 C. W. N. 403; 5 C. L. J. 315.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1795 OF 1911.

April 16, 1913.

Present:—Justice Sir Richard Harington, Bart., and Mr. Justice Newbould.

CHERAG ALI PRODHANIA AND OTHERS —DEFENDANTS—APPELLANTS

versus

MOHINI MOHAN BARDHAN—PLAINTIFF —RESPONDENT.

Evidence—Document—Not between parties to suit—Statement in document as to lands in suit—Whether document evidence—Maker of document, whether should be called to depose to truth of statement in document—Co-sharer landlord purchasing raiyati *interest—His right to* khas *possession.*

A deed made between persons, who are not parties to a suit, and containing a statement with regard to the property in dispute stating that it belonged to *A.*, is not evidence in the suit; if it was desired to prove the facts stated by the maker of the deed, he should have been called to depose on oath to the truth of what he stated.

When a co-sharer landlord purchases the interest of a *raiyati*, he does not thereby obtain all the privileges which the *raiyat* has under the law; but he has the right to possession of the land which he has purchased; and if he has purchased the rights of a person who was in *khas* possession, he is entitled to those rights and entitled to *khas* possession.

Appeal from the decree of the District Judge of Comillah, dated April 19th, 1911 affirming that of the first Munsif of Chandpore, dated March 23rd, 1910.

Babus *Dwarka Nath Chakravarti* and *Bipin Chandra Basu*, for the Appellants.

Babus *Ambica Charan Das*, for the Respondent.

JUDGMENT.

HARINGTON, J.—This is an appeal on behalf of the defendant in a case in which the plaintiff sued the *khas* possession of certain lands. The plaintiff's title is derived from purchase in execution of a rent decree against a man named Rahimuddi. The defendants on their part asserted their right to possession under *howla* from certain other persons who were also made defendants.

The point taken by the learned Vakil for the appellant is that in deciding the question whether the land in dispute belonged to Rahimuddi or not the learned Judge has taken into consideration a document which was not evidence. It was a deed made between parties who are not parties to the suit, and it contained a statement with regard to the lands in dispute stating that they were

Rahimuddi's. They were named as one of the boundaries of the land the subject of the deed. I agree with the learned Vakil that this statement was not evidence. The deed was not between the parties to the present suit, and all it amounts to is a statement made by the maker of the deed. That statement was not upon oath, and if it was desired to prove the truth of the facts stated by the maker of this deed he should have been called to depose on oath to the truth of what he stated. So, strictly speaking, the appellant is right so far that this document was not evidence. But on looking at the judgment it is quite clear that the Judge had before him evidence which raised a very strong *prima facie* case on behalf of the plaintiffs even if this one statement in this one document be rejected. Then he examined the evidence on behalf of the defendant and came to the conclusion that the *howla* under which the defendant claimed to hold did not exist at all. That being the state of the evidence it seems to me it would be idle to send the case back for a re-trial, and I should greatly regret if I had to do it considering that the case began as long ago as 1903. In the face of the evidence which appears on the judgment of the Judge of the lower Appellate Court it is quite clear that it would be quite idle to send it back. More specially where it has been found as a fact that the document under which the defendant claimed is an entirely imaginary document.

The another point was raised, namely the question as to whether the plaintiff as purchaser acquired a *raiyati* right in the land ought to have been considered. The learned Judge in the Court below says it does not arise, and I think he is quite right there. The only question was whether the plaintiff was entitled to *khas* possession of the land. It is quite true that the Legislature has enacted that where a person has interest in the land as co-sharer landlord and becomes the purchaser of the interest of the *raiyat*, he shall not obtain by that all the privileges which the *raiyat* has under the law. But there is nothing in the law which I can see or anything which has been cited to us to prevent his having the right to possession of the land which he has purchased at the execution sale. The only question is, is he entitled to *khas* possession? He has purchased the right of a person who was in *khas* possession, and he is entitled to those rights unless the law enacts he shall not have them notwithstanding his purchase. The law has not enacted that. Therefore, I think, he is entitled to *khas* possession. The question as to the *raiyati* rights does not arise.

For these reasons I think the appeal should be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 32 OF 1910.

September 9, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

TAHILRAM MANIRAM—APPELLANT

versus

J. A. BLACKWELL AND OTHERS—RESPONDENTS.

Contract—Offer and acceptance—Parties not of one mind—Alteration of document—Material alteration—Document vitiated if antedated—Duty of party propounding the document—Failure of suit based on it—Contract—Acceptance—Altered document admissible in evidence for a collateral purpose—Earnest-money—Addition of conditions of forfeiture of earnest-money and re-sale, effect of—What is earnest-money—Measure of damages—Mitigation of damages.

In a contract for the purchase of a piece of land, the negotiations were conducted by a broker acting for both the plaintiff and the defendant. The defendant gave the broker a letter in which he expressly agreed to buy the land and to pay a certain sum as earnest-money after three days. On this, the broker prepared a *kabala* in terms of the offer of the defendant with the additional conditions as to forfeiture of earnest-money and as to re-sale in case of default, and got it signed by the plaintiff. It was then brought to the defendant for his signature, who refused to sign it. Subsequently, it was represented to the defendant that there were other purchasers for ¾ths of the land and that he would be only liable for ¼th. He signed on this representation and added the words 'and others' to show that he was not the sole purchaser. No such purchasers were forthcoming and the defendant refused to take the land. The plaintiff sued for damages resulting on a re-sale. The *kabala* was found to have been altered by being antedated:

Held, (1) that the *kabala* was not a contract, the parties not being *ad idem*;

(2) that even if the *kabala* were the contract, it was vitiated by alteration of the date;

(3) that the party who presented an instrument which was an essential part of his case in an ap-

parently altered and suspicious state must fail from the mere infirmity or doubtful complexion of his proof, unless he could satisfactorily explain the existing state of the document.

Khoob Koonwar v. *Moodnarain Singh*, 9 M. I. A. 1; 19 Eng. Rep. 642; 11 W. R. (P.C.) 36, referred to.

(4) that the alteration of the date was material, and such an alteration had the effect of cancelling the document, and a suit brought on such a document must fail;

Master v. *Miller*, 2 R. R. 399; 2 H. Bl. 141; 1 Anst. 225; 5 Term Rep. 637, *Suffell* v. *The Bank of England*, L. R. 9 Q. B. D. 555, 51 L J. Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500, *Atmaram* v. *Umedram*, 25 B. 616; 3 Bom. L. R. 213, *Christacharlu* v. *Karibasayya*, 9 M. 399, *Gour Chandra Das* v. *Prasanna Kumar*, 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 788, referred to.

(5) that there was a valid contract when the plaintiff accepted the defendant's offer;

(6) that the plaintiff could sue on the basis of the contract, created by the acceptance of the defendant's offer, the contract never having been reduced to the form of a document;

(7) that though the altered document could not be made the foundation of plaintiff's claim, yet it might be used for the collateral purpose of proving the acceptance;

Atmaram v. *Umedram* 25 B. 616; 3 Bom. L. R. 213; *Sutton* v. *Toomer*, 7 B. & C. 416, 1 M. Ry. 125; 6 L. J. (o. s.) K. B. 49; 108 Eng. Rep. 778, *Falmouth* v. *Roberts*, 11 L. J. Ex. 180; 9 M. W. 469; 1 D. N. S. 633; 60 R. R. 790, referred to.

(8) that if the *kabala* had contained any special condition that was not in the offer, there would have been no unqualified acceptance;

Jones v. *Daniel*, L. R. 2 Ch. D. 332; 63 L. J. Ch. 562; 8 R. 579; 70 L. T. 588; 42 W. R. 687, referred to.

(9) that the addition of the conditions as to forfeiture of earnest-money and as to re-sale, and the sending of the *kabala* did not imply any qualification of the acceptance;

(10) that earnest-money was not only part-payment but a guarantee of performance;

(11) that the condition as to re-sale also was nothing more than a statement of legal rights of the parties created by the acceptance of an offer of purchase;

(12) that it was not incumbent on any party to break his contract with *A.* to mitigate the damages of *B.*;

(13) that the price realized at the auction afforded a fair measure for the calculation of damages.

Appeal from the decision of the Additional Judicial Commissioner of Sind.

Mr. *Wadhumal Oodharam*, for the Appellant.

Mr. *T. G. Elphinston*, for the Respondents.

JUDGMENT.

PRATT, J. C.—The suit is for damages for breach of contract and the main question for decision is that raised in the 2nd issue framed by the lower Court whether there was a valid contract of purchase ?

The negotiations were conducted by the 2nd defendant, Chandiram, who acted as broker for the plaintiffs and for the 1st defendant, Tahilram. Plaintiffs had authorised the broker to sell for Rs. 1-8 per square yard. On the evening of the 6th May, the broker took Tahilram and his friend, Showkiram, and showed them the plot. The broker says that Tahilram then offered Re. 1-8, but asked him to come and see him the next morning. Tahilram says that he did not agree to purchase that evening, but asked the broker to come and see him in the morning. It is not likely Tahilram agreed to purchase that evening as he would naturally take some time to consider the matter.

Next morning—*i.e.*, on the 7th—the broker came to see Tahilram at 7 A.M. and he says that Tahilram agreed to purchase at the rate of Re. 1-8-0 and gave him the offer Exhibit 3. Tahilram says that he agreed to purchase at Re. 1-7-0 and gave the broker Exhibit 3 merely as a guarantee of his good faith in order to put him in a better position to negotiate with the plaintiffs. Showkiram, the only other person, present at this interview admits that the broker said that the plot would not be sold for less than Re. 1-8-0 and that Tahilram asked him to settle for Re. 1-7-0 or Re. 1-6-0. Exhibit 3, however, speaks for itself. It mentions no rate, but it is an express agreement to buy the plot coupled with a promise to pay Rs. 2,000 earnest money on the following Monday, the 10th May. The promise to pay earnest money would never have been made if this were not a firm offer. If the offer had been for only Re. 1-7-0 that rate would have been specified. We believe, therefore, that by this offer Tahilram authorized the broker to settle at Rs. 1-8-0 and coupled that authority with a request to get a better rate Re. 1-7-0 or Re. 1-6-0, if possible. The subsequent conduct of the broker corroborates this conclusion for he immediately prepared a *kabala* at the rate of Re. 1-8-0 and got it signed by the plaintiffs. And again Tahilram himself referred to it as an offer at the rate of Re. 1-8-0 in a letter to Blackwell the next day Exhibit 9.

From this point there is a wide divergence in the evidence. The broker says that Tahilram signed this *kabala* in his office at 10-30 or 11 A.M. and that at 3 P.M. the same day he repented and wished

to back out of the bargain. Tahilram, on the other hand, says that the *kabala* was brought to him by the broker at 9-30 and that he refused to sign as his clerk had made inquiries and had learnt that the rate was excessive. Plaintiff Blackwell supports the broker's story and says that the *kabala* was brought to him signed by Tahilram at 1-30 P.M. But I have no doubt that Tahilram is telling the truth. It was before 3 P. M. that the broker complained to Showkiram that Tahilram was backing out—and that afternoon he asked the *Mukhtyarkar*, Kansing, to induce Tahilram to sign the *kabala*. The broker would, no doubt, regard the transaction as complete as soon as he had got Tahilram's signature to the *kabala*. If he had got that signature by 1 P. M. on the 7th—he would not have bestirred himself, as he admits he did, to look for other purchasers on the evening of the 7th and on the 8th. There are, moreover, two alterations of the *kabala* which seem to me conclusive on this part of the case. The date on the first line of the *kabala* is altered from 8th to 7th and the words "and others" are interpolated in the body of the *kabala* above the word Tahilram. Plaintiff Blackwell and the broker can give no reasonable explanation of these alterations. Blackwell says that he noticed the wrong date on the *kabala* when it was brought to him for signature on the morning of the 7th. He says he then had this date corrected and entered one of the two other dates at the back of the *kabala*. This implies that the *kabala* was dated 8th on one side and 7th on the other when brought to Blackwell. This is very improbable. The *kabala* was prepared on the strength of the memorandum, Exhibit 3, which is dated the 7th. There was, therefore, no probability of a mistake in the dates. Again the two dates on the back and the correction look as if they had been made in one ink and at the same time. As to the words "and others" Blackwell and the broker pretend that they only noticed them when the latter brought the *kabala* to the former to sign. It is grossly improbable that these words were inserted without the knowledge of the broker. It is suggested that the words "and others" were inserted because Showkiram, a Government servant, was a sharer with Tahilram and wished to conceal the fact. This is also absurd for the effect of the phrase would only be to excite suspicion. On the other hand, Tahilram gives a very probable and reasonable explanation of both points. When he found the rate was too high he repented of his bargain and refused to sign the *kabala*. Hence the broker's protests and his endeavours to find other purchasers at the same rate. Thinking he had got such purchasers, he, the next day, got the letter, Exhibit 9, from Tahilram cancelling Exhibit 3—But when these purchasers also refused to complete he went to Tahilram and falsely represented to him that other purchasers were good for $\frac{3}{4}$ths of the plot and that he would be only liable for $\frac{1}{4}$th. Tahilram signed on this representation and put in the words 'and others' to show that he was not the sole purchaser. The *kabala* was originally dated the 8th, the date when Tahilram signed—and was subsequently altered by the plaintiff Blackwell or with his connivance.

The lower Court has been influenced in coming to a different conclusion by two general considerations. The *first* is that in the subsequent correspondence between Blackwell and Tahilram the date of the *kabala* was referred to as being the 7th May and yet Tahilram was then intending to join Blackwell in an indemnity suit against the broker. The *second* is that Tahilram should have believed the broker after he had cheated him by representing to Blackwell that Exhibit 3 was an offer at the rate of Re. 1-8-0. As to the first it is sufficient to say that Tahilram had not seen the alteration in the original *kabala* at the time of the correspondence and he had, therefore, no reason to suspect that there was a fraud or that the date was very material. And as to the second consideration in the view we take of the case the broker had not cheated Tahilram by representing Exhibit 3 to be an offer at Re. 1-8 and this has been admitted by Tahilram himself in Exhibit 9. These considerations do not, therefore, affect the conclusion that I have come to on the evidence.

This conclusion is—

(1) That the *kabala* Exhibit 4, is no contract at all.

(2) That there was a valid contract on the 7th when plaintiffs accepted the offer Exhibit 3.

The first point is admitted in the memorandum of appeal and the Pleader for the defendant

TAHILRAM *v.* J. A. BLACKWELL.

Tahilram has himself argued that at the time of this *kabala* the parties were not *ad idem*. Plaintiffs thought they were selling the whole while defendant Tahilram thought he was purchasing a quarter. If the contract had not already been concluded, defendant's addition of the words "and others" had the effect of importing a fresh offer which was not accepted.

The second arises out of my finding that Tahilram authorized the broker to conclude a bargain at the rate of Re. 1-8-0. That offer was accepted by the plaintiffs. The acceptance was communicated to the broker who was acting as Tahilram's agent for this purpose by the signing of the *kabala* and to the defendant when the signed *kabala* was tendered to him by the broker. No doubt, if the *kabala* had contained any special condition that was not in the offer Exhibit 3 there would have been no unqualified acceptance—*Jones* v. *Daniel* (1). But the only conditions in the *kabala* which do not appear in Exhibit 3 are the conditions as to forfeiture of earnest money and as to re-sale in case of default. Earnest money, however, is not only part payment, but a guarantee of performance. The mere description in Exhibit 3 of the Rs. 2,000 as earnest money implied a condition of forfeiture in case of default. So also the condition as to re-sale is nothing more than a statement of the legal rights of the parties as created by the acceptance of Exhibit 3. In *Noble* v. *Edwards* (2) Vice Chancellor Bacon referring to a similar stipulation in a contract for the sale of land said: "It is very convenient that the right should be expressed in the terms of the contract, but without any such expression the law implies such a contract and provides the remedy for the breach of it." The case was reversed on appeal on a different point, but the passage quoted is good law. The sending of the *kabala*, therefore, did not imply any qualification of the acceptance. The case is analagous to that of *Filby* v. *Hounsell* (3) where it was said that the signing of the written contract was a mere form. Although the broker was trying to cover Tahilram's loss by finding other purchasers there is no evidence that plaintiffs ever released Tahilram from his agreement. It matters not that the parties may have intended to reduce the contract to a formal *kabala* for there is no evidence that there was any condition that the agreement should not be binding until a formal document was prepared and executed. Defendant did not add the words 'subject to *kabala*' in the offer Exhibit 3; and on this point it is only necessary to refer the cases of *Rossiter* v. *Miller* (4) and *Whymper* v. *Buckle & Co.* (5).

Now if plaintiff's suit is on the *kabala* alone it must fail for two reasons (1) the *kabala* is no contract and (2) even if the *kabala* were the contract it is vitiated by the alteration of the date.

The first point is self evident. As to the second it is faintly argued that plaintiff Blackwell, may not be the person who falsified the *kabala*. But as he propounds the instrument, the presumption under section 106, Indian Evidence Act is against him. As said by the Privy Council in the case of *Khoob Koonwar* v. *Moodnarain Singh* (6) "the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document." And I entirely disbelieve the account given by Blackwell of the alteration.

The alteration of the date is material, for it altered the identity of the instruments and was made to prejudice defendant's rights and to create evidence that he executed a formal agreement in accordance with the terms of the memorandum Exhibit 3. Such an alteration has the effect of cancelling the document and a suit brought on such a document must fail. The English Law as to alteration of documents in fully stated in the cases of *Master* v. *Miller* (7) and *Suffell* v. *The Bank of England* (8). The English Law on this point has been adopted by all the High Courts in India and I need only cite *Atmaram*

(1) (1894) 2 Ch. D. 332; 63 L. J. Ch. 562; 8 R. 579; 70 L. T. 588; 42 W. R. 687.
(2) (1877) 5 Ch. D. 378; 37 L. T. 7.
(3) (1896) 2 Ch. D. 737; 65 L. J. Ch. 852; 75 L. T. 270; 45 W. R. 232.
(4) (1878) 3 A. C. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865.
(5) 3 A. 469.
(6) 9 M. I. A. 1; 1 W. R. (P.C.) 36; 19 Eng. Rep. 642.
(7) (1791) 2 R. R. 399; 2 H. Bl. 141; 1 Anst. 225; 5 Term. Rep. 637.
(8) (1882) 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.

v. *Umedram* (9) *Christacharlu* v. *Karibasayya* (10); *Gour Chandra Das* v. *Prasanna Kumar* (11) and it has also been recognized by the Legislature in section 87 of the Negotiable Instruments Act.

Three questions now arise—

(1) Has the plaintiff sued on the contract antecedent to the *kabala*?

(2) If not—is he entitled to fall back on that contract?

(3) Can the *kabala* be used as evidence of the acceptance of Exhibit 3?

As to the first point, the plaint is very clear. Paragraphs 3 and 4 refer to an agreement settled provisionally on the evening of the 6th and finally on the morning of the 7th when the memorandum Exhibit 3 was delivered. Paragraph 9-A of the plaint and issue No. 3 of the lower Court makes it clear that plaintiffs contended that the defendant was bound prior to the execution of the *kabala* (which is merely referred to in paragraph 7 of the plaint as subsequently signed, for it is there claimed that defendant, Tahilram, would be bound under section 237, Indian Contract Act, even if he did not authorize the broker to settle at the rate of Re. 1-8.

The second question is, therefore, not material and I need only remark that as the agreement was not embodied in the *kabala* there would have been no objection to plaintiff, if he had sued on the *kabala* alone amending his plaint and basing his claim on the real contract.

There is a class of cases in which plaintiff failing in his suit on an altered instrument has been allowed to recover on the original consideration. See for instance *Sutton* v. *Toomer* (12) and *Atkinson* v. *Hawdon* (13). As to these it was observed in *Gour Chandra Das* v. *Prasanna Kumar* (11) that a suit on the original consideration would not lie as the original liability was merged in the instrument. With due deference, I am of opinion, that the true rule is that a suit on the original consideration will lie unless the alteration has deprived the other party of some remedy over. In *Alderson* v. *Langdale* (14) referred to by the Calcutta High Court the plaintiff was endorsee of a Bill of Exchange and received it from the drawer, the defendant in satisfaction of debt due to the defendant—Plaintiff altered the bill and he was not allowed to recover on the debt as the alteration had prejudiced the plaintiff's remedy against the drawee and acceptor of the Bill. It is this feature of the case which distinguishes it from *Sutton* v. *Toomer* (12) and *Atkinson* v. *Hawdon* (13). However, it is needless to discuss this point further for there is in this case no question of an instrument creating a liability and of an original liability independent of that instrument. If the *kabala* had been a contract plaintiffs could not have recovered on the parol agreement prior to it by reason of section 91, Indian Evidence Act. The only liability was the agreement created by the acceptance of Exhibit 3 and that agreement was never reduced to the form of a document. As to the third question it is settled law that though the altered document cannot be made the foundation of plaintiff's claim yet it may be used for a collateral purpose. In *Atmaram* v. *Umedram* (9) it was held that a written acknowledgment of a debt, though materially altered, was admissible in evidence for the purpose of extending the period of limitation. In *Sutton* v. *Toomer* (12) a pro-note had been altered but the plaintiff was allowed to recover on the original loan and the pro note was admitted in evidence of the terms on which the money was deposited. In *Falmouth* v. *Roberts* (15) a written agreement, though altered, was admitted as evidence of the terms of a yearly tenancy under a parol agreement. So here, the *kabala*, though altered, is good evidence that plaintiffs did accept the offer Exhibit 3 by their conduct in signing.

As to the damages, it was suggested that plaintiff was only entitled to recover his deposit and expenses. The argument is based on the rule in *Bain* v. *Fothergill* (16), but the case of *Ranchhod* v. *Manmohandas* (17) clearly shows that the English Rule is an anomalous rule which has no application in this country.

(9) 25 B. 616; 3 Bom. L. R. 213.
(10) 9 M. 399.
(11) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 788.
(12) (1827) 7 B. & C. 416; 1 M. Ry. 125; 6 L. J. (o. s.) K. B. 49; 108 Eng. Rep. 778.
(13) (1835) 2 A. & E. 628; 4 N. & M. 409; 1 H. & W. 77; 4 L. J. (N. S.) K. B. 85; 41 R. R. 493; 111 Eng. Rep. 242.
(14) (1832) 3 B. & A. 660; 1 L. J. K. B. 273; 37 R. R. 513; 110 Eng. Rep. 241.
(15) (1841) 11 L. J. Ex. 180; 9 M. & W. 469; 1 D. N. S. 633; 60 R. R. 790.
(16) (1873) 43 L. J. Ex. 243; 7 H. L. 158; 31 L. T. 387; 23 W. R. 261.
(17) 32 B. 165; 9 Bom. L. R. 1087.

Even in England the rule would not apply to a case of wilful repudiation of the contract, and in the case already cited *Noble* v. *Edwards* (2) which was also a case arising out of speculation in land, damages were assessed on the basis of a re-sale. It is suggested that the sale was unduly delayed, but I do not think that this is the case and at any rate the point was not taken in the Court below or in the memorandum of appeal and we need not consider it. It was further suggested that plaintiffs might have got out of their contract with their vendor and so mitigated damages. Even if this were so the rule as to the mitigation of damages is one to be applied with discretion. It is not incumbent on any party to break his contract with *A.* in order to mitigate the damages of *B.*

We agree with the lower Court that the price realized at the auction afforded a fair measure for the calculation of damages.

Although I would decide in the favour of the plaintiffs, I would not allow them their costs for I have no doubt that plaintiff Blackwell connived at the falsification of the *kabala* and that the evidence he has given on this point is not true. I would confirm the decree of the lower Court and dismiss this appeal, but direct that parties bear their own costs in both Courts.

FAWCETT, A. J. C.—I concur generally in the conclusions of the learned Judicial Commissioner and will only add a few remarks.

As regards the alteration of the date of the *kabala*, Exhibit 4, I expressed the opinion during the hearing of the arguments that this could not have been done by Chandiram, defendant No. 2, as the "th" of the "7th" on the back of the *kabala* was quite different to the " th " of the " 8th " in the first line of the *kabala*. Further scrutiny of the *kabala* and of the *kabala* Exhibit 2, which was also written by Chandiram, has, however, convinced me that I was wrong, and that there are ' ths ' in those documents, which are written in a similar way to the ' th ' of the dates in question. I have no doubt that the alteration of the " 8 " to " 7 " on the first page of the *kabala*, Exhibit 4, and the insertion of the date " 7th May 1909 " on the 2nd page were made by Chandiram ; but in veiw of the discrepant and improbable stories as to the reason for, and time and manner of making the alteration, which are told by Blackwell and Chandiram, and the other surrounding circumstances, I agree with the finding that this alteration was made subsequently to the actual execution of the *kabala* with the connivance of plaintiffs for the purpose of making it appear that the *kabala* was signed by defendant Tahilram on the 7th instead of on the 8th May 1909. I admit, I feel some hesitation about this finding because it is improbable that the space between 'this' and 'day' in the last line of the *kabala* was left blank until after its execution; and it is not, I think, unusual for a *kabala* to be dated the day on which the first signature is obtained instead of that of the last one, see for instance Exhibit 21, which is dated 9th May 1909, though it was signed by Tahilram on the 10th (paper-book page 69). But the probabilities on the whole, in my opinion, favour the other supposition ; and if it is an erroneous finding, plaintiff and Chandiram have by their suspicious conduct and statements, only themselves to blame for it. The finding in any case becomes of minor importance, in view of there having been already a completed contract prior to the execution of the *kabala* by defendant No. 1 on which plaintiffs are entitled to fall back.

Another point on which I feel some doubt is the legal effect of the insertion by defendant Tahilram of the words "and others" after his name in Exhibit 4. He, no doubt, did this in order to show that there were other persons whom he, at any rate, considered liable for joint or part performance of his liability under the *kabala*; but as the particular persons were not named or designated or made parties to the contract, I am inclined to think that this does not affect defendant. Tahilram's liability under the *kabala* to the plaintiffs and that it cannot properly be taken as a counter-proposal of a qualification or condition which affects his acceptance of the terms of the *kabala* by signing it. The general rule is that an acceptance is not made conditional by an addition which is immaterial *Clive* v. *Beaumont* (18), *Bolton* v. *Lambert* (19), and

(18) 1 De. G. & Sm. 397; 13 Jur. 226; 75 R. R 144.
(19) (1888) 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R, 434.

that no person can maintain an action upon a contract under seal unless he is named therein, either by his own name or by some acquired on adopted name, or is otherwise described therein *Maughan* v. *Sharpe* (20) and the contract has in express terms been made with him *Sunderland Marine Insurance Co.* v. *Kearney* (21). Even where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents as parties of the first part" and other parties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with the parties of the first part and all other creditors, *Chesterfield Colliery and Midland Silkstone Colliery Co.* v. *Hawkins* (22), *Gurrin* v. *Ropera* (23). But this point is immaterial, in view of the finding that the *kabala* is vitiated by a subsequent material alteration.

As regards the question of the *kabala* being used for a collateral purpose, I think the case clearly falls within the 3rd proposition which is stated by Hutchins, J., in *Christacharlu* v. *Karibasayya* (10) to be established by the English authorities on the point *viz.*, "where the obligation existed before the execution of the altered document and it is open to the obligee to sue on the original obligation, and he does so, the document may be adduced in proof of the nature and extent of the obligation." The *kabala* may also, in my opinion, be used for the purpose of proving acceptance of the offer in Exhibit 3 by the plaintiffs, though even without it the evidence of Chandiram Exhibit 10 at page 37 of the paper-book sufficiently proves this. The contrary view that, where a party by his own act alters a genuine instrument, so that it cannot be the foundation of any legal remedy, he ought not to be permitted to prove the promise contained in it by any other evidence (which is favoured in *Gour Chandra Das* v. *Prasanna Kumar Chandra* (11) appears to be based merely on some American cases and is, as the learned Judicial Commissioner shows, not in accordance with the English authorities. In this country the common law of England is followed, as the Contract Act is silent on the subject of the effect of unauthorized alteration of document (see Pollock and Mulla's Indian Contract Act, 2nd Edition, page 265,) and the Courts here are clearly not justified in executing that law beyond its recognized scope. Nor do "equity and good conscience" require that the plaintiffs should be punished by the entire loss of the damages they are otherwise entitled to merely because of the alteration of the date in Exhibit 4. The order which is proposed as to costs sufficiently meets the justice of the case.

I also agree that plaintiffs were justified, in putting the property up to auction in the way they did and that the price realized at the auction affords fair measure for the calculation of damages. No doubt, if the auction had been held earlier, a better price might have been obtained, but plaintiffs could not safely arrange for such sale until the period provided in the *kabala* and Exhibit 3 for the completion of the purchase had expired, and there appears to have been no undue delay after that date. In any case this is not a point which appellants are entitled to urge in this appeal.

I concur accordingly in the order proposed by the learned Judicial Commissioner.

Appeal dismissed.

(20) (1864) 34 L. J. C. P. 19; 17 C. B. (N. S.) 443; 10 Jur. (N. S.) 989; 10 L. T. 870; 12 W. R. 1057.
(21) (1851) 16 Q. B. 925; 20 L. J. Q. B. 417; 15 Jur 1006.
(22) (1865) 34 L. J. Ex. 121; 3 H. & C. 677; 11 Jur. (N. S.) 468; 12 L. T. 427; 13 W. R. 840.
(23) (1865) 34 L. J. Ex. 128; 3 H. & C. 694; 11 Jur. (N. S.) 491; 12 L. T. 432; 13 W. R. 843.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 205 OF 1912.
February 12, 1913.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
MOHAN LAL—JUDGMENT-DEBTOR—APPELLENT
versus
JAGANNATH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.
Civil Procedure Code (*Act V of* 1908), *s.* 47—*Parti-*

MOHANLAL *v.* JAGANNATH.

tion suit—Compromise-decree—Execution—Objection that decree-holder realised certain debts due to judgment-debtor—Distinct cause of action—Separate suit.

In a partition suit, a compromise-decree was passed whereby certain debts due to the family were allotted to the decree-holder, and certain other debts were allotted to the judgment-debtor. Besides, the judgment-debtor had to pay a certain fixed sum of money to the decree-holder which he did not do, consequently, an application was made to execute the decree. The judgment-debtor objected that the decree-holder's application should be rejected inasmuch as he had realised certain debts which had been allotted to him:

Held, (1) that the plea could not be raised in execution proceeding as it did not fall within the scope of section 47 of the Civil Procedure Code and that the judgment-debtor could recover the money so wrongfully realised by the decree-holder by a separate suit;

(2) that the objection could not be treated as a plaint.

Execution first appeal from the decision of the Subordinate Judge of Meerut.

Mr. *S. K. Dar* (with him Mr. *Umashanker Bajpai*), for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This is an appeal arising out of execution proceedings. The facts are briefly as follows :— The parties are step-brothers. A suit for partition was brought by the plaintiffs-respondents for partition of the joint family property. The suit ended in a decree dated the 3rd of March 1908 based on a compromise. The compromise is dated the 14th of January 1908 and was filed, in the course of the appeal in this Court, on the 22nd of January 1908, and was remitted to the Court below for verification and report. It reached the Court below on the 31st of January 1908. According to the compromise the landed property was divided in a certain manner, likewise the house property. With these we are not concerned in this appeal. The third class of property consisted of debts on bonds and on accounts entered in certain account-books. Of this class about ten debts secured by bonds were allotted to the plaintiffs. The remaining debts including all those due on accounts were allotted to the defendant. In addition to this allotment of the property under the compromise a sum of Rs. 3,400 was to be paid by the defendant. Of this a sum of Rs. 400 was to be paid at once and the balance of Rs. 3,000, at the end of two years. The compromise on being duly verified was submitted to this Court and a decree was passed thereunder on the 3rd of March 1908. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree whereby they sought to recover the balance of Rs. 3,000. The present application for execution was made in January 1912. On the 8th of March 1912, the judgment-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree, that the application was time-barred, that interest had been charged by the decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts, which had been allotted to the judgment-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application in which the judgment-debtor sought for time to bring into Court evidence to prove that the decree holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant. The lower Court has disallowed the objections. The plea of limitation was not pressed and the lower Court held that if the decree-holders had wrongfully recovered the debts, the judgment-debtor had his remedy against the decree-holders in a regular suit. The judgment debtor comes here on appeal and the first plea taken is that the point raised as to the collection of debts due to the judgment-debtor by the decree-holders is a point which falls under section 47 of the Code of Civil Procedure and the lower Court ought to have gone into it. To this we cannot agree. The appellant has entirely a separate cause of action against the decree-holders, if the latter have, as a matter of fact, recovered the debts due to him and not to themselves. Once the final decree in the partition suit was passed, the plaintiffs, decree-holders, ceased to have any title whatever to the debts in question. It is not pleaded that the plaintiffs' decree for Rs. 3,000 has been satisfied. There has been no voluntary payment. It is further urged on behalf of the appellant that under clause (2) of section 47 we should treat his present petition of objection more in the nature of a plaint, so that the whole proceedings may be treated as a suit by him to recover the amount which he claims to have been collected by the

decree-holders. We see no reason to do so, assuming for a moment that the second clause of the section enables us to do as he wishes. The present proceeding is one which has arisen out of an application by the decree holders and the objections are merely objections asking the Court to reject the application. No amount is specifically claimed therein as having been collected by the decree-holders.

The second ground of appeal is not pressed. The third ground of appeal has no force. Assuming that the respondents have misappropriated the money due to the appellant the latter has a remedy by regular suit.

The fourth ground of appeal is that as the plaintiffs have refused to fulfil their obligations under the decree they are not entitled to recover the money from the appellant. In so far as the decree itself is actually concerned there is no obligation on the decree-holders which they have to perform. It is urged that on the 31st of January 1908, when the compromise filed in this Court was received in the Court below, an agreement was filed by the parties on the same day under which the plaintiffs, decree-holders, agreed to make over the account-books to the defendant. It is further urged that it was clearly understood by the parties that the defendant was to have two years' time given to him under the decree (as was actually granted thereby) for payment of Rs. 3,000, because he was to have the acount-books at once handed over to him to enable him to recover the debts allotted to him. It is pleaded that the decree-holders have never handed over the accounts to him and have thereby prevented him from recovering the debts and as a consequence have prevented him also from paying the sum of Rs. 3,000. It was urged that when the previous applications were made by the decree-holders this objection was all along taken, though it is also admitted that, as a matter of fact, it was not taken in the present instance in the Court below. It seems to us quite clear that the rights of the parties, after the compromise had been arrived at, were governed by the decree of the 3rd of March 1908. It may be that on a true interpretation of that decree the judgment-debtor was entitled to the possession of the account-books, as the debts based on those account-books were entered therein and they formed the chief proof of those debts. It was open to the judgment-debtor to put the decree into execution and to recover the books from the plaintiffs if they did not deliver them. As a matter of fact the decree is silent as to the possession of the account-books and we do not think that we can go behind the decree to find out what other rights the parties may have. If any portion of the compromise was accidentally omitted from the decree, it was open to the judgment-debtor to have the decree amended. If he intentionally omitted any portion of the compromise from the decree he has himself to blame. In any case he is not entitled to go behind the decree which finally decided the rights of the parties. This is a point, which as we have already pointed out, was not taken in the Court below. If the appellant deems himself aggrieved in any way, we must leave him to his remedy by a separate suit. We think the decision of the Court below is perfectly correct. We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO 3667 OF 1910.

March 28, 1913.

Present:—Mr. Justice Stephen and Mr. Justice Holmwood.

HRIDOYTARA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SRINATH CHAKRAVARTI—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Permission obtained by guardian from Court to mortgage particular land of minor for specified amount—Mortgage by guardian of larger quantity of land for smaller amount—Mortgage, whether viodable—Suit upon mortgage after ten years—Limitation—Contract Act (IX of 1872), s. 64.

The guardian of a minor obtained leave to mortgage 7 *kanis* of land in a certain *taluk* belonging to the minor for Rs. 200. The mortgagee knew this, but he advanced Rs. 175 to the guardian on a mortgage of 7 *kanis* in that *taluk* and 6 *kanis* in another *taluk* belonging to the minor. After ten years he brought a suit on the mortgage:

Held, that the mortgage effected was not the mortgage for which leave was given, but was essentially different from it; that the mortgage was entered into with the knowledge of the mortgagee in disobedience of the order of the Court; that the mortgage was, therefore, voidable; that the mortgagee's suit against

the guardian is now barred by limitation; and that the mortgagee is not entitled to recover the money as under section 64 of the Contract Act for that claim is barred by limitation.

Hem Chandra Sarkar v. *Lalit Mohan Kar*, 14 Ind. Cas. 515; 16 C. W. N. 715; 16 C. L. J. 537, distinguished.

Appeal from the decree of the District Judge of Noakhali, dated July 23rd, 1910, reversing that of the Second Munsif of Lakhipur, dated January 25th, 1910.

Babu *Brojendra Nath Chatterjee*, for the Appellants.

Dr. *Surat Chandra Basak* and Babu *Bipin Chandra Basu*, for the Respondent.

JUDGMENT.—The defendant No. 1 in the present suit was a certificated guardian of two minors. As such she applied to the Court below for leave to mortgage property in order to pay off certain debts due by the estate of the minors. She obtained leave to mortgage 7 *kanis* of land in *Taluk* No. 2370 for Rs. 200. In the face of this order, the contents of which were known to the mortgagee, the plaintiff in the present suit, a sum of only Rs. 175 was advanced by the plaintiff on a mortgage of the 7 *kanis* in *Taluk* No. 2370 and six other *kanis* in another *Taluk*. The mortgage was, therefore, entered into with the knowledge of the mortgagee in disobedience of the order of the Court. The mortgagee then proceeded to wait for 10 years and has now brought his suit on the mortgage.

The defence made is that the mortgage is voidable under section 30 of the Guardians and Wards Act, and there is no doubt that this is so, because the mortgage effected is not the mortgage for which leave was given but is essentially different from it. We have no hesitation, therefore, in holding that the mortgage is voidable. Then arises another matter for further consideration.

The plaintiff-respondent before us argues that although it is voidable he is nevertheless entitled to recover the money which he advanced and which, it appears, was needed for the necessity of the minors. He, no doubt, had a good claim to recover this money from the guardian who acted in contravention of the powers given to her. But his suit in respect of this claim is barred by the statute of limitation. Are we then under the rulings laid down by this Court and by others and in accordance with the principle recognised by section 64 of the Contract Act, to hold that he is entitled to recover any of the moneys which he paid? We do not think that he is. Various cases have been quoted to us of which the one in this Court is reported as *Hem Chandra Sarkar* v. *Lalit Mohan Kar*(1), where the contract was made by a certificated guardian who had not obtained the leave of the Court and it was held that it was nevertheless good, because to put it shortly it was a contract which might properly have been entered into by a Hindu widow who was an uncertificated guardian. The contract, in fact, was held to be one which the Court presumably would have sanctioned, and, therefore, the money actually paid under it was held to be recoverable. The present case is widely distinguishable from that. The contract which the Court in fact sanctioned was a mortgage of 7 *kanis* of land for Rs. 200. Instead of that 13 *kanis* have been pledged for Rs. 175. That being so, it is not necessary to go into the other features of the case which distinguish the present case from that to which we have just referred; and we hold that there is no reason why the defendant or any of them should make good to the plaintiff the money which he advanced and the suit to recover which is barred by the statute of limitation.

Under these circumstances we set aside the judgment and decree of the lower Appellate Court and restore those of the Munsif.

The appellants are entitled to their costs in the lower Appellate Court and in this Court.

Appeal allowed.

(1) 14 Ind. Cas. 515; 16 C. W. N. 715; 16 C. L. J. 537.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3037 OF 1911.

April 23, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Roy.

MANAHAR MUKHERJEE—PLAINTIFF—APPELLANT

versus

KHETRA NATH SABUI AND ANOTHER DEFENDANTS—RESPONDENTS.

Landlord and tenant—Contract after Bengal Ten.

ancy Act to pay rent in monthly instalments, whether valid—Contract to pay interest on each instalment from time it falls due, whether legal—Bengal Tenancy Act (VIII of 1885), ss. 53, 67, 178, sub-s. (3), cl. (h).

By a contract between a landlord and tenant after the passing of the Bengal Tenancy Act and to which the provisions of that Act apply, provision was made for payment of the rent in monthly *kists*, and also for payment of interest on each, from the time when it fell due:

Held, that the landlord was entitled to impose an obligation on the tenant to pay the rent in monthly *kists*, for that is in accord with the provisions of section 53 of the Bengal Tenancy Act; that the contract having been made after the passing of the Act, the provision in section 178, sub-section (3), clause (*h*) came into play; that, therefore, the contract for the payment of interest on *kists* is invalid; and that the landlord is entitled to the interest secured to him by section 67 beyond which he cannot go, that is, to 12½ per cent. from the expiration of the quarter in which the *kist* fell due.

Hemanta Kumari Debi v. *Jagadindra Nath Roy Bahadur*, 22 C. 214, (P. C.); 21 I. A. 131, distinguished.

Appeal from the decree of the Second Sub-Judge of Hooghly, dated June 29th, 1911, modifying that of the Munsif of Serampore, dated December 5th, 1910.

Babus *Bipin Behary Ghose* (Junior) and *Harendra Krishna Mukherjee*, for the Appellant.

Babu *Shib Chandra Palit*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—The only question that arises on this appeal is as to the time from which interest should run on arrears of rent. The contract between the parties is one after the passing of the Bengal Tenancy Act and one to which the provisions of that Act apply. By that contract provision is made for payment of the rent in monthly *kists* or instalments and also for payment of interest on each, from the time when it falls due.

It is contended on behalf of the landlord that literal effect should be given to this provision for interest.

On behalf of the tenant it is contended that interest cannot run from the date when each instalment fell due but from the expiration of that quarter of the agricultural year in which the instalment fell due. The reasons urged by the tenant for the adoption of this view, notwithstanding the express provision of the contract, are these: It is said in the first place that the provision for interest is in excess of that which can be permitted, inasmuch as it is for interest which exceeds Rs. 12½ per cent. per annum. It is conceded that this is a sound objection, but the landlord says that he is entitled to recover interest at the rate of Rs. 12½ per cent. But if that be so, it cannot be by virtue of the contract, because there is no contract to that effect. The tenant goes further and says that it would be opposed to the distinct enactments of the Bengal Tenancy Act to hold that there is any contractual relationship between the landlord and tenant that would entitle him to receive Rs. 12 per cent. per annum from the date when each *kist* fell due. It may be conceded that the landlord was entitled to impose on the tenant an obligation to pay the monthly *kists* for that is in accord with the provisions of section 53 of the Bengal Tenancy Act, whereby it is provided that "subject to agreement or established usage, a money-rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year." The words indicate that there may be an agreement in modification of the provision for four equal instalments and there is no reason to hold that there cannot be monthly instalments. But that carries the landlord but a short way on his road towards his claim. Section 67 of the Bengal Tenancy Act is one of a group of sections being those numbered 65 to 68 inclusive, which deal with arrears of rent. By section 67 it is provided that "an arrear of rent shall bear simple interest at the rate of twelve-and-a-half per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the institution of the suit, whichever date is earlier." That section as it now stands is a result of the amendment by the Bengal Tenancy Amendment Act, 1907, and the case has been argued before us as though the amendment made no difference for the purpose of the question now under discussion. The answer that the landlord would make to the contention that section 67 must govern the relationship of landlord and tenant, is that these sections only relate to those cases where a contract between the parties provides for quarterly *kists*; and, in support of that, reference is made to the decision of the Privy Council in *Hemanta Kumari Debi* v. *Jagadindra Nath Roy Bahadur* (1). Especial reliance

(1) 22 C. 214; 21 I. A. 131.

is placed on a passage at page 221 where Lord Macnaghten in delivering the judgment of the Privy Council says: "A subordinate question arose in Appeals Nos. 20 and 21 of 1890 with regard to the interest on the rent in arrear. It appears that there are some arrears which have become due since the Bengal Tenancy Act, 1885. The Subordinate Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act, as regards arrears which became due after the Act came into force, the interest should be calculated quarterly. It appears to their Lordships that the High Court were wrong, and that the provision in section 67 of the Act, on which they relied, only applies to cases where the rent is payable quarterly. Here it is not disputed that the rent is payable monthly and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly." The learned Judges of the High Court in disposing of this matter had said this: "Now, with regard to the arrears which fell due since the present Act came into force, they stand on a different footing. We do not find that the plaintiff claimed interest on the footing of any contract, and, therefore, the only claim that he has for interest is based upon the terms of the Bengal Tenancy Act. By section 67 of that Act, an arrear of rent shall bear simple interest at the rate of 12 per cent. from the expiration of that quarter of the agricultural year in which the instalment falls due, to the institution of the suit. So under the present law he is not entitled to interest from the date of the instalment, but, from the end of the quarter in which it fell due. We, therefore, give him Rs. 12 per cent. from the end of the quarter on which the instalment fell due, to the institution of the suit." In the grounds of appeal to the Privy Council it was urged that the Court had erred in not allowing interest on the monthly instalments of the rents which had fallen due after the Tenancy Act came into force; that the appellant having proved by evidence that from a long time past the defendant had been paying rent in monthly *kists* and interest at the rate of Rs. 12 per cent. in the case of breach of any instalment, the appellant was entitled to interest at that rate on each monthly instalment irrespective of whether the rents fell due before or after the Tenancy Act came into force, that the evidence adduced in the case established a contract to pay interest on the monthla instalment before the passing of the Tenancy Act, and the Court was in error in holding that the appellant had not claimed interest on the footing of any contract, and the only claim she had for interest was based upon the terms of the Bengal Tenancy Act; that the appellant's claim for interest on the monthly instalments, whether based on contract or usage, was not affected by section 67 of the Bengal Tenancy Act. Prior to the Bengal Tenancy Act interest on arrears of rent in respect of agricultural tenancy was regulated by section 21 of Act VIII of 1869, which practically re-produces section 21 of Act X of 1859 whereby it was provided that "Any instalment of rent which is not paid on or before the day when the same is payable according to the *pattah* or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per cent. per annum."

The only other provision for payment of interest on rent apart from contract to that effect was to be found in Act XXXII of of 1839, which corresponds with the English Act 3 and 4 William IV, Chapter XLII section 28. The judgment of the Privy Council must be read in the light of these facts. That judgment did not accept the view of the High Court that interest was payable under section 67 but under some other obligation; whether it was the Act of 1869 or the contract or usage does not appear, and it matters not, for their Lordships were satisfied that interest was payable and I am not sure that there was any appeal by the tenant from the decision of the High Court that interest was payable. That then is how the matter stood. Their Lordships were dealing with a contract before the passing of the Act, and what we have to consider is whether that decision can in any way be taken as affecting a contract of tenancy made after the Act. The last thing that we would wish to do would be in any way to escape from the just result of the decision of the Privy Council, or to

place upon any decision a limited construction of which it was not fairly capable. But it seems to me that we have in this case a condition of things which differentiates the present case from that before their Lordships, in an essential matter. In saying this I have in mind the fact, I have already stated, that the contract here was after the passing of the Act, which brings into play the provision in section 178 sub-section (3), clause (*h*), which says that: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall affect the provisions of section 67 relating to interest payable on arrears of rent." It is conceded in this case that so far as the rate of rent in excess of twelve per cent. was charged, it was contrary to the provisions of the Bengal Tenancy Act. Therefore, as it seems to me, we have this position that there is no valid contract for the payment of interest on *kists*, the only provision in that direction being one which is admittedly illegal. How then is this interest payable? I have indicated the provisions of the law that permit a Court to charge interest. The Acts of 1869 and 1859 have passed away. We still have the Interest Act and the Bengal Tenancy Act, the Interest Act has no application here, so that we are reduced to this that there is no provision statutory or contractual which imposes upon the tenant a liability to pay interest, unless we can bring into play the operation of section 67. That has been done by the lower Appellate Court. There has been no appeal from this by the tenant and the landlord is thus entitled to the interest secured to him by section 67; beyond that he cannot go.

For these reasons we confirm the decree. There would be no order for costs of defendant No. 1 as he has not appeared. Defendant No. 2 will have his costs for he has been compelled to appear though he has no direct interest in the subject-matter of the appeal.

ROY, J.—I agree.

Decree confirmed.

ALLAHABAD HIGH COURT.

CIVIL REFERENCE No. 677 OF 1912.

April 9, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

CHINTAMANI—DEFENDANT—APPLICANT

versus

MAHIMA DAT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Suit for participation in income of religious endowment—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Small Cause suit—Second appeal.

A suit for participation in the income of an endowment, even if it is a part of the regular income, is not excluded from the cognizance of a Small Cause Court and, therefore, no second appeal lies where the value of the suit is Rs. 100 only.

Hans Raj v. *Ratni* alias *Jawala Dei*, 27 A. 200; A. W. N. (1904) 227, followed.

Bhavadasan v. *Narayana Somayajipad*, 28 M. 202, not followed.

Mahadeo v. *Budhai Ram*, 26 A. 358; A. W. N. (1904) 50, referred to.

Civil reference made by the Local Government under the Kamaun Rules.

Dr *S. C. Banerji*, for the Applicant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This matter comes before us by way of a reference under the Kamaun Rules, from the Local Government.

The plaintiff brought a suit to recover a sum of Rs. 10, his allegations being that the Rs. 10 represented gifts made by the Hindus to the temple of Badri Nath. He alleged that there had been an arrangement between the priests as to the division of the gifts, that this arrangement was come to either in the course of or in consequence of certain litigation and that his share of the gifts was Rs. 10 which he sued to recover.

The Court of first instance dismissed the plaintiff's suit.

On appeal the decision of the Court of first instance was confirmed. But on second appeal to the Commissioner these decisions were reversed and the plaintiff's claim decreed.

The defendant petitioned the Local Government, with the result that the present reference has been made to us.

The first question upon which we are asked to give our opinion is whether or not a second appeal lay to the Commissioner. If no second appeal lay the decision of the Court of first appeal would prevail and the plaintiff's suit would be dismissed.

Under section 102 of the Code of Civil

Procedure, 1908, modified as to its application to Kamaun by the Kamaun Rules of 1894, Notification No. 6—VII-34, dated the 1st of January 1909, no second appeal lies in any suit of the nature cognizable by a Court of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 100. The next question is, therefore, was the present suit a suit of the nature cognizable by the Small Cause Court.

Under section 15 of the Small Cause Courts Act all suits which are not excluded by some special enactment, or by the second Schedule to the Small Cause Courts Act, are of the nature cognizable by the Small Cause Court. It is alleged that the present suit comes under Article 13. Omitting the immaterial parts of this Article, it reads as follows: "A suit to enforce payment of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in a shrine or other religious institution." In our opinion this Article applies only to cases of cesses or dues alleged to be payable by members of the public to the person claiming to be entitled to receive them by reason of his interest in the shrine or religious institution. It cannot apply to the division of the funds of any particular shrine or religious institution.

This view has been taken by a Bench of this Court in the case of *Hans Raj* v. *Ratni* alias *Jawala Dei* (1). A similar view was taken by the Punjab Chief Court [see *Harnam* v. *Gandu* (2) and *Jawhair Singh* v. *Sardar Man Singh* (3)].

The opposite party rely upon the case of *Bhavadasan* v. *Narayana Somayajipad* (4). The learned Judges in that case did not follow the ruling of this Court in the case of *Mahadeo* v. *Budhai Ram* (5). The learned Judges say: "So far as participation in the income from the landed endowments of the *Sabha* is concerned, there can be no doubt that a suit by the plaintiff for his share of such incomes, supposing his allegation as to his membership is true, and supposing also what should have been paid to him out of those incomes is withheld, would be a suit within the meaning of the Article for 'dues to which a person is entitled by reason of his interest, in a religious institution.' Considering that portions of the emoluments of persons employed in many temples including famous ones consist of offerings made at the shrines, it is to be presumed that a right to share in voluntary payments made to religious institutions was not intended to be put on a different footing from that on which the incomes of permanent endowments thereof stand, with reference to the matter under consideration. As between persons who are entitled to participate in such voluntary payments the share to which each of such persons is entitled is properly a "due" to him by reason of his interest in the institution." With great respect we do not see any reason for holding that a suit for participation in the income even if it were a part of the regular income of the endowments is certainly excluded from the cognizance of a Small Cause Court. There are strong reasons why a person who is claiming cesses or dues against the public should not be allowed to institute a suit in the Small Cause Court. The same reasons would not at all apply to a suit in which the matter in issue was whether some particular individual was entitled to receive out of the income from the other members of the institution a particular sum. We have no hesitation, therefore, in answering the first question as follows, namely that no second appeal lay to the Commissioner.

It is quite unnecessary to answer the other questions except the question as to costs. We see no reason for departing from the ordinary rule that costs should follow the result.

We, consequently, advise that the plaintiff's suit should be dismissed with costs in all Courts including costs of the present reference. This is our answer, the record may be returned.

(1) 27 A. 200; A. W. N. (1904) 227.
(2) 81 P. R. 1889.
(3) 84 P. R. 1892.
(4) 28 M. 202.
(5) 26 A. 358; A. W. N. (1904) 50.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 438 OF 1912.

April 30, 1913.

Perssnt:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

UGRA NARAIN SINGH—DECREE-HOLDER—APPELLANT

versus

BASAN NARAIN SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Account—Suit for account—Preliminary decree—Appeal from decree—Subsequently final decree passed—Preliminary decree subsequently set aside—Execution—Whether final decree may be executed—Executing Court—Power to determine whether decree operative or not.

In a suit for account a preliminary decree was made directing the defendant to render accounts. The defendant appealed. A final decree was eventually passed against the defendant for a certain sum of money, but the defendant did not take any part in the proceedings in the matter of taking of accounts. After that the preliminary decree was set aside on appeal:

Held, that as no final decree had been passed when the defendant preferred his appeal, and as the plaintiff did not bring it to the notice of the Appellate Court that a final decree had been passed in the case the Appellate Court had jurisdiction to hear the appeal, and that the power to hear it was not taken away by the final decree; that the final decree which was dependent upon and subordinate to the preliminary decree must be taken to have been superseded by the decision of the Appellate Court setting aside the preliminary decree, and that, therefore, the final decree could not be executed.

M. H. Mackenzie v. *Lala Narsing Sahai*, 1 Ind. Cas. 413: 10 C. L. J. 113; 36 C. 762; *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur*, 6 C. L. J. 547; *Madhu Sudan Sen* v. *Kamini Kant Sen*, 32 C. 1023 and *Kuriya Mal* v. *Bishambar Das*, 5 Ind. Cas. 276; 32 A. 225, 7 A. L. J. 210, distinguished.

Jatinga Valley Tea Co. Ld. v. *Chera Tea Co. Ld.*, 12 C. 45, referred to and explained.

Shama Pershad Roy Chowdhury v. *Hurro Prosad Roy Chowdhury*, 3 W. R. (P. C.) 11; 10 M.I.A. 203; 19 Eng. Rep. 948; *Jogesh Chunder Dutt* v. *Kali Churn Dutt*, 3 C. 30; 1 C. L. R. 5, relied upon.

It is open to an executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not, and if such a decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground.

Appeal from the order of the District Judge of Gya, dated February 28th, 1912, affirming that of the Sub-Judge of that District, dated December 6th, 1911.

Babus *Provash Chunder Mitter* and *Satish Chandra Bose*, for the Appellant.

Babus *Umakali Mukherjee* and *Atul Chunder Dutt*, for the Respondent.

JUDGMENT.—This appeal is against an order passed by the District Judge of Gya in certain proceedings in execution of a decree in a suit for account. The decree-holders who are the appellants in this Court in a suit for account obtained a preliminary decree which directed the defendant to render accounts. This preliminary decree was passed on the 21st March 1908. The defendant appealed against that decree on the 21st May 1908. Notwithstanding that the defendant appealed against the preliminary decree, the Court of first instance proceeded with the matter of accounts (the proceedings not having been stayed by the Appellate Court) and passed a decree for Rs. 1,284-8 against the defendant on the 28th May 1908. It does not appear that the defendant took any part in the proceedings before the Court of first instance in the matter of taking of accounts or that he even appeared before that Court subsequent to the filing of the appeal against the preliminary decree. On the 11th August 1908, the District Judge set aside the preliminary decree holding that the defendant was not liable to render any account. There was an appeal by the plaintiffs against this decision of the District Judge to the High Court and the High Court dismissed the appeal on the 30th August 1910. On the 22nd February 1911, the decree-holder applied for execution of the final decree which had been passed by the first Court on the 28th May 1908. The defendant objected to the execution on the ground that, the preliminary decree on the basis of which the subsequent final decree was passed having been set aside, the final decree which was subordinate to and dependent upon the preliminary decree must be taken to have been superseded and that, therefore, the final decree could not be executed. Both the Courts below have given effect to this contention and the plaintiffs have appealed to this Court.

It is contended on behalf of the appellants that the final decree can be executed so long as it remains unreversed and that the appeal against the preliminary decree was not maintainable when a final decree had already been passed in the case; and reliance is placed upon several decisions of this Court, namely, in the cases of *M. H. Mackenzie* v. *Lala Narsingh Sahai* (1) *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2) and *Madhu Sudan Sen* v. *Kamini*

(1) 1 Ind. Cas. 413; 36 C. 762; 10 C. L. J. 113.
(2) 6 C. L. J. 547.

Kanta Sen (3) and also upon the case of *Kuria Mal* v. *Bishambhar Das* (4). It has, no doubt, been laid down in these cases that, when a final decree has been made, it is not only open but it is the duty of the party who is aggrieved by the preliminary decree or interlocutory order which up to that stage had not been questioned by way of appeal to prefer an appeal against the final decree and to question the validity of the preliminary decree or interlocutory order. But in all these cases, [except the case of *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2)], the appeal against the preliminary decree or the interlocutory order was presented after the final decree had been passed and the fact that a final decree had been passed having been brought to the notice of the Appellate Court at the hearing of the appeal from the preliminary decree or interlocutory order, it was held that, the final decree having been passed, the appeal against the preliminary decree or interlocutory order could not be maintained. The facts of the case in *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2) were peculiar. There, the plaintiff having lost in the Court of first instance appealed and himself obtained an order of remand from the Appellate Court directing the first Court to appoint a Commissioner for ascertaining whether the lands in suit appertained to the plaintiff's *patni*. The order of remand was made by consent of both parties. The plaintiff appeared before the Munsif after the order of remand, assisted in the local investigation held by the Commissioner but at the final hearing by the Munsif when asked to argue the case he refused to do so upon an erroneous assertion that an appeal had been lodged in the High Court against the order of remand. After the arguments on the side of the defendant were finished but before the judgment was actually delivered, the plaintiff preferred an appeal to the High Court against the order of remand and, when that appeal came on for hearing, the fact that a final decree had already been passed was brought to the notice of the Court, and this Court held that the plaintiff having made his election and taken the full benefit of the order of remand which was passed with the consent of both parties could not turn round and complain against the order of remand. In this case, the defendant preferred an appeal against the preliminary decree before the final decree was passed and he does not appear to have taken any part in the proceedings subsequent to the filing of his appeal. At the time when he preferred the appeal, no final decree had been passed. The Appellate Court, therefore, certainly had jurisdiction to hear the appeal and that power of the Appellate Court to hear the appeal against the preliminary decree was not taken away by the final decree passed by the Court of first instance on the 28th May 1903. The final decree in the case which merely determined the amount for which the defendant was liable to the plaintiffs was dependent upon the preliminary decree which held that the defendant was liable to render account and the validity of the proceedings which resulted in the final decree depended upon the preliminary decree itself and, that decree having been set aside on appeal; the final decree necessarily fell through.

It has next been contended that it was, at any rate, necessary to have the final decree formally set aside and that, at all events, the question could not be gone into in execution proceedings and that the executing Court has no power to deal with the matter. We think, however, that the final decree was superseded by the order of Appellate Court setting aside the preliminary decree upon which it depended. In the case of *Jatinga Valley Tea Company Ld.* v. *Chera Tea Company Ld.* (5), it was pointed out that the Munsif's jurisdiction to hear the case upon remand depended upon the remand order and that, if the remand order were badly made, the decree and, indeed, all the proceedings taken under that remand order were null and void. It is true that, in that case, the final decree was also expressly set aside by this Court but the fact that a final decree had been passed was brought to the notice of this Court at the hearing of the appeal in that case. In the present case, although the plaintiffs were perfectly aware that a final decree had been passed in the case, they did not bring it to the notice of either the first Court of appeal or the High Court. We are of opinion, on the principles laid down in the case of *Shama*

(3) 32 C. 1023.
(4) 5 Ind. Cas. 276; 32 A. 225; 7 A. L. J. 210.
(5) 12 C. 45.

Pershad Roy Chowdhry v. *Hurro Prosad Roy* (6), and in the case of *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (7), that the final decree in this case which was dependent upon and subordinate to the preliminary decree must be taken to have been superseded by the decision of the Appellate Court setting aside the preliminary decree. We are further of opinion that it is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and, if such a decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground. Having regard to the decision of the Appellate Court holding that the defendant was not liable to account at all, the Court of execution was certainly right in holding that the final decree could not be executed. Under these circumstances, the order appealed against seems to us to be perfectly correct and the appeal must, therefore, be dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(6) 3 W. R. (P. C.) 11; 10 M. I. A. 203; 19 Eng. Rep. 948.

(7) 3 C. 30; 1 C. L. R. 5.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 129 OF 1909.

May 16, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Newbould.

RAHIMUNNESSA KHATUN AND OTHERS —DEFENDANTS—APPELLANTS

versus

KARAM ALI KHAN—PLAINTIFF—RESPONDENT.

Res judicata—*Rent suit—Defendant pleading rent-free title—Title not found—Subsequent suit on same title for different land, whether barred by* res judicata *—Civil Procedure Code* (*Act V of* 1908), *s.* 11.

In a suit for rent, the defendant set up a rent-free title. Issue was joined upon that plea and the Court found against him. He subsequently brought a title suit against the then plaintiff, relating not to precisely the same land but involving precisely the same question of title:

Held, that the subsequent suit was barred by *res judicata*.

Radhamadhub Holdar v. *Monohar Mukerji*, 15 C. 756; 15 I. A. 97; *Kasiswar Mukhopadhya* v. *Mohendra Nath Bhandari*, 25 C. 136 and *Panchu Mandal* v. *Kanta Saha Chandra*, 12 Ind. Cas. 9; 14 C. L. J. 220, referred to.

Appeal from the decree of the Sub-Judge of Backergunge, dated September 23rd, 1908, confirming that of the Munsif of Barisal, dated July 15th, 1907.

Babus *Jogesh Chandra Roy* and *Prokash Chandra Majumdar*, for the Appellants.

Babu *Manmotha Nath Mukherjee*, for the Respondent.

JUDGMENT.—The suit out of which this second appeal arises relates to certain land comprised within a subordinate rent-free tenure known as Cheragi Ajwat Khan, Cheragi being a Muhammadan term corresponding to the Hindu term Brahmotter. This Cheragi as we shall call it admittedly belonged to one Chand Khan deceased whose descendants are shown in the following table:

CHAND KHAN (deceased)

- Faijuddi (deceased)
- Aijuddi (deceased) = Rahimunnessa Khatun (defendant No. 1)
  - Defendant No. 2 (a son.)
  - Defendant No. 3 (a son.)
  - Defendant No. 4 (a daughter.)
  - Defendant No. 5 (a daughter (now dead.)
- Bilat Ali (originally defendant No. 6 now dead).
- a daughter = Karam Ali (plaintiff).

Chand Khan conveyed the Cheragi by way of gift to his two sons, Faizuddi and Aizuddi, in equal shares, and it was subsequently partitioned between them, the land now in dispute falling within the share allotted to Faizuddi. The two brothers are now both dead. The plaintiff in the suit is Karam Ali, the husband of a daughter of Faizuddi. The original defendants were the widow of Aijuddi, his two sons and two daughters, and Bilat Ali a son of Faijuddi. One of Aijuddi's daughters and Bilat Ali are now dead, their present representatives having been substituted for them on the record.

The case made by the plaintiff is as follows:—

By inheritance and purchase the whole of Faijuddi's share came into the hands of his son Bilat Ali and was sold by the latter to the plaintiff by an instrument

dated the 2nd January 1894. Then Abdul Aziz, who is a stranger to Chand Khan's family and is not a party to this suit, came upon the scene. He is said to be a person of some property and he purchased Faijuddi's share twice over, once by a conveyance, dated the 29th December 1894, executed by Karam Ali and his wife and again by a conveyance, dated the 3rd January 1895, executed by Bilat Ali. Having so secured his title to this share, he then leased the land in dispute to the plaintiff by an instrument described as a Kaemi Karsha *patta*, dated the 8th January 1895, under which the plaintiff now claims to be entitled to that land.

The title set up by the principal defendants, the widow and other heirs of Aijuddi is founded upon an alleged sale of Faijuddi's share in execution of a money-decree. The sale is said to have taken place about the year 1270 (1863) and the purchaser, one Abed Chaudhuri, is said to have sold the share by private sale to Aijuddi in 1273 (1866). In 1274 Aijuddi transferred the share to his wife by way of gift in lieu of dower. By a lease or leases, of the year 1894, of date prior to the purchase of Faijuddi's share by Abdul Aziz, the widow and children of Aijuddi, (who for the sake of brevity may be referred to as the defendants in the present suit) purported to lease certain *bastee* land comprised in the Cheragi, to Abdul Aziz, on the footing that they were entitled to the entirety (or sixteen annas) of the latter.

Both the lower Courts have decided in favour of the plaintiff. This appeal is preferred by the defendants and the only question with which we have to deal is whether the suit is barred by the principle of *res judicata*.

In 1902, the principal defendants or their then representatives brought a suit for rent against Abdul Aziz in respect of the *bastee* land above mentioned. His defence so far as it is necessary to mention it was that the defendants were only entitled to a moiety of the rent, because a moiety of the Cheragi was vested in him under the title now set up. Issue was joined upon that plea and it was found both by the first Court and the Appellate Court, the judgments are dated respectively the 12th January 1903, and the 19th September 1903, that the sale of Faijuddi's share by auction in 1270 was not a merely *benami* or colourable transaction and that the share had been acquired by Aijuddi by purchase from the auction-purchaser, Abed Chaudhuri. This finding disposed of the defence raised by Abdul Aziz and is now relied upon by the appellants as raising an estoppel against the plaintiff in the present suit. No doubt the Appellate Court in the former suit mentions the fact that Abdul Aziz had attorned to the defendants by taking a lease from them, but a perusal of the judgment of the first Court will show that he had denied having entered into possession under the lease. In view of the judgments delivered and of the light which they throw on the pleadings it is abundantly clear that the case was substantially decided on the question of title.

The present suit does not relate to precisely the same land but it involves precisely the same question of title. The plaintiff was not a party to the previous suit but he claims under Abdul Aziz in virtue of the title which the latter set up in that suit. The Munsif mentions in his judgment that Abdul Aziz assisted the plaintiff in the conduct of the case.

The question of *res judicata* was dismissed by the learned Subordinate Judge with the observation that the decision in the rent suit could not operate as *res judicata* in the present suit. We are unable to accept that conclusion as correct.

We suspect that some part of the difficulty commonly felt about the application of the rule of *res judicata* to decisions in rent suits arises from the fact that rent suits were originally tried by the Revenue Courts. The decision of a Revenue Court on a question of title arising in a rent suit could in no case be binding on a Civil Court when the same question afterwards came before it. The reason was that the Revenue Courts were not Courts of concurrent jurisdiction with the Civil Courts and were not competent to adjudicate finally on questions of title [*Khugowlee Singh* v. *Hossein Bux Khan* (1), *Run Bahadoor Singh* v. *Lucho Koer* (2)]. The principle is embodied in section 11 of the present Code. A decision in a suit or on a

(1) 15 W. R. (P. C.) 30; 7 B. L. R. 673.
(2) 12 I. A. 23; 11 C. 301.

given issue cannot operate as *res judicata* in a subsequent suit unless the decision is that of "a Court competent to try such subsequent suit or the 'suit in which such issue has been subsequently raised.'" Now that rent suits are triable by the ordinary Civil Courts, the question whether a decision in such a suit does or does not operate as an estoppel cannot be so summarily dealt with and may often require careful examination with reference not only to the principle already adverted but also to other principles laid down in section 11.

In the case before us, we are of opinion that the plea of *res judicata* should prevail. As in this suit, the Court of original jurisdiction in the former suit was the Court of a Munsif. We have shown that the same question which arises here was decided in the former suit and the fact that the plaintiff now is not Abdul Aziz but a tenant of his makes no difference. As we have said, the plaintiff claims under Abdul Aziz and he is bound by the decision in the former suit just as much as Abdul Aziz.

The case appears to us to belong to the class of cases of which *Radhamadhub Holdar* v. *Monohur Mukerji* (3), *Kasiswar Mukhopadhya* v. *Mohendra Nath Bhandari* (4) and *Panchu Mandal* v. *Chandra Kant Saha* (5) are examples and, in our view, as we have said the question of title which arises is *res judicata*.

The result is that the appeal must be allowed and the suit dismissed with costs in all Courts.

Appeal allowed.

(3) 15 C. 756; 15 I. A. 97.
(4) 25 C. 136.
(5) 12 Ind. Cas. 9; 14 C. L. J. 220.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 4 OF 1913.
April 19, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.
PANCHAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
HAZARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Inheritance—Thakurs — Illegitimate son—Persons living as husband and wife—Presumption as to legitimacy—Burden of proof.

When two persons live together as husband and wife apparently any one alleging that a child born to such persons is illegitimate must prove it, but when it is admitted that the woman was the wife of another person and was turned out by him on account of adultery the burden is shifted on to the other side.

The illegitimate son of a Thakur cannot inherit as against the legitimate nephews of the deceased.

Letter Patent Appeal against the decision of Mr. Justice Rafique in S. A. No. 534 of 1912, dated the 30th of November 1912.

Mr. *Harendra Krishna Mukerji*, for the Appellants.

Mr. *Hamilton* (with him Mr. *Haribans Sahai*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that the alleged transfer of certain share of *zemindari* was invalid as against them. The facts are shortly as follows:—

Daulat and Punta were uterine brothers living separately and owning separate property. Plaintiff No. 1 is a son of Punta and plaintiff No. 2 is a grandson of Punta. The defendants Nos. 1 and 2 are the sons of Daulat by one *Musammat* Rani Dulaya. The defendant No. 3 is the lawfully wedded wife of Daulat. During his life-time Daulat made a deed of gift in favour of the defendants Nos. 1 and 2 describing himself as a "Danji Thakur", and describing the mother of the defendants Nos. 1 and 2 as his kept woman. After the death of Daulat, the married wife of Daulat made a statement in the Revenue Court setting out that her husband Daulat in his life time had lived with *Musammat* Rani Dulaya, that he did this with the permission of defendant No. 3 who at that time had no children by her husband. She then went on to say that she relinquished her rights in favour of the defendants Nos. 1 and 2, and that she did not wish the plaintiffs to have any share in the property. Mutation of names followed the lines of this statement, and it is in respect of this record that the plaintiffs come into Court seeking the declaration already mentioned.

The Court of first instance found that the defendants Nos. 1 and 2 were the

illegitimate offspring of the connection between Daulat and *Musammat* Rani Dulaya, and on this finding decreed the plaintiffs' suit.

The lower Appellate Court held that it was for the plaintiffs to show that the connection between Daulat and Rani Dulaya was unlawful and that they had failed to do so, and that accordingly the plaintiffs' case failed.

On second appeal to this Court the learned Judge who heard it evidently thought that the real issue in the case was whether or not a custom prevailed in the family which entitled Daulat to legally take to wife *Musammat* Rani Dulaya in such a way that the offspring would be legitimate. The learned Judge of this Court evidently intended to find that the lower Appellate Court, (if it could be said to have arrived at a conclusion at all as to the existence of such a custom), had arrived at that conclusion upon wholly insufficient evidence.

It would appear from the finding of the first Court, (which has not in any way been departed from by the lower Appellate Court on the general facts), that this *Musammat* Rani Dulaya was the wife of one Sarain, and that she had been put away by him on account of her adulterous intrigue with Daulat. We have had the evidence before us. We have no hesitation whatever in saying that the lower Appellate Court threw the onus on the wrong party and arrived at a conclusion in favour of the appellants upon wholly insufficient evidence. It is true that when persons are living together apparently as husband and wife, the onus lies upon any person alleging illegitimacy to prove it, but the moment it was admitted (as it was in the present case) that *Musammat* Rani Dulaya was the wife of Sarain, the plaintiffs had done all that was necessary on their part, unless the defendants could establish a custom which allowed a man to take as wife a woman who was the wife of another man and who had been put out on account of her adultery. In our opinion (as we think was the opinion of the learned Judge of this Court) the defendants wholly failed to prove any such custom.

It was next alleged that even assuming that the defendants Nos. 1 and 2 were illegitimate, they as the illegitimate sons of Daulat were entitled to succeed to his property against the legitimate sons of Punta. The learned Vakil on behalf of the appellants admitted that he could only substantiate this proposition if it was found that Daulat was a Sudra. The first Court found he was not a Sudra. In order to prevent putting the parties to the unnecessary expense of a reference to the Court below, we allowed the learned Vakil to refer us to the evidence on this point and we have considered that evidence. One of the defendants' own witnesses admitted that the Danjis were Thakurs. Several witnesses for the plaintiffs state that they were Thakurs. The Books on Caste, to which we have been referred, all show that this community have represented themselves as Thakurs, and finally we have the all important piece of evidence that Daulat himself when he made the deed of gift in favour of defendants Nos. 1 and 2 described himself as a Thakur. As against this we have the vague statement of some witnesses for the defence who said that Danjis were not Thakurs but not one of them was asked or stated that the Danjis were Sudras. Upon this evidence it is impossible to find that Daulat was a Sudra; and if Daulat was not a Sudra, his illegitimate issue cannot inherit as against the legitimate issue of Punta.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4119 OF 1910.

April 22, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Roy.

JASIMUDDIN SHEIK—DEFENDANT—APPELLANT

versus

BENI MADHAB DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Land held as raiyat *under* utbandi *for six years, then as* ijaradar *for nine years, then as* raiyat *for eleven years—Acquisition of right of occupancy—Right of occupancy in abeyance during*

JASIMUDDIN SHEIK v. BENI MADHAB DAS.

ijara—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 22, *cl.* (3).

A person held a certain piece of land as a *raiyat* under the custom of *utbandi* from 1884 to 1889. From 1890 to 1898 he was the *ijaradar* of a considerable area which included the piece of land held by him as *raiyat*. During the *ijara* he continued to cultivate the land as before. After the *ijara* he held and cultivated the land till 1908:

Held, that there had been occupation as *raiyat* of the same land for 12 years continuously within the meaning of section 180 of the Bengal Tenancy Act and that a right of occupancy had been acquired in the land; and that during the term of the *ijara* the active operation of the possession as a means of acquiring the right of occupancy was suspended and remained in abeyance under section 22, clause (3) of the Act.

Appeal from the decree of the District Judge of Nadia, dated September 9th, 1910, confirming that of the Munsif of Ranaghat, dated April 19th, 1910.

Moulvi *Muhammad Mustafa Khan*, for the Appellant.

Babus *Hara Prosad Chatterjee* and *Chandra Kanta Ghose*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The appellant is a defendant against whom a decree has been passed declaring the plaintiffs' *jamai* title to the land in suit, and ordering that they do recover possession against the defendant. It is the plaintiffs' case that they are *raiyats* who have cultivated the land from 1884 to 1908 and that by virtue of the interest so acquired by them they are entitled to be put into possession of the land from which they have been wrongly ousted by the defendant. The District Judge of Nadia has by his decree confirmed the decision of the Munsif, and it is from this decree that the present appeal has been preferred. It has been contended before us that notwithstanding the plaintiffs' long cultivation of the land, they have not acquired either occupancy or non-occupancy rights. To follow this contention it is necessary to narrate briefly the dealings with this land. It is a part of a *chur* that formed many years ago. In 1884 it came into possession of the plaintiffs' ancestors as *raiyats* and from then till 1908 it has continuously remained in the possession of the plaintiffs and their ancestors by whom it has throughout been cultivated. This possession would ordinarily clothe the plaintiffs with a right of occupancy but the defendants maintain that this is not so as the land is *chur* held under the custom of *utbandi* and from 1890 to 1898 it was held by the plaintiffs' ancestors as *ijaradars*. This, it is urged, has brought into play sections 180 and 22 (3) of the Bengal Tenancy Act, to the detriment of the plaintiffs. But I do not agree. True, that from 1890 to 1898 the plaintiffs' ancestors were *ijaradars* of a considerable area which included the small parcel of land now in dispute, but notwithstanding this they still continued to hold as *raiyats* as they had done before without any break in the occupation or change of its character. The utmost that can be said is that during the currency of the *ijara* the active operation of the possession as a means of acquiring the right of occupancy was suspended, and remained in abeyance, but there was no interruption in the continuity of this possession by the possession of any other *raiyat* [*Mokoondey Lall Doobey* v. *Crowdy* (1), *Sari* v. *Punchanun Roy* (2), *Lal Bahadoor Singh* v. *Solano* (3).]

Section 180 of the Bengal Tenancy Act provides that a *raiyat* who in any part of the country where the custom of *utbandi* prevails, holds land ordinarily let under that custom and for the time being let under that custom, or who holds land of the kind known as *chur* or *diara* shall not acquire a right of occupancy until he has held the land in question for twelve continuous years. But this the plaintiffs have done in the view I have expressed, though for eight years there was a suspension of effective possession and that period is excluded from computation.

I would, therefore, confirm the decree of the lower Appellate Court with costs.

ROY, J.—I concur. The plaintiffs were *raiyats* from 1884 to 1889. They became *ijaradars* in 1890 but they still continued to cultivate the lands as before. They then preserved their status as *raiyats*. Clause 3 of section 22 of the Bengal Tenancy Act does not bar this continuance of the *raiyati* right and it certainly does not say that the *raiyat* by becoming an *ijaradar* of the place forfeits his rights as a *raiyat* of the lands he was occupying. It only provides against the acquisition of the right of

(1) 17 W. R. 274; 8 B. L. R. App. 95.
(2) 25 W. R. 503.
(3) 10 C. 45.

occupancy during the term of the *ijara*. In the case of *Maseyk* v. *Bhagabati Burmanya* (4) Sir Comer Petheram takes the same view. His Lordship observed: "The provisions of section 22 (3) do not say that he shall lose all his rights as a non-occupancy *raiyat* or as a tenant." The case in the Bengal Law Report quoted by my Lord is exactly on all fours with the present and although that were a case under the old rent law, there is nothing in the present law for holding otherwise. The lands are *utbandi* but there has been occupation as a *raiyat* of the same lands for twelve continuous years and so the plaintiffs have acquired a right of occupancy.

Decree confirmed.

(4) 18 C. 121.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1072 OF 1912.
April 16, 1913.
Present:—Mr. Justice Ryves and
Mr. Justice Lyle.
HAZARI LAL—PLAINTIFF—APPELLANT
versus
TULSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (*XXVI of* 1881), *ss.* 8, 37—*Promissory-note—Liability of the maker to the holder for consideration.*

The maker of a promissory-note is liable to the holder of it for consideration even though the instrument originally was made without consideration.

Second appeal from the decision of the District Judge of Meerut, dated the 15th of May 1912.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

Dr. *S. C. Banerji* (with him Mr. *Durga Charan Banerji*), for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

Tulshi Ram made a promissory-note in favour of Sagar Mal-Chajjumal on the 30th of August 1908 promising to pay them on demand Rs. 500 with interest at 12 per cent. per annum for value received.

On the 15th of June 1910, Sagar Mal and Chajjumal sold this note to Hazari Lal, the plaintiff by a registered sale-deed for Rs. 575. Hazari Lal demanded payment of it from Tulshi Ram on more than one occasion, and sent him a registered notice on the 29th of July 1911, which was disregarded. He brought this suit to recover the amount due on the note on the 30th of August 1911, from Tulshi Ram Chajjumal and Sagar Mal were made *pro forma* defendants. Tulshi Ram in his written statement stated: "As a matter of fact the note of hand in suit was not executed on receipt of money in cash as consideration. The contesting defendant and defendants Nos. 2 and 3 entered into an agreement for purchasing and selling grain pits in the form of a *badni* contract. Accordingly, in compliance with the wishes of defendants Nos. 2 and 3 the note of hand in suit was executed in the beginning for their satisfaction. In the transaction relating to grain pits, a considerable amount of profits was on the date fixed due to the contesting defendant against defendants Nos. 2 and 3 on account of the prices having risen. This gave rise to serious disputes in the market of the Hapur Mandaru and several *Punchayats* were held. Ultimately, after an amicable settlement in respect of the profits of the contesting defendant, defendant No. 3 executed a note of hand for Rs. 150 in favour of the contesting defendant, on 13th of *Bhadon Badi Sambat* 1968," corresponding to the 22nd of August 1911.

The Munsif after hearing the evidence of both parties and examining the account books of Sagar Mal-Chajjumal, which were produced in evidence, found that the note had been given as it purported for a "cash loan" and that it had been sold to Hazari Lal, the plaintiff, for the consideration stated by him and decreed the suit. On appeal the learned District Judge did not disturb this latter finding. He thought it necessary to take further evidence as to the relations between Tulshi Ram and the firm Sagar Mal-Chajjumal. He took a great deal of trouble in examining their books and taking further evidence which, however, seems to us to have been altogether irrelevant. The finding at which he arrived seems to us self-contradictory and contrary to the case set up by Tulshi Ram himself.

He says "I find on the first point that the pro-note was executed merely as security On the second point I find that when ac-

counts were ripe for settlement by the 9th October, Tulshi Ram was a winner, and when the *Katik* accounts were ripe for settlement he was a winner of Rs 166.10.3, even supposing that Chajju was not cheating him over the *Bhadon* settlement.

A third question remains for consideration and that is plaintiff's position. On the 29th July 1911, over a year after he bought the pro-note, he gave Tulshi Ram a registered notice. Tulshi Ram went to Chajjumal and got him to give him, on the 22nd August 1911, a pro-note for Rs. 150 which settled the account, Chajju having sold the pro-note for Rs. 500 to plaintiff, could afford to do this. Tulshi Ram said in the lower Court that they (Chajju and Sagar Mal) could not then find the pro-note. This is a weak explanation of Tulshi Ram's failure to get back the pro-note in suit or to get a distinct reference to the fact of its satisfaction in the pro-note for Rs. 150 which he was getting. On the 30th August 1911, the plaintiff brought the present suit. The pro-note was satisfied as I have shown when the grain transactions left Tulshi Ram a winner in November 1903. The plaintiff was buying waste paper, and as paragraph No. 2 of the plaint suggests at its par value."

Tulshi Ram was entering into a speculation in grain with the firm of Chajjumal-Sagar Mal, and this firm apparently declined to do business unless they received security as is stated in the 8th paragraph of their written statement "in the beginning for their satisfaction." Assuming this to be the case this security seems to have been given not to cover one particular transaction, but generally for so long as their relations continued. Does the learned District Judge mean in the first part of his finding that as early as the 9th of October 1903 the amount of the bond was really re-paid and that nothing was due under it? If he does then what does he mean by saying that on the 22nd of August 1911 Tulshi Ram got Chajjumal to give him a pro-note for Rs. 150 which settled the account.

But, in our opinion, it is immaterial which statement represents his real finding because on the facts found it seems to us that the plaintiff must succeed. Under section 37 of the Negotiable Instruments Act the maker of the promissory-note is liable to Hazari Lal who is a "holder" within the meaning of section 8 of the Act. He paid consideration for the note and we think he can recover on it even if it was originally made by Tulshi Ram without consideration. But we think on another ground also he is entitled to recover, and that is on the principle that whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself.

If nothing was due on the pro-note on the 9th October 1908 Tulshi Ram should have got it back. His negligence in not getting it back enabled Sagar Mal-Chajjumal to sell it for a good consideration to the plaintiff, who had no notice of what had passed between Tulshi Ram and Chajjumal and Sagar Mal. We, therefore, set aside the decree of the lower Appellate Court and restore that of the Munsif with costs which in this Court will include fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 487 OF 1912.

March 21, 1913.

Present:—Mr. Justice Kensington.

Lala NARPAT RAI—PLAINTIFF—PETITIONER

versus

HARI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee—Joint Hindu family—Family disputes between mortgagee's father and his sons—Arbitration—Award not touching the mortgaged property—Mortgagor paying off mortgage debt to the sons—Re-payment ignored by mortgagee—No effect of award upon the title of mortgagee to recover the whole rent due in respect of the mortgaged property.

Plaintiff was the mortgagee of a house. *H.*, a near relation of the mortgagor rented the house from the mortgagee. Family disputes arose between the plaintiff and his sons, members of a joint Hindu family, there was a reference to arbitration and an award between the parties to the dispute. The mortgagor paid off the mortgage-debt to plaintiff's sons. Plaintiff sued *H.* for rent:

Held, (1) that, as the particular house was not definitely awarded to plaintiff's sons by the arbitration proceedings, plaintiff was entitled to ignore the alleged re-payment of the mortgage-money to any one other than himself;

(2) that there was no justification for restricting plaintiff's decree to ⅓th of the rent due merely because the arbitration award covered the bulk of the estate then in dispute.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 9th February 1912, decreeing plaintiff's claim in part.

Lala *Hukam Chand*, for the Petitioner.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—The circumstances of this petty dispute, so far as the plaintiff and his sons are concerned, have been explained in my order on a somewhat similar case, *Narpat Rai* v. *Nausharia Mal* (1).

The plaintiff was here admittedly sole mortgagee of the house concerned, under a deed dated 25th May 1902. The defendant, Hari Ram, who rented the house from him at Rs. 2 a month, was the brother-in-law of the mortgagor.

On the 16th May 1911, the Small Cause Court gave plaintiff a decree for Rs. 161, arrears of rent to 31st May 1909, against Hari Ram. The plaintiff then instituted this further suit for subsequent rent as follows:—

	Rs.	as.	ps.
From 1st June 1909 to 12th August 1911 at Rs. 2 monthly	53	1	0
From 13th August 1911 to 23rd October 1911 at Rs. 4 monthly	9	5	0
Cost of a notice	0	3	6
TOTAL	62	9	6

The lower Court has given plaintiff a decree for 1/6th of Rs. 53-13-6 calculating the rent up to the 18th August 1911 on which date Hari Ram is said to have paid off the mortgage-debt to plaintiff's sons.

Neither side has produced any oral evidence and I cannot find that the defendant was entitled to pay off the mortgage to plaintiff's sons even with notice to the plaintiff. This particular house does not appear to have been definitely awarded to plaintiff's sons by the arbitration proceedings referred to in the previous case and plaintiff was entitled to ignore the alleged re-payment of the mortgage money to any one other than the mortgagor. There is also no justification for restricting plaintiff's decree to 1/6th of the rent due merely because of the arbitration award covering the bulk of the estate then in dispute. On the other hand I consider that as in the previous case plaintiff is not entitled to an enhanced rate of rent as the trouble was all caused by his dispute with his sons.

The revision is allowed, and the decree of the Small Cause Court in plaintiff's favour, as against the defendant Hari Ram is altered to one for rent at Rs. 2 a month for the whole period 1st June 1909 to 23rd October 1911, total Rs. 57-8 0 with costs thereon in the Small Cause Court and in this Court.

It will be understood that this decree decides no question of plaintiff's title as mortgagee after the 23rd October 1911, but it is to be hoped that there will be no further litigation about this now that the main disputes between plaintiff and his sons have been settled.

(1) 18 Ind. Cas. 592; 17 P. W. R. 1913.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 434 OF 1911.

April 23, 1913.

Present:—Mr. Justice Banerjee and Mr. Justice Ryves.

RAO RAGHUNATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAZIR BEGAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law--Mortgage by father—Legal necessity for contracting debt at high rate of interest—Burden of proof on mortgagee.

It is the duty of a mortgagee to prove necessity for the loan at the high rate of interest agreed on by the manager of a Hindu family.

Nand Ram v. *Bhupal Singh*, 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294, *Chandradeo Singh* v. *Mata Prashad* 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, followed.

First appeal from the decision of the Subordinate Judge of Agra, dated 30th of June 1911.

Mr. *Benode Behari*, for the Appellants.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Ghulam Muitaba*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff who is the assignee of a mortgage bond dated the 7th of November 1884 for enforcement of the

bond by sale of the mortgaged property. The bond was executed by Rao Narain Singh in favour of Mulchand to secure a principal sum of Rs. 398. The time fixed for re-payment was one year. Interest was agreed to be paid at the rate of Rs. 2-8-0 per cent. per month compound interest, with half yearly rests, and it was provided that after the expiry of a year from the date of the bond compound interest would be charged at the rate of Rs. 3-2 per cent. per mensem. It is alleged that some three lakhs or three and half lakhs of rupees are due on the bond. But the plaintiff seeks to recover Rs. 20,000 only. The plaintiff purchased the debt for an ostensible consideration of Rs. 6,500 and there can be no doubt that she did so as a speculation. The property comprised in the mortgage consisted of shares in four villages, one of which Jagner was sold by auction in execution of a decree obtained on a prior mortgage of 1876 and was purchased by one Pirthi Singh who stated after his purchase that he had made the purchase on behalf of two ladies, the wives respectively of the defendant Raghunath Singh and his brother Hanwant Singh. He also executed a sale-deed in favour of those ladies. They have mortgaged a part of that property to one of the defendants to suit. The defendants consist of the sons and grandsons of Rao Narain Singh, the mortgagor, the two ladies to whom we have referred above, and the transferee *i.e.*, the mortgagee from them. The defence of the sons and grandsons was that there was no legal necessity either for the loan or for the exorbitant rate of interest agreed to be paid such as would render the family property liable for it. They also pleaded part payment of the mortgage money. The two ladies who purchased the village Jagner contended that as they had purchased it in satisfaction of a prior mortgage, the plaintiff was not entitled to sell that village in enforcement of his mortgage without paying to them (the ladies) the amount of the prior mortgage. The Court below has overruled these pleas and has decreed the plaintiff's claim. The first contention raised in this appeal is that the plaintiff has failed to prove the existence of valid necessity both for borrowing the money secured by the mortgage and for the contract to pay the high rate of interest agreed upon. As regards the principal amount borrowed the bond itself recites that it was taken for the purpose of paying Government revenue. Two witnesses were examined and both of them support the plaintiff's allegation that the money was borrowed for payment of Government revenue and that it was deposited in payment of arrears of Government revenue due at the time. The learned Subordinate Judge has believed this evidence and we see no reason to differ from the conclusion at which he arrived. He has given, in our opinion, valid and sufficient reasons for his conclusion and we agree with those reasons.

The next question is whether there was any necessity for charging the family property for a loan taken on such onerous terms as the terms of this loan. The rate of interest, as we have stated above, was Rs. 2-8 per cent. per mensem *i.e.*, Rs. 30 per cent per annum, compound interest with half yearly rests. It was also agreed that after the expiry of one year the interest would be raised to Rs. 3-2 per cent. per mensem *i.e.*, Rs. 37-8 per cent. per annum, compound interest. According to the ruling of the majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (1) the burden lay on the plaintiff to prove the existence of a valid family necessity, and in the later case of *Nand Ram* v. *Bhupal Singh* (2) it was held that it was also the duty of the plaintiff mortgagee to prove that there was necessity for raising the loan at the high rate of interest agreed on by the manager of the family. There can be no doubt that the rate of interest in the present case was enormously high, so much so that the allegation is that the debt of Rs. 398 has now swelled to 3 or $3\frac{1}{2}$ lakhs. There is not a particle of evidence to prove that there was any necessity for borrowing money at such an exorbitant rate of interest. The security given for the small loan of Rs. 398 was amply sufficient; four villages being mortgaged for the loan. Therefore on the face of the transaction it is clear that there was no necessity for borrowing money at such a high rate of interest. No evidence has been given on the point on behalf of the plaintiff, and it has not been shown that Rao Narain Singh could not raise a loan of Rs. 398 at

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 233.
(2) 13 Ind. Cas. 5; 8 A. L. J. 1294; 34 A. 123.

a lower rate of interest. As it has not been proved that there was any necessity for raising the loan at such a high rate of interest, the family property cannot be held liable for interest at this exorbitant rate. We have a discretion in the matter, and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security given to the mortgagee and also of the fact that unusually long delay has been made in bringing the suit we think that simple interest at the rate of 12 per cent. per annum would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the principal amount of the loan. In this respect we think that the decree of the Court below is erroneous.

The third point raised relates to the village Jagner. In regard to its purchase the allegation of the plaintiff is that the purchase was in reality made by Raghunath Singh and Hanwant Singh in the names of their respective wives and that the purchase-money was paid by them. On the other hand it was asserted on behalf of the ladies that it was they who provided the purchase-money, having received it from the Raja of Mahiyar. The learned Subordinate Judge has, in our opinion, given valid reasons for disbelieving the defendant's statement on the point. It appears that shortly before the purchase Raghunath Singh and Hanwant Singh got Rs 3,000 from *Musammat* Guman Kuar who had sold some property in regard to which Reghunath Singh and Hanwant Singh were reversioners. The purchase at auction was made by Pirthi Singh the general attorney of *Musammat* Guman Kuar. Shortly after the auction-sale, he stated that he had made the purchase on behalf of the two ladies. Apparently, the purchase-money was paid by him out of the Rs. 3,000 payable by *Musammat* Guman Kuar to Raghunath Singh and Hanwant Singh. Under these circumstances, in the absence of clear evidence to show that the purchase-money was paid by the ladies themselves, the Court below was fully justified in holding that the purchase was in fact made not by the ladies but by their husbands. This being so, the plaintiff is entitled to enforce the mortgage against the village Jagner and the transferee from the ladies is as much bound to satisfy the mortgage-debt as the ladies themselves. The result is that we allow the appeal in part and vary the decree of the Court below to this extent that we allow interest on Rs. 398, the principal amount borrowed, at the rate of 12 per cent. per annum simple interest from the date of the mortgage to the date we fix for payment, and thereafter at the rate of 6 per cent. per annum. We fix the 1st of October 1913 as the date on or before which the mortgage-money should be paid. The parties will pay and receive costs in both Courts in proportion to failure and success. Costs in this Court include fees on the higher scale. In other respects we affirm the decree of the Court below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 751 OF 1910.

April 3, 1913.

Present:—Justice Sir Frederick Robertson, KT.

SHER AND OTHERS—DEFENDANTS—APPELLANTS

versus

DULLAH—PLAINTIFF—RESPONDENT.

Shamilat, *rights in—Alienation of* khewat *rights—General principle as to passing of share in* shamilat.

In general when an alienation of *khewat* rights is effected and there is nothing to show that the alienor had any intention of reserving the *shamilat* rights, but his apparent intention was to place the alienee in the same position as himself, the natural conclusion is that *shamilat* rights pass as well. Where the sale is simply to an outsider or a money-lender, and there is no clause in the deed specifically stating that *shamilat* rights have passed, the position is, of course, quite different and only what is specifically stated in the deed as having passed may save in any particular case, be very reasonably held to be the limit of what has passed.

Second appeal from the decree of the Divisional Judge, Shahpur Division, dated the 23rd February 1909, affirming that of the Munsif, 2nd class, Mianwali, dated the 23rd December 1907, decreeing the claim.

Mr. *Nand Lal*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—The question in this case is whether a certain gift of land made by one Jinda to his son-in-law, Ali Muhammad, included a share in the *shamilat* or not,

SHER *v.* DULLAH.

Ali Muhammad is dead and the land is now held by Sher and others sons of the daughter of Jinda. Now in regard to this question of a share of *shamilat* there is undoubtedly a conflict of opinion in this Court. There are judgments which say, and I am not prepared to differ from them, that it cannot be affirmatively asserted as a matter of course that the sale of a piece of proprietary land in a village necessarily carries a share in the *shamilat*. On the other hand, there is a judgment of a Division Bench of this Court, No. 10 of 1894, which, without going so far as to say that in all cases it must be assumed that a share in the *shamilat* passes with a share in the *khewat* rights, held that a person having become a *khewatdar* by virtue of a deed was entitled to share, under the terms of the village administration paper, in the *shamilat*. With all due deference to any opinion which may have been expressed in the various judgments, none of which, so far as I know, have discussed and differentiated from this one, it appears to me that in general when an alienation of *khewat* rights is made and there is nothing to show that the alienor had any intention of reserving the *shamilat* rights, but that the intention which is apparent is to place the alienee, in reference to the land gifted, in the same position as the alienor, the natural conclusion is that *shamilat* rights pass as well where the sale is simply to an outsider or a money-lender and there is no clause in the deed specifically stating that rights have passed, the position is, of course, quite different and only what is specifically stated in the deed as having passed may, save in any particular case, be very reasonably held to be the limit of what has passed. Here, however, the case is quite different. The position is of a father wishing to benefit his daughter and her descendants. There is no reason whatever to suppose that in putting his son-in-law in the position of a *khewatdar* the donor had the slightest intention of reserving the *shamilat* rights for the benefit of his nephews or collaterals. It is true that the *shamilat* rights are not mentioned in the deed, but it is also shown upon the record that at the moment *shamilat* rights were not considered of any importance, and it was then apparently very unlikely that any division of *shamilat* would take place at all. But on looking at the *wajib-ul-arz* and the revenue papers we find a distinct statement as to who are entitled and who are not entitled to share in the *shamilat* in the village. There is a distinct reservation that *khewatdars* are entitled and that *malikan-i-kabza* are not entitled. Now within two years of the making of this gift settlement operations were undertaken. Jinda was still alive, and it is perfectly clear that it would have been open to him to have had Ali Muhammad entered as *malik-i-kabza* only had it been his intention to reserve the *shamilat* rights either to himself or to his successors. On the contrary, we find that the donee is entered as a full *khewatdar*.

The lower Appellate Court has remarked that "the deed gave the area of the holding transferred as 498 *kanals* 7 *marlas* of which 244 *kanals* were gifted to Ali Muhammad. At the settlement, two years later the land was found to measure 73 *ghumauns* or 584 *kanals*. The balance of 95 *kanals* was not divided between Ali Muhammad and Dullah but between Jinda and Dullah. This shows clearly that the document was strictly interpreted to mean that Ali Muhammad was only to get what the deed said he was to get. On Jinda's death his half of the 95 *kanals* descended to Dullah." Now this may be so, but there is nothing on the record to support this statement and it appears to be made under a misapprehension. The 95 *kanals* were not apparently part of this holding at all, on the contrary they appear not to have been held by Jinda and Dullah alone but to have been held by Jinda Dullah and certain other co-sharers, the ownership of that *khata* being different from the ownership of the *khata* one-half of which was gifted to Ali Muhammad and in respect of which Ali Muhammad was entered in the revenue papers as occupying exactly the same position as Dullah. Dullah has been allowed a share in the *shamilat* in respect of this holding and I am unable to see any reason why the descendants of Ali Muhammad should not also share in the *shamilat*.

I think it is quite clear that, as a matter of fact, Jinda intended to transfer the whole of his rights in the *khata* in question, including all his appurtenant rights, to his son-in-law for the benefit of his daughter's sons and that, seeing that as far back as 1878 during the life of Jinda the donee was

entered with his full knowledge and consent as full *khewatdar* and not as a *malik-i-kabza*, Ali Muhammad, and now his descendants, are entitled to share in the *shamilat* which has become valuable only quite lately. I accordingly accept the appeal and decree that the gift by Jinda to Ali Muhammad carried with it a share in the *shamilat deh* to the extent to which his *khewat* holding entitled the donee. Costs against respondents throughout.

Decree accordingly.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1059 OF 1912.
April 30, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Lyle.
WAZIR KHAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
RAMPHAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IX of 1882), s. 59—Execution of mortgage, proof of—Attestation.

Where one of the attesting witnesses to a mortgage-deed is dead and the other denies all knowledge of it and there is no other evidence to show that the document was executed in the presence of any of the witnesses who signed it, due execution of the document is not proved.

Second appeal from the decision of the District Judge of Mainpuri, dated the 4th May 1912.

Mr. *Satya Narain*, for the Appellants.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage. One of the questions raised in the present appeal is that the bond sued on was not duly executed in pursuance of section 59 of the Transfer of Property Act. That section provides that a mortgage must be signed by the mortgagor and attested by at least two witnesses. Their Lordships of the Privy Council have recently ruled that attesting witnesses mean witnesses who actually see the mortgagor sign the document and who then subscribe their names to the document as witnesses. In the present case neither of the attesting witnesses was called in the first instance. One is alleged to be dead. The other attesting witness was called after a remand from this Court and he denied all the knowledge of the

document. The plaintiff had then to fall back upon the evidence of a witness named Pim Raj. We have carefully gone through the evidence of this witness, and it is quite clear that he nowhere states that the mortgage was executed in the presence of any witnesses who signed the document. He says that the document was executed in his presence but that he was not a marginal witness and it is admitted that his name does not appear on the mortgage-deed. This being so, it is quite clear that the plaintiff failed to prove that the mortgage was executed and attested in accordance with the provisions of section 59 of the Transfer of Property Act. Dr. Satish Chunder Banerji on behalf of the plaintiff-respondent asks that the case may now be sent back for further evidence. We do not think that this is a case in which we ought to remand the case again. The case was already remanded once for want of proof by the plaintiff. Furthermore, the original advance was the petty sum of Rs. 99 and the present claim has swollen to Rs. 1,005 as the result of a very high rate of interest and delay in suing. We may further point out that as the evidence stands on the record the plaintiff did not even prove that the mortgagor admitted execution of the bond in the presence of the persons who afterwards signed their names as witnesses. So it can hardly be said that he was misled by the view previously taken by this Court as to the provisions of section 59. The result is that we allow the appeal, set aside the decrees of both the Courts below, and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL JURISDICTION.
May 15, 1913.
Present:—Mr. Justice Fletcher.
A. E. SALEJI AND OTHERS—PLAINTIFFS
versus
AHMED MUSAJI SALEJI AND OTHERS—DEFENDANTS.

Commission—Examination of witness—Discretion of Court—Defendant applying to have another defendant examined on commission—Application for issue

A. E. SALEJI *v.* AHMED MUSAJI SALEJI.

commission when to be granted—Civil Procedure Code (Act V of 1908), O. XXVI, r. 4.

The issue of a commission to examine a witness or witnesses in a suit is a matter of judicial discretion.

An application for the examination of a witness by commission will not be granted unless the Court is satisfied, *first*, that the application is made *bona fide*; *secondly*, that the issue in respect of which the evidence is required is one which the Court ought to try; *thirdly*, that the witness to be examined would give evidence material to the issue, and, *fourthly* there are some good reasons why the witness cannot be examined in Court.

This was a suit for the management and administration of the *wakf* properties left by one Ebrahim Solomon Saleji and Musaji Ahmed Saleji. There were several defendants in the suit, of whom two, defendants Nos. 2 and 28 reside at Rangoon. They did not file any written statement.

An application has now been made on behalf of the first defendant for an order that the defendants Nos. 2 and 28, Mahomed Musaji Saleji and Ismail Ahmed Mahemedi who are at Rangoon, be examined on commission. The plaintiff and nineteen of the defendants opposed the application.

Messrs. *Jackson* and *St. John Stephen*, for the Applicant, Defendant No. 1.

Mr. *B. C. Mitter*, for the Plaintiff and Mr. *C. C. Ghose*, for the Opposing Defendant, *Contra*.

JUDGMENT.—This is an application to examine two defendants, defendants Nos. 2 and 28, upon commission. The application is made by the first defendant who has appeared in the suit. The defendants Nos. 2 and 28 have not appeared in the suit and they both reside and carry on business at Rangoon. It seems to me to be quite clear from the cases that have been cited on both sides that it is a matter of judicial discretion as to the issue of a commission to examine a witness or witnesses in the suit. I do not agree with Mr. Jackson that this is really an application to examine a defendant in the suit. It is quite true that the two witnesses who are asked to be examined on commission are defendants to the suit but they have filed no written statements and are not defending the suit. The application, I think, therefore, must be treated as if it were an application by the first defendant to examine two defendants without having reference to the fact that they are defendants who are not contesting the suit. It seems to me that the law or rather what can be deduced from the authorities is very conveniently laid down in the Annual Practice of the present year, page 614, where it is stated that the application will not be granted unless the Court is satisfied *first* that the application is made *bona fide*, *secondly* that the issue in respect of which the evidence is required is one which the Court ought to try, *thirdly* that the witnesses to be examined would give evidence material to the issue, and *fourthly*, there are some good reasons why they cannot be examined here. On the first of those grounds, Mr. Jackson admits that his affidavit does not say that his application is made *bona fide* and not for the purpose of delay but he states that a requisition has been assented to by the other side, postponing the trial of the case for one month. On the other hand, the plaintiffs and the opposing defendants have sworn that the present application is made *mala fide*. It seems to me so far from being satisfied that the present application is made *bona fide* and not for the purpose of delay, that no sufficient explanation has been given why the first defendant has waited until the eve of the case coming on for trial before he applied for the present commission. The next point is as to what these witnesses are going to be called to prove. That is stated in the 7th paragraph of the affidavit which has been filed in support of the application where the applicant states that "I say that both the second and the twenty-eighth defendants, who have not entered appearance in the suit, would be material witnesses on my behalf for the purpose of this suit, and they would be able to depose to the several contentious facts and other issues raised in my written statement." It seems to me that this is too much a general statement as to what these two witnesses are going to be examined on. If you accept the statement in its broadest terms, it means that everything in the suit is going to be proved by these two witnesses. Moreover, there is considerable doubt in this case as to whether these two witnesses will not come. At least they have made no affidavit themselves and Counsel depends on two telegrams which are annexed to the affidavit of the first defendant. It seems to me that on those grounds this application ought not to be granted. The present application must,

therefore, be dismissed and dismissed with costs.

Application dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1114 OF 1912.

April 16, 1913.

Present:—Mr. Justice Ryves and Mr. Justice Lyle.

ACHHAIBAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM SARUP SAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Satisfaction of decree certified by manager of joint Hindu family—Whether binding on other members of the family—Hindu Law—Power of manager.

The managing member of a joint Hindu family can have satisfaction of a decree certified so as to bind the other members of the joint family.

Hori Lal v. *Nimman Kunwar*, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819, referred to.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 17th of June 1912.

Mr. *Iswar Saran*, for the Appellants.

Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—Bisheshar Sahu, father of defendants Nos. 1 to 3, obtained a decree for sale on a mortgage of certain property on the 9th of October 1890. Bhavani Din, the mortgagor, judgment-debtor after the decree sold his equity of redemption to the plaintiff and left Rs. 770 with him out of the consideration money to pay off the mortgage decree. Bisheshar Sahu died leaving three sons, namely Ram Sarup, Beni Madho, and Chunni. Ram Sarup was an adult and the two younger brothers were minors. After two infructuous applications to execute the decree, the plaintiff paid off the amount of the mortgage to Ram Sarup and Ram Sarup applied, under section 258 of the old Civil Procedure Code, to have the satisfaction of the decree certified by the Court, and this was done on the 31st March 1897.

Thirteen years afterwards Beni Madho and Chunni applied to execute the same decree by sale of the property. The plaintiff, who alone had any interest in the property, was not made a party to these proceedings.

One Samai Ahir was brought on the record as a legal representative of Bhavani Din the mortgagor judgment debtor. The Court executing the decree found that Beni Madho and Chunni had made their application within three years of attaining majority and ordered the property to be sold and sent the papers to the Collector for compliance. When the sale notification was issued the plaintiff first became aware of what had been done. He applied to the Collector objecting to the sale on the ground that the decree had been already executed, his application, however, was dismissed on the ground that he was no party to the decree. Hence this suit.

The Munsif found:—

(1) that the three brothers Ram Sarup, Beni Madho and Chunni formed a joint Hindu family and that Ram Sarup was the manager;

(2) that the joint family was benefited by the payment of the mortgage money;

(3) that it was neither alleged nor proved that Ram Sarup had misappropriated the money. He also held that Ram Sarup, as manager of the family, was legally entitled to accept payment and enter satisfaction of the decree, and that his act bound the joint family. He decreed the suit.

On appeal before the learned District Judge no question of fact was raised. Various legal pleas were taken, only one of which, however, is now in question in this appeal, and that is whether the managing member of a joint Hindu family can have satisfaction of a decree certified, so as to bind the other members of the joint family. The learned Judge says: "I accept the finding of the lower Court that Ram Sarup and defendants Nos. 2 and 3 were members of a joint Hindu family. The lower Court has found that the head of a Hindu family can enter satisfaction of a decree against himself and other members of the family. I am unable to agree." This decision of the learned District Judge was given on the 17th of June 1912 *i.e.*, before the judgment of the Full Bench in *Hori Lal* v. *Nimman Kunwar* (1) had been published.

(1) 15 Ind. Cas. 126; 9 A. L. J. 819; 34 A. 549.

UTTAM CHAND *v.* GHANISHAM DAS.

It seems to us that that decision concludes the question and is full authority for holding that the managing member of a joint Hindu family can execute decrees, on behalf of the family and can receive payment and give good receipts on behalf of the family which are binding on the family. It is argued before us that the three brothers were joint decree-holders and that satisfaction entered by one could not bind the others and reliance was placed on the case of *Ganga Dayal* v. *Mani Ram* (2). That case was decided before the Full Bench case and in any event is distinguishable from the present case, because it is stated on page 160 of the report: "It is further argued in the present case that plaintiff No. 1 must be deemed to be the managing member of the family who would have a right to give a discharge. The powers of the manager of a Hindu family are, undoubtedly, very extensive, but there is nothing in the present case to show that the plaintiff No. 1 ever acted as the manager."

It is conceded by the learned Vakil for the respondent that if, in our opinion, the lower Court has come to a definite finding that Ram Sarup was the managing member of the family then the reasons given by the learned District Judge for dismissing the suit could not be supported. And this is obviously so, for if Ram Sarup was the manager of the family and as such received payment in full of the decree held by the joint family, and had satisfaction of the decree certified by the Court executing it, then the decree was completely discharged and could not possibly be executed again. We have no hesitation in holding that the District Judge concurred with the Munsif and did find that Ram Sarup was the manager of the joint family of which he and his two brothers were the members.

In the Court of the Munsif, Beni Madho and Chunni had denied that Ram Sarup was the manager of the family. They alleged that he had separated from them. On the evidence before him the learned Munsif came to a very distinct finding, as mentioned in the beginning of our judgment. In the grounds of appeal before the District Judge, no specific objection was taken to this finding and the Judge himself states that no question of fact was raised before him, and he accepted the findings of the lower Court. This must include the findings as to the status of Ram Sarup, because the whole of his argument pre-supposes that Ram Sarup was the manager and acted as such.

We, therefore, allow the appeal, and setting aside the decree of the District Judge with costs, restore that of the Munsif. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(2) 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 159 OF 1910.

February 6, 1913.

Present:—Mr. Justice Kensington and Mr. Justice Beadon.

UTTAM CHAND—DEFENDANT—APPELLANT

versus

GHANISHAM DAS—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908)—Partition—Lists of properties allotted to each co-sharer, signed by other co-sharers—Registration compulsory.

On the last day of partition, effected between the co-sharers of the joint family properties of considerable value, lists of the properties allotted to each co-sharer were prepared, and each co-sharer was given the list of his share of the properties, purporting to have been signed by the other co-sharers:

Held, that these lists or *chithas* formed the actual deed of partition and, therefore, its registration was necessary.

Second appeal from the decree of the Additional Divisional Judge of Multan Division, dated the 21st day of June 1909, affirming that of the District Judge, Mianwali, dated the 27th February 1908, decreeing the claim in part.

Mr. *Kanwar Narain*, for the Appellant.

Messrs. *Gokal Chand Naurang* and *Daulat Ram*, for the Respondents.

JUDGMENT.—Chotu Ram deceased father of plaintiff-respondent, Uttam Chand defendant-appellant and Udho Das were members of a joint family and Uttam Chand admits that at a partition of the joint family property Chotu Ram was given a one-third share.

Musammat NAJIBAN *v.* NIHAL SINGH.

In the present suit plaintiff-respondent claims his alleged share of two portions of land, namely (*a*) a portion which was admittedly part of the joint family property and (*b*) a portion which Uttam Chand admittedly purchased after the partition and which plaintiff-respondent alleges to have been purchased with joint funds.

As regards portion (*a*) Uttam Chand alleges that at partition he paid Rs. 800 each to Chotu Ram and Udho Das in respect of their shares and thus acquired the whole and as regards (*b*) Uttam Chand denies that the purchase was made with joint funds.

The first Court decreed the plaintiff-respondent's claim as regards portion (*a*) only, and in the lower Appellate Court the learned Divisional Judge, while dismissing Uttam Chand's appeal in respect of portion (*a*), omitted, apparently by an oversight, to decide the plaintiff-respondent's cross-objections in respect of portion (*b*).

In this Court Uttam Chand has presented a further appeal in respect of portion (*a*) and plaintiff-respondent has renewed his cross-objections as regards portion (*b*).

As regards portion (*a*) the only point for decision is whether or not Uttam Chand bought out Chotu Ram by paying him Rs. 800 for his share.

In support of his contention Uttam Chand relies on certain documentary evidence purporting to be lists of the property allotted to each co-sharer at the partition. The list of each co sharer purports to have been signed by the other two co-sharers and in respect of portion (*a*) these lists show that Uttam Chand got the whole and that Chotu Ram and Udho Das each got Rs. 800 in lieu of their shares.

Plaintiff-respondent is a blind man and it appears that on his father's death all his papers and books came into the possession of Uttam Chand and Udho Das. To obtain these plaintiff-respondent had to institute criminal proceedings and thus one of the three lists came into his possession. He denies that these are the genuine original lists and the first Court on full consideration of the evidence held that the lists were not reliable and were not proved.

The lower Appellate Court also found on the merits that the lists are not genuine and further held that they are inadmissible in evidence for want of registration.

In the grounds of appeal the concurrent finding of fact regarding the genuineness of these lists is attacked in various ways but it is unnecessary for us to consider the merits of this finding because we think that the lower Appellate Court has rightly held that the lists are inadmissible for want of registration and Counsel for the appellant admits that if the lists are inadmissible the appeal must fail.

Counsel for the appellant contends that the lists were drawn up after the partition had taken place in order that each party might have a memorandum showing the property which had previously been allotted to him. We are, however, unable to accept this view. The lists purport to be evidence of a partition which began on the 11th of *Baisakh Sambat* 1960 and ended on the 17th *Sawan Sambat* 1960 when the lists purport to have been signed by the parties affected by the partition. These lists or *chithas* form the actual deed of partition and registration was necessary.

Though cross-objections regarding portion (*b*) have been presented, Counsel for the plaintiff respondent admits that there is practically no evidence to show that the purchase was made with joint funds and the cross-objections are not pressed.

We accordingly dismiss both the cross-objections and the appeal and order that the plaintiff respondent's costs of this appeal be paid by the defendant-appellant.

Appeal dismissed

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1181 OF 1912.

April 25, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

Musammat NAJIBAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NIHAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Bhai hakiki, *whether includes sister*—*Vendee paying off a prior mortgage*—*Whether pre-emptor is bound to recoup*—*Price.*

The words '*bhai hakiki*' include a sister also.

Where a vendee, in disregard of the covenant in a sale-deed and apparently without any compulsion on the part of the mortgagee, pays off a prior mortgage.

debt upon the property, a pre-emptor is not bound to recoup him.

Second appeal from the decision of the District Judge of Meerut, dated the 2nd of August 1912.

Mr. *Muhammad Ishaq*, for the Appellants.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.— This appeal arises out of a suit for pre-emption. The plaintiffs are co-sharers and own sisters of the vendor. The defendant-vendee is a co-sharer. It is somewhat important to remark that practically speaking the parties admitted that a right of pre-emption existed. The issue was whether or not the plaintiffs being females had a right. The Court of first instance dismissed the suit. The lower Appellate Court decreed the suit.

Objections have been filed on behalf of the vendee against the decree for pre-emption. An appeal is taken to the order of the Court below as to the amount which the plaintiffs ought to pay as a condition precedent to getting possession of the property. As the objection goes to the root of the matter, it was argued first and we shall so dispose of it. According to the *wajib-ul-arz* (which neither party took any particular exception to) the custom is that a *bhai hakiki* (own brother) first, and afterwards *bhai karibi ekjadi* have the right and so on. The allegation of the vendee is that *bhai hakiki* is restricted to males. We think on the whole that it would be reasonable to interpret the expression *bhai hakiki* as including females, as was done in the case of *Niaz Fatima* v. *Tamiz Begam* (1), unless there are some special reasons for restricting it to the males. The only ground that can be suggested is the fact that in the earlier *wajib-ul-arz* there was an entry to the effect that daughters were excluded from inheritance. After a good deal of consideration we have come to the conclusion that this is not a sufficient ground for limiting the expression to males. In the present case, as we have already stated, both parties admitted some custom of pre-emption. Furthermore it was alleged in the plaint and admitted in the written statement that the plaintiffs were not only sisters of the vendor but also were co-sharers. This shows that females can be and are co-sharers; on the whole we see no sufficient reason for differing from the view taken by the lower Appellate Court on this point.

The appellants contend that they have been ordered by the Court below to pay more than he ought to pay. The question arises in this way. The price of the property sold was Rs. 700. The property was subject in conjunction with certain other property to a mortgage for Rs. 2,900 after the sale the vendee alleges that he paid off the amount of this mortgage. The Court of first instance was of opinion that the plaintiffs would have to pay the whole of this Rs. 2,900 notwithstanding that the mortgage was charged upon other property as well as the property sold. The lower Appellate Court varied this by directing that the office should "calculate the share of the mortgage falling to Abdul Hamid's property." It is complained that the calculation made in the office was not correct. Assuming that the property was sold as between vendor and vendee subject to the mortgage and that the vendee had been obliged to pay off the entire mortgage the pre-emptors might have to recoup the vendee, (of course, thereby acquiring his right to contribution against the rest of the property charged). On the same assumption if the vendee had discharged the apportioned part of the mortgage the pre-emptor should indemnify the vendee. However, in the present case it is quite clear from a perusal of the sale-deed that the purchase was on the understanding that the vendor was to discharge the mortgage. As between the vendor and vendee the property was *not* sold subject to the mortgage. In other words Rs. 700 was the value of the property assuming it to be free from incumbrances. In our opinion the mere fact that the vendee after the property was sold to him disregarding the covenant in the deed and apparently without any compulsion on the part of the mortgagees paid the entire mortgage-debt ought not to saddle the pre-emptors with the payment of the money so paid, or any part of it.

We overrule the objection of the respondents with costs. As to the appeal we allow it to this extent, that we decree the plaintiff's claim conditional upon his paying into Court the sum of Rs. 700 within two months from this date. If the money is not paid within that time the suit will stand dismissed with

(1) 15 Ind. Cas. 175.

costs in all Courts. If the money is paid the appellants will have their costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 358 OF 1912.

April 4, 1913.

Present:—Mr. Justice Rattigan.

PALA—PLAINTIFF—APPELLANT

versus

Musammat MANGLAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendee purchasing defeasible title cannot give better title to his transfree—Pre-emptor can delay suit till the last moment of limitation allowed—His only risk in being forestalled by a person of superior or equal right of pre-emption.

A person who purchases property subject to the law of pre-emption takes a title which is defeasible in the event of a pre-emptor coming forward within the time allowed by law with a claim for pre-emption, and during this period he cannot give a transferee from himself a better title than he possesses. If in such circumstances he and his transferee choose to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be preferred, they do so with their eyes open and at their peril.

A pre-emptor is entitled to delay his suit for pre-emption up to the very last moment, though, of course, he does so at the risk of losing his right, if, in the interval, another person with equal or superior right has by exercise of greater diligence forestalled him in securing the bargain.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 6th December 1911, reversing that of the Munsif, 1st class, Ludhiana, dated the 15th July 1911, decreeing the claim.

Pandit *Kishori Lal*, for the Appellant.

Mr. *Morrison*, for the Respondents.

JUDGMENT.—One *Musammat* Manglan sold the house and site in dispute which is situate in the village *abadi* to Munshi Ram *Khatri* and mutation of names in favour of the vendee was effected on the 20th April 1910. On the 11th June 1910 Munshi Ram re-sold the house and site to Ram Singh, defendant No. 3, and on the 16th April 1910, the plaintiff, who has been proved to be the nephew of *Musammat* Manglan's late husband, Sobha, brought the present suit in which he claims the property in virtue of his right of pre-emption. The property has been found to be "village immoveable property," and as the plaintiff is the person entitled to inherit the property on the death of *Musammat* Manglan, he is obviously entitled to claim, under section 12 (*a*) of the Punjab Pre-emption Act, pre-emption in respect of the sale of *Musammut* Manglan as against both Munshi Ram and Ram Singh who are in no way related to the vendor. The Court of first instance accordingly granted him a decree for possession by pre-emption on payment of Rs. 186 to Ram Singh on or before the 31st July 1911.

From this decree Ram Singh preferred an appeal to the Divisional Judge, and that learned Judge in a judgment which I confess I am unable to understand and by a course of reasoning which I venture to think is surprisingly novel, has accepted the appeal and dismissed plaintiff's suit. The Divisional Judge does not hold that plaintiff had no right of pre-emption either in respect of the sale to Munshi Ram or of that to Ram Singh. The ground upon which he bases his judgment is that under the Punjab Pre-emption Act, a pre-emptor can pre-empt a sale, but he cannot pre-empt a re-sale as such, or in other words that "he cannot base his suit on the right of pre-emption which he had in respect of the original sale when the property has been re sold. The Act does not entitle him to pre-empt a re-sale or to treat the first and subsequent sales as a single sale."

It is conceded that plaintiff's suit for pre-emption was brought within one year from the date of the mutation, in respect of the first sale and that it is within time so far as that sale is concerned. But according to the Divisional Judge, the plaintiff has lost his right of pre-emption in respect of that sale because, prior to the institution of his suit, the property has been re-sold to another person. Now it may at once be admitted that if the second sale had been made to a person who possessed a right of pre-emption superior, or possibly even equal, to that of the plaintiff, the latter would not have been entitled to claim pre-emption as against such second vendee, [see *inter alia Amirullah Shah* v. *Tabe Hussein* (1), *Mughal* v. *Jalal* (2),

(1) 138 P. R. 1884.
(2) 69 P. R. 1898.

Mahtab-ud-din v. *Karam Ilahi* (3), *Topon Mal* v. *Ditta* (4), C. A. No. 363 of 1902, *Sanwal Das* v. *Gur Parshad* (5), *Dhanna Singh* v. *Gurbakhsh Singh* (6).] But I know of no authority in which it has been held that the original vendee can, by re-selling the property to a person who has no right of pre-emption or who has a right of pre-emption inferior to that of the pre-emptor, defeat a subsequent suit by the latter brought within the period of limitation.

A person who purchases property subject to the law of pre emption, takes a title which is defeasible in the event of a pre-emptor coming forward within the time allowed by law, with a claim for pre-emption and during this period he cannot give a transferee from himself a better or more secure title than he possesses. The transferee may himself have, which in the event of his purchasing the property, will give an independent right inherent in himself, a stronger title to it than the original vendee possessed. He may, in other words, be a person who has a right of pre-emption in respect of the property sold, and it is upon this principle that it has been held that a re-sale to a person with pre-emptive rights superior or equal to that of the plaintiff pre emptor can defeat the latter's subsequent suit. But in such cases the second vendee succeeds in defeating his rival's claim by virtue of his own inherent rights and not by virtue merely of the sale by the original vendee.

I am unable to accept the Divisional Judge's *dicta* that a plaintiff has no right to delay his suit till the period of limitation is about to expire and that "it is a fallacious view of the law of limitation to regard it as a law which justifies a plaintiff in delaying his suit and not exercising due diligence." A plaintiff is entitled to delay his suit for pre-emption up to the very last moment, though, of course, he does so at the risk of losing his right if, in the interval, another person with equal or superior right has by exercise of greater diligence fore-stalled him in securing the bargain. Apart from this risk, there is, however, no reason why a pre-emptor should not defer taking action until the eleventh hour if he so thinks fit, and I cannot agree with the Divisional Judge that it is "an absurd extension" of the privileges conferred upon a pre-emptor to hold that he is entitled to impose on the original vendee a disability to re-sell for a whole year while the pre-emptor makes up his mind whether he will exercise his statutory privilege of pre-emption. Be it absurd or otherwise, the law certainly allows the pre-emptor one year for that purpose and at any time within that period, even (as is ordinarily the case) up to the very last day, he is entitled to bring his suit for pre-emption in respect of the original sale. Personally, I can see no absurdity in this provision of law. A pre-emptor naturally wishes for time to deliberate whether or not he will purchase the property and in many cases he has some difficulty in securing the money requisite to enable him to purchase, and for these and similar reasons the legislature has thought fit to give him a period of one year within which he should make up his mind. In the meantime the vendee must be well aware that his purchase is precarious and that he has bought property which may be taken from him at any time during that year by a pre-emptor. If in such circumstances he and his transferee choose to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be preferred, they do so with their eyes open and at their peril.

Mr. Morrison, for respondents, candidly admitted that he could not support the judgment under appeal and that the present appeal must be accepted. He prayed, however, that in view of his not contesting the appeal, the respondents should not be saddled with costs. I accordingly accept the appeal and setting aside the decree of the lower Appellate Court, I restore that of the Court of first instance.

The sum of Rs. 136, if not already paid into Court, shall be so paid by the plaintiff within three weeks from this date. In default of such payment, the plaintiff's suit to stand dismissed. The parties will bear their own costs throughout.

Appeal accepted.

(3) 73 P. R. 1898.
(4) 47 P. L. R. 1905.
(5) 4 Ind. Cas 179; 90 P. R. 1909 (F. B.); 159 P. W. R. 1909; 147 P. L. R. 1909.
(6) 4 Ind. Cas. 337; 91 P. R. 1909 (F. B.); 148 P. L. R. 1909; 161 P. W. R. 1909.

BANKE LAL *v.* SHANTI PRASAD.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 342 OF 1912.
April 25, 1913.
Present:—Mr. Justice Banerji and
Mr. Justice Ryves.
BANKE LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SHANTI PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition Act (*IV of* 1893), *ss.* 1 (4), 2, 3—*Mortgagee right in* zemindari *property, sale of—U. P. Land Revenue Act* (*III of* 1901), *s.* 108, *applicability of—Partition.*

Where a mortgagee right in a *zemindari* property is sought to be partitioned, it is open to one of the parties to the suit to request the Court to have the property sold to the highest bidder and to distribute the proceeds amongst them.

The party who is entitled to less than a moiety share in the property is not alone entitled to request the Court to have it sold under section 2 of the Partition Act, 1893.

First appeal from the decision of the Subordinate Judge of Bareilly, dated the 16th May 1912.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—Banwari Lal, Parsotum Das and Ram Richpal brought a suit for partition of their shares in certain joint property. A preliminary decree was passed in that suit, and for the purpose of preparing a final decree the Court appointed a commissioner and Receiver. Among the properties ordered to be partitioned are mortgagee rights in $\frac{1}{2}$ of the village Sundhaura. On the 15th of May 1912 Shanti Prasad, who was one of the defendants, and the extent of whose share as also the share of his minor brother, Ram Kunwar, is $\frac{1}{4}$th applied to the Court, apparently under Act IV of 1893 praying that the mortgagee rights be sold by auction to the highest bidder among the parties. This application was opposed by Banke Lal and Ratan Lal. On reference by the Court to the Receiver and on obtaining a report from the Receiver the Court made an order directing the sale of the mortgagee rights to the highest bidder among the co-sharers. The present appeal has been preferred against this order, and it is contended that the Partition Act (IV of 1893) does not apply to a case like this, inasmuch as the property in question is property paying revenue to Government. Clause (4) of section 1 of the Act is referred to in support of this contention. That clause provides that nothing contained in the Act shall be deemed to affect any local law providing for the partition of immoveable property paying revenue to Government. Partition of immoveable property paying revenue to Government in these Provinces is to be effected under the provisions of the Land Revenue Act III of 1901. Under that Act separate *mahals* cannot be formed of mortgage rights as between the holders of a mortgage. The partition contemplated by that Act is a partition of *zemindari* rights and if partition is sought of *zemindari* rights in respect of property which is under a mortgage, as against other co-sharers of the *zemindari* rights, the application for partition should, as required by section 108 of the Act, be made by the mortgagor and the mortgagee jointly. In our opinion that Act has no application to a case like this. Under Act IV of 1893 at the request of share-holders interested individually or collectively to the extent of one moiety or upwards the Court may direct a sale of the property ordered to be partitioned and distribution of the proceeds and where such an order is made, any of the parties other than the applicant may apply for leave to buy at a valuation of the share or shares of the party or parties asking for sale. In the present case Shanti Prasad and his brother who applied for sale of the mortgagee rights were share-holders only of one-fourth and not of a moiety. Therefore, they alone could not ask the Court to sell the mortgagee rights. Other share-holders may have expressed their consent to the sale of the mortgagee rights. But they made no request to the Court in that behalf. Therefore, it seems to us that the Court was not competent to take action under section 2 of the Act. If action had been taken under that section, and the Court had decided that the property ought to be sold; the share-holders other than the applicant could under section 3 have applied for a valuation and the Court in that case should have ordered a valuation to be made. Neither of these proceedings appears to have been taken. There being no application either under section 2 or under section 3, the Court was not competent to make the order passed by it. We must, therefore, set aside its order of 16th May 1912. It will be open to the parties or such of them as may choose to do

so to ask the Court to take action under section 2 and in that case it will be open to other share-holders to apply under section 3, and if such applications be made, it will be the duty of the Court to proceed under the provisions of sections 2 and 3. The order complained of is an illegal order. We accordingly allow the appeal, and set aside that order Under the circumstances we direct the parties to pay their own costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1159 OF 1911.
April 9, 1913.
Present:—Sir Lawrence Jenkins, KT, Chief Justice, and Mr. Justice Roy.
GANGADHAR MANDAL—DEFENDANT No. 1—APPELLANT
versus
RAJENDRA NATH GHOSH AND OTHERS —PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 22, sub-s. (1), 49, 85 sub-s. (2), 167—Landlord purchasing raiyati *holding in execution of rent-decree—Suit for possession against under-*raiyat*—Attempt to create permanent lease-hold interest in favour of under-*raiyat *by* raiyat*—Incumbrance, annulment of—Notice—Whether landlord bound to avoid incumbrance or to give notice in order to sue for* khas *possession.*

An occupancy *raiyat* attempted to create a permanent lease-hold interest in favour of his under-*raiyat* by a registered document. Subsequently, the landlord of the *raiyat* in execution of a decree for rent purchased the *raiyati* holding and brought a suit for *khas* possession against the so-called under-*raiyat*:

Held, that the landlord is entitled to succeed even without annulling the incumbrance under section 167 or giving a notice under section 49 of the Bengal Tenancy Act, as the sub-letting by the *raiyat* was invalid.

Peary Mohun Mookerjee v. *Badul Chundra Bagdi*, 28 C. 205; 5 C. W. N. 310, followed.

Appeal from the decree of the District Judge of Jessore, dated January 2nd, 1911, affirming that of the Munsif of Narail, dated January 7th, 1910.

Babus *Mohendra Nath Roy* and *Manmotha Nath Roy*, for the Appellant.

Babu *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is a suit to recover possession, and the plaintiff's title is this. His predecessor settled the holding with certain individuals, and the rent falling into arrear, the plaintiff brought a suit for arrears of rent, obtained a decree, and in execution of that rent decree, himself became the purchaser of the *raiyati*-holding. The defendant No. 1's position is that he claims as an under-*raiyat*, and there can be no doubt that there was an attempt to create a permanent lease-hold interest in his favour by the occupancy *raiyats*. This document was registered but in accordance with decisions which are binding on us, we must hold that this registration was of no effect, having regard to the provisions of sub section (2) section 85 of the Bengal Tenancy Act. The lease, therefore, was of no effect. But defendant No. 1 contends that even though that may be so, still he was in actual occupation of the land and paid rent for it to the *raiyats*. This, he says, created an under *raiyati* interest in his favour, and inasmuch as the landlord purchaser omitted to take the requisite step under section 167 of the Act to annul incumbrances and also omitted to give notice in the terms of section 49, the suit must fail as the right to possession has not been established. This view has been rejected by the lower Appellate Court from whose decree the present appeal has been preferred. In my opinion the lower Appellate Court was right and I say that because the position is covered by the decision in *Peary Mohun Mookerjee* v. *Badul Chundra Bagdi* (1), where it was held in circumstances closely resembling the present that the landlord purchaser was entitled to treat the under-*raiyati* holding as not being valid against him. It may be that at one time it was an arguable point whether this did not prejudicially affect the interest of a third party within the meaning of the concluding words of sub-section (1) of section 22 of the Act, but any argument on that point is now rendered of no effect by reason of this decision in *Peary Mohun Mookerjee's* case (1).

The result is that, in my opinion, the decree of the lower Appellate Court is correct and must be confirmed with costs.

ROY, J.—I agree.

Decree confirmed.

(1) 28 C. 205; 5 C. W. N. 310.

In re JIVANJI PIRBHOY.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 2, 4 AND 5 OF 1912.

June 27, 1912.

Present:—Mr. Pratt, J. C.

In re JIVANJI PIRBHOY INSOLVENT.

Ex parte DAVID SASOON & Co.

Contract Act (IX of 1872), ss. 39, 73—Breach of contract—Sale of goods deliverable at future date—Rights of injured party—Damages, measure of—Promisor becoming insolvent—Duty of Official Receiver in assessing damages.

Where a party to a contract for the sale of goods, before the time for the delivery of the goods has arrived, repudiates it or disables himself entirely from performing his part of the contract, the other party may rescind, and without waiting for the date of delivery, sue for damages at once.

The right to rescind and to damages is enacted in sections 39 and 73 of the Contract Act.

The law as to damages on forward contracts may be summed up as follows:

(1) Damages are to be assessed with reference to the date fixed for delivery.

(2) If that date is in future the Court must estimate the rate as best it can—and it matters not that the estimate is to a great extent speculative.

(3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made a fresh contract, at better rates, or that acting reasonably and as a prudent man he might have made such a contract—this will be considered a ground for abatement of damages.

(4) If plaintiff after rescission makes a fresh contract he does so at his own risk—and if he gets a worse rate he cannot make use of that for the purpose of enhancing his damages.

In the case of insolvency of a party to a contract for the sale of goods, damages may be claimed and proof may be given before the Official Receiver, such claims being in the nature of contingent debts—contingent

(1) on non-performance by the Official Receiver; and

(2) on the rates at the date of the delivery being lower than the contract rate.

The function of the Receiver is precisely that of a Court assessing damages on the expected rates of a future date in the case of an anticipatory breach, and the same principles of assessment apply in either case.

In estimating the rates of the future date of delivery an important factor will be the rate at which at the time of the Receiver's valuation a future contract for that date could be made.

Mr. *R. B. Teckchand Udhardas* for Messrs. David Sassoon & Co.

The Hon'ble Mr. *Harchandrai Vishindas*, for Messrs. Ralli Bros., Ewart Ryrie and Finlay.

Mr. *T. G. Elphinston*, for Messrs. Forbes, Forbes & Co.

Mr. *Nadirshah* for Messrs. Donald Graham & Co.

Mr. *Rupchand Bilaram*, for the Insolvent.

JUDGMENT.—These three appeals have been filed by Messrs. David Sassoon & Co. against orders of the Official Receiver in the matter of the proof of debts on the Insolvency of Jivanji Pirbhoy.

Appeal No. 2 is against an order holding that two creditors, Messrs. Ralli Brothers and Messrs. James Finlay, were justified in rescinding their contracts on the 12th and 19th January respectively.

Appeal No. 4 is against an order of the Official Receiver disallowing the claim of David Sassoon & Co., on their forward contracts with the insolvent.

Appeal No. 5 is against an order of the Official Receiver allowing damages to Ralli's and Finlay's on similar contracts with the insolvent.

The adjudication order was made on the 31st May, and the date fixed for proof of debts was the 19th August. The forward contracts were for June to December shipments. In the inquiry that began on the 19th August Rallis and Finlays have been allowed damages according to rates obtainable at the dates of their rescission in January; while David Sassoon have been allowed no damages because they did not rescind—and although it was admitted that their contracts were never taken up by the Receiver.

This bare statement of the order makes it obvious that the law has been either misunderstood or misapplied. I shall, therefore, begin by stating what the law is—as to damages on forward contracts and their valuation in insolvency.

The right to damages on breach of contract is enacted in section 73 of the Indian Contract Act. Illustration (*a*) to that section is a case of a forward contract of sale and the measure of damages is the difference between the contract price and the price at the time when the goods "ought to have been delivered."

But the breach may occur before the time for the delivery of the goods has arrived. If the buyer gives notice that he will not take delivery or disables himself entirely from performing his part of the contract this is an anticipatory breach which entitles

In re JIVANJI PIRBHOY.

the seller to rescind (section 39, Indian Contract Act). When the seller has rescinded the case of *Hochster* v. *De la Tour* (1) has settled that he need not wait for the date of the delivery, but may sue at once. The difficulty then arises as to how damages are to be assessed. It is difficult to assess them with reference to the date of delivery for that is still in future. Should they be assessed with reference to the date of breach of contract or with reference to the future date of delivery. This point was settled in the case of *Frost* v. *Knight* (2) and *Roper* v. *Johnson* (3). In *Frost* v. *Knight* (2), Cockburn, C. J., said: "The eventual non-performance may, therefore, by anticipation, be treated as a cause of action and damages be assessed and recovered in respect of it, though the time for performance may yet be remote." In *Roper* v. *Johnson* (3) this case was followed and it was held that "The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages." In this case damages were allowed on the basis of an estimate of a future rise in the price of coal. This was affirmed in appeal in spite of Counsel's objection that at all events plaintiffs were not entitled to speculate upon a possible rise in the market after the day of trial.

No doubt, when the time for performance is still in future it is very difficult to assess damages and Mayne in his work on Damages (page 185) refers to the prophetic judgment which the Court has to exercise in such cases. But the difficulty in assessing damages is no reason for not attempting to fix them. On this point reference may be made to the case of *Simpson* v. *L. & N. W. Railway Co.*, (4) where damages were recovered for failure to deliver samples of goods in time for show at an exhibition—although the loss must have been to a great extent a mere matter of speculation.

It is settled law, therefore, that damages have to be assessed with reference to the date fixed for performance.

There is, however, another rule affecting the measure of damages and it is enacted in the explanation to section 73 of the Contract Act. The Court must also take into account "the means which existed of remedying the inconvenience caused by the non-performance of the contract." This is in substance the English Law for Cockburn, C. J., said in *Frost* v. *Knight* (2) at page 115: "In assessing damages for breach of performance, a Jury will, of course, take into account whatever the plaintiff has done or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished." In the case of a contract of sale determined by an anticipatory breach if the defendant can show that the plaintiff has made another forward contract for the sale of some goods on terms more favourable than those of the time of performance—or that acting as a prudent man he might reasonably have made such a contract—that is a circumstance that the Court will take into consideration for the purpose of reducing the amount of damages.

There is, of course, no obligation on the plaintiff to make such a contract. This was very clearly put in *Brown* v. *Muller* (5). "He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose for example his new contract was with a person who proved insolvent."

But although there is no obligation yet if the defendant proves that the plaintiff acting with prudence might reasonably have made such a contract the plaintiff's damages will be reduced accordingly. The rule, however, only applies for the mitigation or abatement of damages. If the plaintiff makes a fresh contract and gets a rate which turns out to be lower than that of the time of performance he cannot make use of the rate of this con-

(1) (1853) 22 L. J. Q. B. 455; 2 El. & Bl. 678; 17 Jur. 972; 1 W. R. 469; 18 Eng. Rep. 922; 22 L. T. (o.s.) 171; 95 R. R. 747.

(2) (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.

(3) (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167; 28 L. T. 296; 21 W. R. 384.

(4) (1876) 1 Q. B. D. 274; 45 L. J. Q. B. 182; 33 L. T. 805; 24 W. R. 294.

(5) (1872) 41 L. J. Ex. 214; L. R. 7 Ex. 319; 27 L. T. 272; 21 W. R. 18.

tract for the purpose of enhancing his damages. This needs no explanation for the plaintiff makes the new contract for himself and at his own risk and not at the risk of the defendant. The passage quoted from *Brown* v. *Muller* (5) is an authority on this point also.

The law as to damages on forward contracts may be summed up as follows:—

(1) Damages are to be assessed with reference to the date fixed for delivery.

(2) If that date is in future the Court must estimate the rate as best it can—and it matters not that the estimate is to a great extent speculative.

(3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made a fresh contract, at better rates, or that acting reasonably and as a prudent man he might have made such a contract—this will be considered a ground for abatement of damages.

(4) It plaintiff after rescission make a fresh contract he does so at his own risk—and if he gets a worse rate he cannot make use of that for the purpose of enhancing his damages.

Now proof of damages can be given in insolvency before the Official Receiver. It was pointed out in *In re Mossji Ismailji Lotia* (6) that such claims are in the nature of contingent debts—contingent (1) on non-performance by the Official Receiver and (2) on the rates at the date of the delivery being lower than the contract rate.

The first contingency arises out of a defect in our Act. It contains no provisions analogous to sections 62 and 64 and 65 of the Presidency Towns Insolvency Act or to section 55 of the English Act under which the Receiver can be compelled either to disclaim or adopt a contract and under which an order of rescission can be obtained from the Court. This omission is very embarrassing to the creditors. Firms like Ralli and Finlay who are in a hurry to rescind at the first opportunity run the risk of being told by the Receiver that he was willing to perform the contracts and that their premature rescission was a breach disentitling them to damages. On the other hand, a firm like David Sassoon which took the more correct course of attempting to ascertain the intention of the Receiver is in no better position for the Receiver is tempted to shirk the responsibility of giving a definite answer.

The result of this omission in our Act is that a creditor who has not rescinded can prove for damages on the contingency of the Receiver refusing to perform. In practice, however, the Receiver at the time of proof of debts either adopts or declines to adopt the contract. If he adopts it the claim vanishes. If he disclaims it that is a breach which establishes the right to damages. It is then the duty of the Receiver to assess the damages on the second contingency and his function is precisely that of a Court assessing damages on the expected rates of a future date in the case of an anticipatory breach. He must ascertain what the future dates of delivery were, he must make an estimate of what the rates will be on those dates, he must assess damages according to those rates and then consider whether he should reduce the damages because of any reasonable opportunity the creditor had as a prudent man of making a contract on better terms.

Now in estimating the rates of the future date of delivery an important factor will be the rate at which at the time of the Receiver's valuation a future contract for that date could be made. This rate will represent the market estimate of that future rate. The market estimate may not be correct, but in the absence of evidence that it is wrong it may be adopted as was done with reference to Forbes' claims in the case of *In re Mossji Ismailji Lotia* (6). But the rates to be considered are the latest, *i.e*, those at the time of the valuation. To take the rates procurable at the time of adjudication or the time of rescission would be tantamount to ignoring evidence or to the movement of the market in the interval. The later the estimate is made, the more material there is for arriving at a correct conclusion.

This, I think, is a fairly complete statement of the law, and I shall now proceed to apply the law to the facts of the present case.

Three creditors are involved, David Sassoon, Finlay and Ralli. All the contracts that are the subject of these appeals with the exception of some of Ralli and some of Finlays were for shipment of June to

(5) 15 Ind. Cas. 825; 5 S. L. R. 249.

December. When the Official Receiver proceeded to take proof of debts on the 19th August some of those shipments had arrived. As to those, all the Official Receiver had to do was to ascertain the price of the goods on those dates in the market and to assess damages, if any, on the difference. Some had not yet arrived and as to these the Official Receiver ought to have estimated the price on the dates when the shipments were expected to arrive—and assessed damages accordingly. But in both cases the damages would have been subject to abatement if the creditor could have covered his loss by another prudent contract. But the Official Receiver merely took the rates at which fresh contract could have been made at the dates of rescission and assessed the damages on these rates. Now if these rates were taken as giving the market estimate of the rates of the date of performance then there is no reason why the one rate should have been considered rather than the other and why the movement of the market between the dates of rescission and the time of the Official Receiver proceeding should have been left out of account. On the other hand if these rates were taken as representing the terms on which those firms should have made fresh contract then these rates could only be adopted if they were more favourable than the rates estimated to prevail at the time of performance. As a matter of fact they are less favourable and the Official Receiver has allowed the creditors to enhance damages on the theory that they could have made fresh contracts on the dates of rescission not at their own risk, but at the risk of the insolvents' estate—and that too without any evidence that the rescinding creditors did, as a matter of fact, re-sell at those rates. Again David Sassoon are allowed no damages because they did not rescind. I have already shown that is not the law—and it is not reasonable that a creditor who treats the insolvent with forbearance should be put in a worse position than one who assumes a hostile attitude and cancels his contract.

The question in regard to the June to December shipment is perfectly simple, for it is admitted that by June the market had risen above the contract rate. It rose steadily and was still rising in August when the Official Receiver was making his valuation. As to the shipments delivered before August 19th there was no loss—and as to the future shipments there was no prospect of loss for any reasonable estimate of these future rates would have been considerably in excess of the contract rates. As to the June to December shipments, therefore, there is not a shadow of a case for damages.

As to Rallis and Finlays contracts of the January to March shipments it is urged that they are not entitled to damages on these because they were not justified in rescinding on the 12th January. I find, however, that neither the insolvent nor the *interim* Receivers who had been empowered to carry on the business took delivery of goods from Grahams according to their notice of the 11th January. I think, therefore, that Rallis and Finlays were justified in concluding that the insolvent was unable to perform his contracts. They are entitled to damages on these contracts. The Official Receiver has assessed these damages according to the rates of the 12th and 19th January. On what principle I cannot conceive unless it be that those rates are better than the rates of the due dates. As to this the Official Receiver should ascertain on what dates these shipments arrived and assessed damages according to the rates of these dates subject to abatement as already explained.

The result is that Appeals Nos. 2 and 4 are dismissed and in Appeal No. 5 the order is modified.

No order as to costs.

Order varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 248 OF 1910.

October 13, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

SAYAM RAMAMOORTHI DHORA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM—DEFENDANT—RESPONDENT.

Estoppel by judgment—Judgment in personam—*All*

SAYAM RAMAMOORTHI DHORA *v.* SECRETARY OF STATE.

necessary parties litigating—No collusion—Effective against all—Civil Procedure Code (Act XIV of 1882), s. 13—Not exhaustive on estoppel by judgment.

If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam* indeed binds third persons in that way: all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion.

Where the question relating to the ownership of a certain piece of land was one entirely between *A.* and *B.*, and *A.* obtained judgment against *B.*, a suit by *B.* against the Secretary of State for a declaration that the land was not liable to assessment would not be maintainable for want of title in *B.* who was estopped by the judgment obtained by *A.* from averring that the land belonged to him and not to *A.*

Section 13 of the Code of Civil Procedure, 1882, does not cover all cases of estoppel by judgment.

Second appeal from the decree of the Temporary Sub-Judge's Court of Vizagapatam, in A. S. No. 362 of 1907, presented against that of the District Munsif of Chodavaram, in O. S. No. 306 of 1906.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *S. Swaminathan*, for the Respondent.

JUDGMENT.—In the suit out of which this second appeal arises the plaintiffs prayed for a declaration that the defendant, the Secretary of State for India in Council, was not entitled to levy any assessment on certain lands which they claimed, as part of their Lingabhupalaram Agraharam. The defendants contended that the lands in question did not belong to the plaintiffs, that in Original Suit No. 588 of 1891 in the Chodavaram District Munsif's Court, one Kannigadu and Sonigadu sued the present plaintiffs for a declaration that the lands belonged to them as Barikis (*i.e.*, village watchmen) and obtained a decree which was affirmed on appeal and second appeal, that subsequently they instituted another suit under the Madras Regulation VI of 1831 in the Revenue Court for the recovery of the lands and it was decided that they were entitled to the assessment of the lands from the present plaintiffs, that the plaintiffs could not, therefore, now be permitted to claim the lands as their own and that there is no cause of action for the suit. Both the lower Courts dismissed the plaintiffs' suit, holding that the question of the plaintiffs' title to land comprised in Original Suit No. 588 of 1891 is *res judicata*. The plaintiffs alleged that that suit did not comprise the whole of the lands included in the present suit. But we must accept the findings of the lower Courts that the lands in both the suits are the same.

We are of opinion that the plaintiffs have no cause of action which would entitle them to maintain the suit. The land admittedly belongs either to them or to the Barikis. The dispute between them was settled in Original Suit No. 588 of 1891 and the Barikis subsequently obtained in the Revenue Court a decree for such possession of the land as they were entitled to. The suit for declaration that the land is not liable to assessment can be instituted only by the person entitled to it as owner. It is contended that the plaintiffs are entitled to prove in this suit that the land belongs to them and not to the Barikis, and that decision in Original Suit No. 588 of 1891 cannot be relied on by the defendant as he was not a party to that suit. This, in our opinion, is an entirely untenable proposition. It is not contended that the plaintiffs would have any cause of action unless the land belonged to them as part of their Agraharam. The question relating to the ownership of the land was one entirely between the plaintiffs and the Barikis; and Barikis having obtained judgment against the plaintiffs, third parties having no interest in the land at the time of the litigation cannot dispute the settlement of the dispute between them as to title; and it appears to us to be equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation. Suppose there is a dispute between *A.* and *B.* as to which of them is the owner of a *zemindari*, and it is decided in favour of *A.* Can *B.* be permitted to sue each of the *ryots* of the *zemindari* for rent on the ground that the *zemindari* belongs to himself and not to *A.*? It seems to us that, undoubtedly, he cannot; see our judgment in Second Appeal No. 574 of 1909. Again could *B.* be permitted to institute a suit against Government for a declaration that it is not entitled to levy water-cess under Act VII of 1865 on certain lands in the *zemindari*, and claim to prove therein that the *zemindari* belongs to himself

and not to *A.*? The answer must be in the negative. In Bigelow on Estoppel, fifth Edition, page 44, the learned author observes as follows:—"Littleton says: Where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, the tenant or the defendant may show the whole matter of record and the outlawry, and demand judgment if he (the defendant or plaintiff) shall be answered." Lastly Lord Coke says: 'Where the record of the estoppel doth run to the disability or legitimation of the person, there *all strangers* shall take benefit of that record: as outlawry, excommencement, profession, attainder of præmunire, or felony, etc., bastardy, mulierty, and shall conclude the party though they may be strangers to the record. But of a record concerning the name of the person, quality or addition no stranger shall take advantage, because he shall not be bound by it.' This principle is not confined to actions *in rem* as stated by the learned author already referred to. "If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all as much as would a conveyance of a jont estate by all the parties interested. Judgment in an action strictly *in personam* indeed binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. Judgment that *A.* is debtor of *B.* is an example. . . . . Indeed, the difference between judgments *in rem* and judgments *in personam* in our land, as regards their effect, appears at bottom to be only a difference of degree" (see page 48). Again he observes: "Third persons cannot object when those who have the exclusive right to settle a question have done so without fraud upon them: in the absence of fraud upon them, those (not being privies) who are not, or from want of interest might not be, parties, have no concern with the judgment, and cannot attack it even for supposed want of jurisdiction, or for fraud upon others" (See page 151).

The question does not depend upon the application of the doctrine of *res judicata* between the parties as expounded in section 13 of the Civil Procedure Code. That section does not cover all cases of estoppel by judgment. We must hold that the plaintiffs cannot be permitted to prove that they are the owners of the land in question. They have, therefore, no cause of action.

Mr. Narayanamurthi, who appears for the plaintiffs, asks whether if the decision in Original Suit No. 583 of 1891 had been in favour of the plaintiffs, the Government would be bound to regard the land as exempt from revenue. The answer is that Government would not be entitled to question title to the land as against the Barikis, but would be entitled to say that the land is not exempt from the payment of assessment. That is a question which could not be finally decided between the plaintiffs and the Barikis.

In the result we dismiss the second appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 872 OF 1912.

APRIL 17, 1913.

Present:—Mr. Justice Ryves and Mr. Justice Lyle.

MOTI BEGUM—DEFENDANT—APPELLANT

versus

HAR PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage, simple mortgage—What mortgage-deed must indicate—"Arh" *and* "mustagharak" *whether imply power of sale.*

In the case of a simple mortgage, the mortgage-deed, read as a whole, should indicate, that the parties to it intend that the property be sold in default of payment.

The use of the words "*arh*" and "*mustagharak*" alone do not always and necessarily imply a power of sale.

Kissen Lal v. *Ganga Ram*, 13 A. 28; *Todar* v. *Ayub Khan*, A. W. N. (1894) 57, referred to.

Second appeal from the decision of the Additional Judge of Saharanpur, dated 28th December 1911.

The Hon'ble Mr. *Abdul Rauf*, for the Appellant.

Mr. *B. E. O'Conor* (with him Mr. *A. Haider*), for the Respondents.

JUDGMENT.—Saiyid Hasan executed on the 9th February 1892 an *ikrarnama* in favour of his wife Moti Begam, whereby he made his immoveable property security for the payment of her dower debt.

On the 4th May 1893, he executed a simple mortgage of the same property in favour of one Ram Chandar. The assignee of Ram Chandar is the plaintiff, and he sues for sale on foot of the mortgage of 1893.

Moti Begam who is in possession defends the suit, setting up, *inter alia*, her priority under the *ikrarnama* of 1892 which she contends is in effect a prior mortgage in her favour. She alleges that on the death of her husband she took possession of the property with the consent of his heirs, and that on 5th August 1910 these heirs executed a second deed of mortgage acknowledging and renewing the terms of the document of 1892. The execution of this second mortgage, she contends, keeps alive the original *ikrarnama*.

The lower Courts have found that the document of 1892 does not create a mortgage but merely a "charge" that on 5th August 1910 any claim founded on this document was barred by limitation and that the document of 5th August 1910 is, therefore, ineffectual as against the mortgage of 1893. They, therefore, decreed the suit.

Moti Begam comes here in second appeal contending that the document of 1892 is a simple mortgage and that as she could, had she sued on it, have been entitled to the benefit of section 31 of the Limitation Act, the debt was not time-barred on 5th August 1910 the date of the execution of the second document. The learned Counsel for the respondent meets his argument with the plea that it is immaterial whether the document of 1892 creates a charge or a mortgage because on 5th August 1910 the document of 1892 was in either case time barred. He contends that the effect of section 31 is not to extend the period of limitation but to permit as a matter of indulgence persons who hold documents which have become time-barred to sue on them nevertheless, since the decision of the Privy Council, a simple mortgage is time-barred after 12 years. It is true that under section 31 the mortgagee is allowed to sue on it but it is nevertheless time-barred for all other purposes.

The wording of section 19 must be carefully noted. It lays down that "where before the expiration of the period prescribed for a suit..., an acknowledgment of liability.....has been made etc." Now if the document of 1892 is a simple mortgage Moti Begam could certainly have sued to enforce her rights upon it on 5th August 1910, and it, therefore, appears to us, that the acknowledgment embodied in the document of that date was made before the expiration of the period prescribed for a suit on that deed if it was a simple mortgage. We have, therefore, to decide the second point raised, *viz.*, "whether the document in question constitutes a simple mortgage or merely a charge." The two rulings chiefly relied on by the appellant are:—*Kishan Lal* v. *Ganga Ram* (1) and *Todar* v. *Ayub Khan* (2). The latter ruling follows the previous one, the facts being similar in both cases. The appellants' contention is practically this that where the words "*arh* and *mustagharak*" are used the document in which they occur must be held to be a simple mortgage, no matter what its other terms and conditions may be. We do not find that the rulings go as far as this.

One page 38 of 13 Allahabad the following passage from a previous ruling is quoted with approval and lays down "What we have to see is, not what is the necessary and logical effect of the definition of simple mortgage and charge.....but what was the intention of the parties...when they wrote the deed."

Then again on page 41:—

"Looking at the document as a whole and considering the meanings.....of the terms employed, *viz.*, *arh* and *mustagharak*, I have no doubt whatever that it was intended to effect a mortgage without possession . . . . . and I think it did effect such mortgage." The purport of the ruling, in our opinion, is this that the question of whether a document is or is not a mortgage must be decided in each case with reference to the terms of the document itself. That a document may be a mortgage-deed even though there is no express provision to the effect that the mortgage money may be recovered by the sale of the mortgaged property and that the power of sale may be implied and should, speaking generally, be inferred from the use of the terms *arh* and *mustagharak*, but that it is the inten-

(1) 13 A. 28; A. W. N. (1890) 216.
(2) A. W. N. (1894) 57.

tion of the parties that should be looked to. We certainly do not consider that the ruling lays down that wherever the words *arh* and *mustagharak* are used the intention of realising the money due by sale of the property concerned *must* be presumed. What we have to see is whether in view of the other terms of the document and the intention of the parties they do imply it.

Now the terms of the document with which we are now concerned are wholly different from those of the documents in suit in the rulings quoted above. To these documents the agreements were in substance nothing but simple mortgages except for the fact that there was no express provision for sale. In 13 Allahabad the whole document is set out on page 29. There is an express proviso to re-pay the money borrowed and the document was executed to cover an ordinary loan. In *Todar* v. *Ayub Khan* (2) the case is not so clear and there is no express promise to pay the money but the document is executed to cover an ordinary loan. Now in the present case the words of the document are wholly different, the executant merely recites that he owes his wife a certain sum by way of dower and that for her satisfaction he has charged the amount on a certain property (*makful wa mustagharak zamanat karke*) and goes on to say that until the debt is paid he will not transfer the property and that when he does pay it the satisfaction of the debt will be entered on the back of this document There is nothing which expressly or impliedly denotes a power of sale beyond the bare use of the two words referred to above and the document ends *lihaza yih chand kalma bataur tamassuk bakaid arh samanat ki likh dya.*

Now why is this expression used instead of the simple and ordinary word *rahannama*. Surely because the writer of the document did not contemplate the document being used as a mortgage-deed. It is difficult to see how a person wishing to create a mere charge as distinguished from mortgage (*rahn*) could do so without the use of the words *arh* and *mustagharak* or some such terms.

There is nothing in the document to indicate that the parties ever intended that the property should be sold or ever contemplated that it should be sold. What was intended, we think, was to provide a property which Moti Begum could always take possession of in lieu of dower. We think we may fairly assume that what she eventually did was an indication of what it was intended that she should do, She never made any attempt to put the property to sale but she took possession of it in lieu of her dower-debt on her husband's death. We are not prepared to follow the learned Vakil for the appellant when he argues that the use of the words *arh* and *mustagharak* must always and necessarily imply a power of sale. We have before us another case, *Masuna Khatun* v. *Tahira Khatun* (3), in which the same words are used although to sell the property would not only be contrary to the terms of the deed and the intention of the parties but would absolutely defeat the purpose for which the deed was executed.

We dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

(3) 19 Ind. Cas. 661 *Infra.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 318 OF 1912.

February 20, 1913.

Present:— Justice Sir Ralph Benson KT., and Mr. Justice Sundara Aiyar.

M. RAJARAMA AIYAR—PLAINTIFF—APPELLANT

versus

RAMASAMI AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust—Charitable endowment—Whole income of property dedicated to charities—Absolute dedication of property—'Absolute right', meaning of—Trustee disposing of office by Will.

Where a document gave the whole of the income of certain property to trusts, reserving nothing for any other purpose, and provided that *A.* should conduct the charities 'with absolute rights':

Held, (1) that the property was dedicated completely to the trusts;

(2) that the expression 'with absolute rights' was intended only to provide that no one else should have any right of interference with *M.*'s management;

(3) that the provision did not give *A.* the power to appoint a trustee by testament.

MASUMA KHATUN *v.* TAHIRA KHATUN.

A trustee cannot legally dispose of his office by Will; he has no right to affect the succession which must be governed by the usage of the trust or the law of the land.

Second appeal from the decree of the Subordinate Judge of Kumbakonam, in A. S. No. 854 of 1910, preferred against that of the District Munsif of Kumbakonam, in O. S. No. 403 of 1909.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant

Messrs. *P. R. Ganapathi Aiyar* and *K. V. Krishnasami Aiyar*, for the Respondents.

JUDGMENT.—The first contention raised in second appeal is that on the right construction of Exhibit B, the property out of which the trusts were to be performed was not absolutely dedicated to the trusts. The document gives the whole of the income of the property to the trusts and nothing is reserved for any other purpose. It must, therefore, be held to have been dedicated completely to the trusts. The next contention is that the provision in Exhibit B, that Mathura Ammal should conduct the charities "with absolute rights" gave her the power to appoint a successor by testament. We cannot accept this argument. The expression 'with absolute rights' was intended only to provide that no one else should have any right of interference with Mathura Ammal's management. According to the decided cases a trustee would be acting illegally in disposing of his office by Will, because he has no right to affect the succession which must be governed by the usage of the trust or by the law of the land. The plaintiff, therefore, obtained no rights under Mathura Ammal's Will. We dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1001 OF 1912.

April 17, 1913.

Present:—Mr. Justice Ryves and Mr. Justice Lyle.

MASUMA KHATUN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TAHIRA KHATUN—PLAINTIFF—RESPONDENT.

Mortgage—Simple mortgage, essentials of—Construction—"Makful" *and* "mustaghrak," *meaning of—Redemption—Conversion of a suit for sale on simple mortgage into a suit for recovery of money charged on immoveable property, whether can be allowed in second appeal.*

One *J.* executed a document in 1871 whereby he agreed to pay one *A.* and her descendants a certain yearly allowance. He secured the allowance on certain *zemindari* property (*makful* or *mustagharak karke*) and agreed that if he failed to pay it the annuitants might take possession of a portion of it sufficient to give them the stipulated income. The allowance not having been paid since 1880, the plaintiffs sued for the whole amount due to them by sale of the property contending that the above document was a simple mortgage:

Held, (1) that the document was not a simple mortgage;

(2) that the words "*makful* and *mustagharak*" ordinarily do imply a power of sale but where the parties clearly did not contemplate the property being sold these words did not imply such a power;

(3) that it was an essential of a mortgage that it should be capable of redemption;

(4) that a suit for sale of property on the basis of a mortgage could not be converted in second appeal into a suit for recovery of money charged on immoveable property.

Gajpat Rai v. *Chimman Rai*, 16 A. 189; A. W. N. (1894) 19, *Chhagan Lal* v *Bapubhai*, 5 B. 68; *Madvala* v. *Bhagvanta*, 9 B. H. C. R. 260; referred to.

Second appeal from the decision of Additional Judge, Moradabad, dated 1st June 1912.

Mr. *Mohamed Isaq Khan*, for the Appellants.

Mr. *A. Hyder*, for the Respondent.

JUDGMENT.—This is a suit on a so-called simple mortgage. The facts are fully stated in the judgments of the two lower Courts. It is sufficient to say that in 1871 Jawad Husain, defendant No. 1, executed the document in suit whereby he agreed to pay to one Amin Daulat and her descendants a certain yearly allowance. He secured the allowance on certain *zemindari* property (*makful aur mustagharak karke*) and agreed that if he failed to pay it the annuitants might take possession of a portion of it sufficient to give them the stipulated income. The allowance

has not been paid since 1880. The plaintiffs now sue for the whole amount due to them by the sale of the property contending that the above document is a simple mortgage.

The two lower Courts have found the document in suit to be a simple mortgage basing their decisions solely on the fact that the words *makful aur mustagharak* are used and relying on the decision of *Kishan Lal* v. *Ganga Ram* (1).

For the appellants it is contended that the above document is not a simple mortgage but merely constitutes a charge on the property.

We have fully discussed the question in our judgment in *Moti Begum* v. *Har Prasad* (2), and are of opinion that the ruling quoted above does not lay down that wherever the words *makful* and *mustagharak* are used, in spite of the other terms and conditions of the document, it must necessarily be held that it is a simple mortgage. No doubt, the use of these words ordinarily implies a power of sale but we do not think that in a case where the parties clearly did not contemplate the property being sold these words necessarily imply such a power. Now if we examine the terms of the document in suit we cannot see how it can possibly be held to be a simple mortgage.

The document is nowhere described as a mortgage deed. On the contrary it is described in two places as an *iqrarnama*.

Not only does the document not provide for the sale of the property but such a sale would defeat the whole purpose of the agreement. Amin Daulat and her descendants are declared entitled to a certain allowance which is secured on the property so that if default is made they can take possession of it or of a portion of it in order to pay themselves the amount due to them. Suppose Amin Daulat had lived and sued, say after ten years, for the arrears of the allowance due to her and had put the property to sale the effect would be that her descendants would be deprived of their security. Again it is an essential of a mortgage in this country at any rate that it should be capable of redemption and we do not see how this so-called mortgage could ever be redeemed. It is true that every mortgage cannot be redeemed at any given time as laid down by the rulings quoted to us by the learned Vakil for the respondent but he has shown us no authority for the proposition that there can be a mortgage which can never be redeemed at all.

The most that can be contended is that the document is an agreement which in the case of default may be converted into an usufructuary mortgage. Even in this view of the case the plaintiff could not sue for sale.

Then we were pressed by the learned Counsel for the respondent that if we hold that the *iqrarnama* created a charge only on the property we should at least decree the claim for twelve years before suit under Article 132 of the first Schedule of the Limitation Act, and reliance was placed on the decision of this Court in *Gajpat Rai* v. *Chimman Rai* (3) and *Chhagan Lal* v. *Bapubhai* (4). We do not think that we can accede to this request at any rate at this stage of the litigation because to do so would involve a complete change in the frame of the suit and in the pleadings.

As the suit was brought the only prayer was:—"Rs. 1,320, the said amount of demand, which is due to the plaintiff, may be awarded with costs and future interest up to the date of realization or the hypothecated property or a sufficient part thereof may be sold by auction and the sale proceeds may be applied in payment of the amount claimed by the plaintiff, as mentioned above. Had the suit been brought on the allegation that the property was charged with an annuity, and that the plaintiffs were entitled to receive payment for the twelve years before suit it would virtually have been a suit *first* for a declaration that the property was charged with the payment of an annuity to the plaintiff and (2) for payment for so many years as was within law of limitation. It would have been open to the defendants to allege that if the charge ever existed it had ceased to be operative as having become barred by limitation and the first vital issue in the case would have been whether the charge still subsisted at the date of suit.

(1) 13 A. 28; A. W. N. (1890) 216.
(2) 19 Ind. Cas. 658 *ante*.
(3) 16 A. 189; A. W. N. (1894) 19.
(4) 5 B. 68.

The plaintiffs would at first have to prove their title to the annuity before they could receive anything under it. The case [*Gajpat Rai* v. *Chimman Rai* (2)] merely followed the Bombay case. In both these cases the title of the plaintiff in the annuity had been finally settled between the parties or their predecessors and the only question for the Court to decide was how much was payable having regard to the law of limitation. The present case is much more like *Madvala* v. *Bhagvanta* (5). That case was cited with approval in *Chhagan Lal* v. *Bapubhai* (4).

The property has changed hands and we cannot assume, especially against transferees, that the annuity is still payable, seeing that the last payment, even alleged, was twenty-nine years before suit.

For these reasons we think the plaintiff's suit must fail.

We, therefore, set aside the decrees of both Courts and dismiss the plaintiff's suit with costs in all Courts which in this Court include fees on the higher scale.

Appeal allowed.

(5) 9 B. H. C. R. 260.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 463 OF 1910.

October 19, 1911.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Abdur Rahim.

MANI *alias* NAGAPPAN MINOR BY NEXT FRIEND PALAYAM SUBBARAYAR—1ST DEFENDANT—APPELLANT

versus

SUBBARAYAR—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption by widow under authority of son's Will—Consent of sapinda—*Nearest* sapindas *at the time of adoption objecting—Adoption invalid—Consent given withdrawn.*

In the case of adoption by a Hindu widow, a consent previously obtained from a deceased *sapinda* cannot be efficacious to validate the adoption, if it is not approved by the persons who are the nearest *sapindas* at the time the adoption is actually made.

An adoption made by a Hindu widow with the authority of her deceased son granted under a Will, but contested by the reversioners by suit, is not valid in law.

Semble.—If a *sapinda* who has given his consent withdraws it afterwards, the widow would not be entitled to act upon such consent.

Second appeal from the decree of the District Court of Coimbatore, in A. S. No. 149 of 1909, presented against that of the District Munsif of Kollegal, in O S. No. 113 of 1908.

Mr. *P. S. Sivaswami Aiyar*, Advocate-General, for the Appellant.

Messrs. *T. R. Krishnaswamy Aiyar* and *K. B. Ranganadha Aiyar*, for the Respondents.

JUDGMENT.—The question in this case relates to the Hindu Law of adoption and is not covered by any reported decision or the authority of any text. It is this: whether an adoption which is made by a Hindu widow with the authority of her son granted under a Will is valid. The learned Advocate-General who supports the adoption contends that the son while he was living, was the nearest *sapinda* of his father, and he having assented to the adoption being made it should be held to be valid, although after the son's death the nearest *sapinda* at the time objected to the adoption. The only thing in the nature of authority which the Advocate-General is able to cite in favour of his proposition is the opinion of a Pundit of Vizagapatam reported in Sir Thomas Strange's Hindu Law (Vol. I, page 80 and Vol. II, page 95). It does not appear that this opinion formed the basis of decision in any case, and all that Sir Thomas Strange says in connection with it is that it has been thought that adoption under such authority or sanction would be valid according to the principle of the Benares School. The Advocate-General has also drawn our attention to Sircar's Tagore Lectures on the Law of Adoption page 255, but the learned writer does not carry the matter any further than as resting upon the opinion of the Pundit in question.

On the other hand, all the decided cases brought to our notice, in which an adoption made with the assent of *sapindas* has been upheld, were cases in which the *sapindas*, who were competent to express any opinion on the matter and authorised or assented to the adoption were living at the time of the adoption. No case has been brought to our notice in which the authority given by a deceased *sapinda* who while living was the one most competent to decide upon the

propriety or otherwise of the adoption being made was held to be sufficient to authorise an adoption made after his death in disregard of the adoption of the nearest *sapindas* who were living at the date of opinion and had not joined the deceased *sapinda* in giving the authority. The question is, should we be justified in extending the rule regarding adoptions with the assent of *sapindas* to a case like this. It is not quite easy to ascertain the exact principle on which the necessity or sufficiency of the assent of *sapindas* is based. The leading authority on the subject is the *Ramnad* case, *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1). In that case their Lordships seem to draw a distinction between the case of an adoption in an undivided family and that in a divided family. In a case of the former class the Judicial Committee seem to be of opinion that the undivided male members ought to be consulted both because they are the natural protectors and guardians of the widow, and because their interest in the family property would be affected by the adoption, while in the latter case they seem inclined to lay more emphasis on the presumed incapacity of a widow in the eye of Hindu Law to judge for herself rather than on the fact that the presumptive or reversionary right of the *sapindas* would be defeated by the adoption. They have made it clear in that case, as explained in the latter case in *Vellanki Venkata Krishna Rao* v. *Venkatarama Lakshmi* (2) that the assent to be given must be in the nature of a decision of a family Council on the propriety or expediency of the adoption. Having regard to the difficulty that would arise in the working of the law, if the assent of all the kinsmen however remote were deemed to be necessary, it has been held [See *Subrahmanyam* v. *Venkamma* (3)] that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest *sapindas*, even if there is only one such, be obtained. But it cannot be said to have been in the contemplation of the learned Judges, who held so that the consent of the nearest *supinda* would be sufficient even if at the time of adoption that *sapinda* is no longer living, and the person who is the nearest *sapinda* at the time does not consent to the adoption. It must, we think, be conceded that, if a *sapinda* who has even given his consent withdraws it, afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of tho *supinda* giving the consent, so as to override the opinion of the *sapindas* who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time, that ought to be sufficient to obviate the necessity of obtaining the consent of the *sapindas* living at the date of adoption. No doubt, it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased *sapinda* cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest *sapindas* at the time the adoption is actually made. We think the decree of the lower Courts is correct and dismiss the second appeal with costs.

Appeal dismissed.

(1) 12 M. I. A. 397 at p. 442; 10 W. R. (P. C.) 17; 1 B. L. R. (P. C.) 1; 20 Eng. Rep. 389.
(2) 1 M. 174; 4 I. A. 1; 26 W. R. 21 (P. C.)
(3) 26 M. 627 at p. 635.

ALLAHABAD HIGH COURT.
EXECUTION FIRST APPEAL No. 43 of 1913.
April 29, 1913.
Present:—Mr. Justice Banerji and Mr. Justice Ryves.
TODARMAL AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS
versus
Musammat PHOOLA KUAR—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Step-in-aid of execution—Application to have decree transferred to another Court for execution.

An application for transfer of a decree to another Court for execution is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act.

Chundra Nath Gossami v. *Gurroo Prosunno Ghose*, 22 C. 375, referred to.

Execution first appeal from the decision of the Subordinate Judge of Shahjahanpur, dated 12th September 1912.

Mr. *Govind Proshad*, for the Appellants.

VAIDENADIER v. KRISHNASAWMY IYER.

Mr. *Sital Proshad Ghose*, for the Respondent.

JUDGMENT.—This appeal arises out of an application for the execution of a decree and the question to be determined is whether the application is time-barred. A preliminary decree for sale was passed on the 1st of September 1897 and it was made absolute on the 17th of November, 1900. The last application for execution admittedly within time was made on the 11th of May 1906. On the 2nd of September 1908 the decree-holder applied to the Court at Bareilly which had passed the decree to transfer it for execution to the Court at Shahjahanpur. This application was made under section 223 of the Code of Civil Procedure of 1882. The certificate asked for was granted, and thereupon an application for execution was made in the Court at Shahjahanpur on the 8th of February 1910. It is this application which the appellants contend is time-barred. The Court below has held against the appellants and in our judgment its decision is right. The present application for execution would be within time if the application of 5th September 1908 was one to take a step-in-aid of execution within the meaning of Article 182 of Schedule I of the Limitation Act. No application for execution could be made in a District outside the jurisdiction of the Court which passed the decree unless that Court made an order transferring the decree for execution. An application for transfer of the decree is, therefore, an essential and necessary step preliminary to the making of an application for execution in a Court which is not the Court which passed the decree. Such an application is clearly an application to take a step-in-aid of execution. This was so held by the Calcutta High Court in *Chundra Nath Gossami* v. *Gurroo Prosunno Ghose* (1), and we agree with that ruling. We dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

(1) 22 C. 375.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 286 TO 288 OF 1910.

October 20, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

V. VAIDINADIER—DEFENDANT—APPELLANT

versus

IN S. A. No. 286 OF 1910.

G. KRISHNASAMI IYER—PLAINTIFF—RESPONDENT.

IN S. A. No. 287 OF 1910.

VAITHIANATHIER—PLAINTIFF—RESPONDENT.

IN S. A. No. 288 OF 1910.

VENKATARAMAIYER—PLAINTIFF—RESPONDENT.

Malicious prosecution—Burden of proof—Absence of reasonable and probable cause, meaning of—Carelessness in deciding reasonableness and probability, not malice—Both malice and absence of reasonable and probable cause must be proved—Recklessness about the truth or falsity of charge—Malice.

In a suit for malicious prosecution it does not rest on the defendant to show that there was reasonable and probable cause, but it is for the plaintiff to prove its absence.

Reasonable and probable cause means reasonable grounds for believing that the plaintiff was guilty of the offence charged, and not reasonable grounds for coming to the conclusion that the Court would convict him of it.

Carelessness on the part of the defendant in deciding whether there was reasonable and probable cause would not amount to malice, and both malice and absence of reasonable and probable cause have to be proved.

If a man has been reckless, whether the charge be true or false, that might amount to malice, but recklessness in coming to the conclusion that there was reasonable and probable cause would not.

Second appeals from the decrees of the Subordinate Judge's Court of Kumbakonam, in A. S. Nos. 540, 541 and 542 of 1909, preferred against that of the District Munsif of Mannargudi, in O. S. Nos. 59, 60, 64 of 1908, respectively.

Mr. *G. S. Ramachendra Aiyar*, for the Appellant.

Mr. *T. R. Venkatrama Sastri*, for the Respondent.

JUDGMENT.— The judgment of the lower Appellate Court is unsatisfactory. The suit in each of the three second appeals was for damages for malicious prosecution. The defendant charged the plaintiff in each of the suits with abetting the offence of

assault committed by certain other persons. He says that each of the plaintiffs used—certain language which showed that he was guilty of abetment. The complaint against the three plaintiffs was dismissed. The Subordinate Judge has not recorded a finding on the question whether, as a matter of fact, the language imputed to the plaintiff in each suit was used by him or not. But he says that assuming he did so, there was no reasonable and probable cause for the charge of abetment against him. In arriving at this finding the Subordinate Judge has apparently thrown the onus on the defendant. He observes: "Taking the defence evidence at its best, it makes out no further than the use of the expressions set forth at the outset, by the respective appellants. From this it is sought to be shown that they became accessories after the fact." It was not on the defendant to show that there was reasonable and probable cause in a suit for malicious prosecution but on the plaintiff to prove its absence. We may also observe that the Subordinate Judge seems to have misunderstood what would constitute reasonable and probable cause; for he says that "the degree of caution expected of a man who wants to set the criminal law in motion is that he should reflect like a man of ordinary prudence what chances there were of conviction against the person whom he accuses and how far his conduct would amount to an offence. It was quite an elementary rule of law that defendant had to remember in this case and not so difficult as to be solved by lawyers. Every man is supposed to know the law, and that no man would be an abettor unless he had actually instigated the offence is a matter that must be universally known." This cannot be accepted as correct. All that the defendant had to be satisfied about was that there was reasonable and probable cause for the charge *i.e.*, reasonable grounds for believing that the plaintiff was guilty of abetment and not reasonable grounds for coming to the conclusion that the Court would convict him of it. Whether the use of the particular language by the plaintiff in each suit in the circumstances in which it was uttered (assuming that the language was used) would amount to reasonable and probable cause for believing that they were guilty of abetment is a question that must be left to the lower Appellate Court to decide.

Again, with respect to the question of malice, the Subordinate Judge observes: "He (the defendant) did not stop to consider what each of the appellants did to contribute to the offence and what proof he had of it. His action in having included the appellants in the criminal charge has, in my view, been on the whole reckless and not sustained by reasonable grounds." Now carelessness on the part of the defendant in deciding whether there was reasonable and probable cause would not amount to malice, and both malice and absence of reasonable and probable cause had to be proved. It has, no doubt, been decided that, if a man has been reckless whether the charge be true or false, that might amount to malice but not recklessness in coming to the conclusion that there was reasonable and probable cause. We must, therefore, reverse the decree of the lower Appellate Court and remand the appeals to it for fresh disposal. The costs of these second appeals will abide the result.

Appeals remanded.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1164 OF 1912.
April 29, 1913.
Present:—Mr. Justice Rafique.
RAMNANDAN SINGH—PLAINTIFF—APPELLANT
versus
Maharaja PARBHU NARAIN SINGH—DEFENDANT—RESPONDENT.

Jurisdiction of Civil or Revenue Court—Compromise filed in Revenue Court—Suit to have the compromise declared invalid on ground of fraud.

A suit to have a compromise, filed in a suit exclusively triable by a Revenue Court, declared invalid on the ground of fraud is cognizable by the Civil Court.

Second appeal from the decision of the Sub-Judge of Jaunpore.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Parmeshwor Dyal* (for the Hon'ble Mr. *Gokul Proshad*), for the Respondent.

JUDGMENT.—It appears that in a suit for arrears of rent brought by the defendant respondent against the plaintiff-appellant in 1908 during the latter's minority a compromise was filed on his behalf by his

grandfather, Hargobind Singh. The plaintiff-appellant now seeks to have that compromise declared invalid. The present appeal arises out of the suit brought by the plaintiff, appellant, for that purpose. The claim was resisted on the ground among others that a Civil Court could not determine the character of a compromise filed in a suit, exclusively triable by a Revenue Court. The learned Munsif in whose Court the present suit was filed dismissed the claim holding that the allegation of the plaintiff-appellant that the latter's grandfather had fraudulently entered into a compromise with the defendant respondent had not been established. On appeal the learned Subordinate Judge affirmed the decree of the first Court on the ground that apart from other considerations the mere fact that the compromise was entered into in the Revenue Court in a suit exclusively triable by it the present claim was not cognizable by the Civil Court. The plaintiff has come up in second appeal to this Court. He contends that the two cases relied on by the learned Subordinate Judge have been misread by him. Those cases lay down that a Civil Court can entertain a suit of the present nature where the compromise is sought to be set aside on the ground of fraud. I think that the contention of the appellant is correct. The learned Subordinate Judge ought to have discussed the question whether the compromise in question was tainted with fraud before deciding the point whether the suit was cognizable by the Civil Court or not. I allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court for decision according to law. Costs here and hitherto will abide the event. The costs in this Court will include fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1201 OF 1910

January 29, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

THE SECRETARY OF STATE FOR INDIA REPRESENTED BY THE COLLECTOR OF GODAVARI—DEFENDANT—APPELLANT

versus

THE RAJAH OF PITTAPUR—PLAINTIFF—RESPONDENT.

Village Service Inams Act (II of 1894), *ss.* 11, 18—*Enfranchisements of* inams—Pattahs—*Quit rent land to be localised for imposition of quit rent*—*Who to localise*—Zemindar *not bound*—Pattah *cannot be forced on* zemindar—*Regulation XXIX of* 1902, *s.* 9—*Evidence Act (I of* 1872), *s.* 106—*Special knowledge.*

The village service *Inams* are enfranchised and *pattahs* are issued for the benefit of the *Inamdars*. If they do not accept the same, the proper course for the Government to follow is to resume these lands if they desire to do so. They cannot force the *pattahs* on the *zemindar*

Before imposing the quit rent the Government should localise the lands. It is not open to them to tell the *zemindar* that he must be in possession of these lands, though they cannot now be identified.

In the absence of a statutory obligation on the *zemindar* to see that the *karnam* keeps a register of the service *inams* for their localisation or to keep one himself, the presumption of special knowledge within the meaning of section 106 of the Evidence Act on the part of the *zemindar*, or his predecessor cannot be sustained.

Second appeal from the decrees of the Subordinate Judge of Cocanada, in A. S. Nos. 56 and 67, etc., against those of the District Munsif of Cocanada in O. S. Nos. 157 to 165 and 516 to 525 and of the District Munsif of Peddapur, in O. S. No. 2 of 1909.

Mr. *F. H. M. Corbett*, Advocate-General, for the Appellant.

Messrs. *S. Srinivasa Iyengar* and *S. G. Srinivasaraghava Iyengar*, for the Respondent.

JUDGMENT.

SANKARAN NAIR, J.—The finding in this case is that prior to the permanent settlement of 1802 in certain villages in the *zemindari* of Pittapur there were *kapu* service *inams*.

Those *inams* were not granted to the *zemindar*. The reversion, therefore, vested in the Government. The *inamdars*, whoever they were, have ceased to perform the services which they are bound to perform and the *inam* lands themselves as such have disappeared, that is to say, the Government are not able to identify them or localise them.

Acting on the view that they are now held by the *zemindar* as *jeroyati* lands the Government Officials have enfranchisd the *inams* in favour of the *zemindar* and issued *pattahs* in his name fixing an annual quit rent. The *zemindar* has refused to receive *pattahs* on the ground that he is not in possession of the *inams* and that he is not bound to receive any *pattahs* from the Government for them.

Then the question is whether the *zemindar* is bound to accept the *pattahs* fixing the annual quit rent. There is no doubt that these service *inams* belonged to the holders thereof and not to the *zemindar*. The persons, therefore, entitled to receive the *pattahs* on enfranchisement are those *inamdars*. If they refused to receive *pattahs*, the Government are entitled to resume those lands. It is contended by the Advocate-General that the *karnams* of the villages were bound to keep proper accounts giving all necessary information about the *inams*, that the *zemindar* is invested with powers of control over such *karnams* and that if he failed to carry out the duty imposed upon him by the statute, the Government ought not to suffer thereby and the *zemindar* must take the consequences *i. e.*, pay the quit rent on the *inams* which the *inamdars* of the lands are bound to pay. It is to be observed that the *zemindar* is not the owner of these *inams*. He had no title to them. Again sections 11 and 18 of the Madras Act II of 1894 show that the *inams* are to be enfranchised in favour of the holders of those lands, and it was the duty of the *zemindar* to recover the quit rent from the holders of such lands and such quit rent is stated by section 18 to be the first charge upon the lands in respect of which it is leviable. It is necessary, therefore, for the Government before imposing the quit rent to localise the lands. It is not open to them to tell the *zemindar* that he must be in possession of these lands, though they cannot now be identified, and that he must receive *pattahs* for the same. The *inams* are enfranchised and *pattahs* are issued for the benefit of the *inamdars*. If they do not accept the same, the proper course for the Government to follow is to resume these lands if they desire to do so. They cannot force the *pattahs* on a person who is unwilling to receive them. I am, therefore, of opinion that the Subordinate Judge is right. I would dismiss the second appeal with costs.

OLDFIELD, J.—I concur in my learned colleague's conclusion that the *zemindar's* connection with these *inams* has always been limited to his collection of the quit rent on them for Government as its agent and includes nothing enabling Government to insist on his accepting title deeds for them on terms of which he does not approve. I desire to deal only with the argument of the learned Advocate-General that the consent of the *zemindar* or person in possession to the terms of enfranchisement not being obtainable, Government must not be the loser owing to its inability to localise the land, of which the *inams* consist. He in fact contended, with reference to section 106 of the Evidence Act, that the *zemindar* was bound to prove where the land was, and that it was not in his enjoyment.

The special knowledge referred to in that section cannot be imputed to the *zemindar* on the ground that he has or had any title to these *inams*, since, as my learned colleague has pointed out, he was never invested with them. The contention is that the knowledge in question must be presumed, because of the *zemindar's* duty to appoint *Karnams* under section 9 Regulation XXIX of 1802. But neither these enactments nor others, to which we have been referred, impose on the *zemindar* an obligation to see that the *Karnam* keeps such a register or to keep one himself, if he does not desire to do so in his own interest. In the absence of such obligation the presumption of special knowledge on the part of the *zemindar* plaintiff, or his predecessors cannot be sustained.

I concur in the dismissal of the second appeal with costs.

Appeal dismissed.

CHIMAN LAL *v.* HARI CHAND.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

APPEAL No. 54 OF 1912.

May 2, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

CHIMAN LAL—APPELLANT

versus

HARI CHAND—RESPONDENT.

Custom—Adoption--Agarwal Banias *of Zira, Ferozepore District—Hindu Law or custom—Unequivocal declaration and subsequent treatment—Case not satisfactory precedent.*

The finding, that the Agarwal *Banias* of Zira, Ferozepore District, do not in matters of adoption follow the general rules of Hindu Law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption, though conclusive between the parties, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal *Banias* of Zira should be forthcoming.

Appeal form a final judgment and decree passed by the Chief Court on review, dated April 6th, 1908, affirming a judgment and decree of the Divisional Judge of Ferozepore, dated October 14th, 1904, which had affirmed a judgment and decree of the District Judge of Ferozepore, dated March 23rd, 1903.

FACTS.—One Jiwan Mal, by caste Agarwal *Bania*, turned the respondent out of the joint family business in August 1900. Thereupon the respondent filed a suit in the Court of the District Judge of Ferozepore in 1901, claiming a declaration that he was the adopted son and lawful heir of the said Jiwan Mal who denied having ever adopted Hari Chand. The District Judge delivered his judgment in March 1903 and held that there was "overwhelming evidence to prove that the defendant, Jiwan Mal, adopted Hari Chand, and treated him as a son continuously for many years." Against this finding an appeal was preferred to the Divisional Judge's Court which remanded the case under section 566, Civil Procedure Code, to the lower Court for an inquiry into the question whether the parties were governed by Hindu Law or custom, and if by custom whether the adoption as alleged to have taken place was valid under the custom prevailing among the Agarwal *Banias* of Zira. The report of the Commissioner having been received the Divisional Judge held that "from the evidence produced by the parties it was proved beyond a shadow of doubt that as far as adoption was concerned the parties did not follow Hindu Law but were governed by custom and that the plaintiff was adopted by the defendant as his son according to the custom prevailing among the Agarwal *Banias* of Zira." Although no appeal lay to the Chief Court, it admitted the case under the special powers of revision conferred on the the Court by section 70 (A) and (B) of the Punjab Courts Act, 1884, (Act XVIII of 1884). The case coming on for hearing, the Chief Court set aside the judgment and decree of the Divisional Judge on the ground that no special treatment of the plaintiff as adopted son was proved [*Sohnan v. Ram Dial* (1)]. The respondent applied for and obtained an order for review of the judgment of the Chief Court which after the case was re-argued set aside its own judgment and affirmed that of the lower Court.

Against this an appeal was preferred before the Privy Council.

Sir *Robert Finlay*, *K. C.*, *M. P.* and Mr. *Ross*, *K. C.*, for the Appellant, contended that the respondent had not proved that the alleged adoption was valid according to Hindu Law, nor did he prove that by custom he was an adopted son of Jiwan Mal. The adoption was invalid both according to custom and Hindu Law and that mere treatment of one as an adopted son was not sufficient in law to establish an adoption in the absence of any proof that such treatment amounted to a valid adoption among the Agarwal *Banias* of Zira either by family or tribal custom. The period of six years during which the respondent was alleged to have been treated as adopted son was not sufficiently long to confer on him the status of an adopted son. The said Jiwan Mal had absolute power to repudiate any adoption during his life-time. The respondent was an orphan and, therefore, incapable of being adopted.

[LORD MOULTON.—If a married man can be adopted, why cannot an orphan be adopted?]

The Chief Court had improperly set aside its own judgment on review.

(1) 79 P. R. 1901; 107 P. L. R. 1910.

Rup Chand v. *Jambu Parshad*(2) referred to.

Mr. *De Gruyther*, *K. C.* with him Mr. *O'Gorman*, on behalf of the Respondent, contended that all Courts in India had concurrently found that the respondent was in fact adopted by Jiwan Mal. The findings that the parties are governed by custom is a finding of fact and as such final and conclusive and not open to appeal.

Mr. *Ross* replied.

JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the 19th January 1901 in the Court of the District Judge of Ferozepore by Hari Chand, who is the respondent here, against Jiwan Mal, now dead, who is represented by Chiman Lal the appellant. In this suit Hari Chand sought a declaration that he was the adopted son of Jiwan Mal the then defendant. In his written statement Jiwan Mal alleged that he had never adopted Hari Chand.

Hari Chand and Jiwan Mal were Hindus, and Agarwal *Banias* of Zira, in the Punjab. Hari Chand was one of the four sons of Ghannu Mal, who was a brother of Jiwan Mal. Chiman Lal, the appellant here, was a son of Maya Mal, who was another brother of Jiwan Mal. At the time of the alleged adoption Hari Lal was an orphan and was married. No issue was framed by the District Judge as to whether the parties were governed by Hindu Law or by custom, or as to the validity of the adoption if it, in fact, were made. The District Judge held that in the Punjab—

"Non-agricultural Hindus do not, in matters of adoption, follow Hindu Law, and there seems no reason to doubt that a declaration of adoption, together with treatment in accordance with the avowed intention, would be sufficient to establish the validity of an adoption, even though the position of the adopted son were inconsistent with the strict requirements of Hindu Law."

The District Judge found that Jiwan Mal had, in fact, adopted Hari Chand, and on the 23rd March 1913, gave the plaintiff a decree.

(2) 6 Ind. Cas. 272; 37 I. A. 93; 14 C. W. N. 545; 7 A. L. J. 349; 12 Bom. L. R. 402; 11 C. L. J. 451; 32 A. 247; 8 M. L. T. 3; 20 M. L. J. 439; (1910) M. W. N. 432.

From the decree of the District Judge Jiwan Mal appealed to the Court of the Divisional Judge of Ferozepore. The Divisional Judge, on the 10th July 1903, remanded the suit to the Court of the District Judge to give the parties the opportunity of proving or disproving the validity of the adoption. On the return to the order of remand the Divisional Judge found, as a fact, that the parties were governed in cases of adoption by customary law, and that in the caste to which the parties belonged "a mere declaration to the effect that a boy has been adopted and his subsequent treatment as a son is sufficient for all intents and purposes to make the adoption a valid one," and further found on the evidence that Hari Chand had been adopted by Jiwan Mal as his son according to the custom prevailing among the Agarwal *Banias* of Zira. The Divisional Judge by his decree of the 14th October 1904 dismissed the appeal.

From the decree of the 14th October 1904 of the Divisional Judge Jiwan Mal appealed to the Chief Court of the Punjab. The learned Judges of the Chief Court on appeal carefully reviewed the evidence in the case, and holding that Jiwan Mal had unequivocally designated Hari Chand as his heir and had treated him as his adopted son, found that the factum of adoption was proved. On the question of the validity of the adoption the learned Judges found that the Agarwal *Banias* of Zira did not follow Hindu Law in matters of adoption, and observed that "the really important thing is the unequivocal intention and treatment, and we find both proved here." The Chief Court by its decree dismissed the appeal.

From the decree of the Chief Court of the Punjab dismissing the appeal to that Court this appeal has been brought. In this appeal it has been contended on behalf of the appellant so far as is material, that Jiwan Mal did not in fact adopt Hari Chand as his son, and that the alleged adoption was invalid according to Hindu law. Their Lordships consider that the Chief Court and the Divisional Judge have concurrently found that among the Agarwal *Banias* of Zira the general rules of Hindu Law as to adoptions do not apply, and that by the custom applicable to the Agarwal *Banias* of Zira an unequivocal declaration by the adopt-

ing father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption; and that in fact Jiwan Mal did unequivocally adopt Hari Chand as his son and treated him as his adopted son. Of the fact of the adoption and treatment there was ample evidence upon which the Judges of the Chief Court and the Divisional Judge could find as they did. The evidence upon which it was found that the Agarwal *Banias* of Zira do not in matters of adoption follow the general rules of Hindu law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption, appears to their Lordships to have been somewhat limited, but their Lordships consider that as between the parties to this suit and to this appeal, and those claiming through or under them that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid. Their Lordships, however, consider that the present case, owing to the limited nature of the evidence as to custom among the Agarwal *Banais* of Zira, would not be a satisfactory precedant if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal *Banias* of Zira should be forthcoming. The contention that Chiman Lal had also been adopted by Jiwan Mal is not established by the evidence before this Board.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the decree of the Chief Court of the Punjab should be affirmed. Chiman Lal, the appellant, must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Hastemp & Davis.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 29 OF 1910.

September 20, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

THE MANAGER INCUMBERED ESTATES IN SIND—APPELLANT

versus

GANGARAM BACHOMAL—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Delay in obtaining copy of decree—Non-deposit of copying charges.

Where an application for a copy of the decree is refused on account of the decree not being ready, the delay in the time taken in obtaining the copy will be excused, even though no deposit for copying charges may have been made.

Appeal from the decision of the District Judge, Hyderabad.

Mr. *E. Raymond*, for the Appellant.

Mr. *Mathradas Ramchand*, for the Respondent.

JUDGMENT.—The judgment of the first Court was delivered on the 26th July. On the 28th July the appellant applied for copy of the judgment. On this application the order made was: "Give copy of judgment. Decree not ready. Take deposit." Copy of judgment was prepared and delivered the same day. On the 2nd September the decree was made and the appellant applied orally for a copy. The Clerk of the Court refused to give a copy unless a fresh application was made apparently treating the application for copy of decree made on the 28th July as refused by reason of the copy not being ready. The Assistant Judge, however, on the 4th September ordered copy of the decree to be given without a fresh application in writing. On these facts we think it immaterial that there was no money left in deposit for the decree after the 28th July. The appellant had applied for copy of the decree. It was refused as the decree was not ready and then was afterwards granted as soon as the decree was prepared. The delay in the preparation of the decree was, therefore, in this case the immediate cause of the delay in the time taken in obtaining a copy. We, therefore, allow this appeal and remand the appeal to the District Court for re-admission and disposal on the merits. Costs to be costs in the cause.

Appeal remanded.

VENKATTACHELLA CHETTI *v.* NARAYANA AIYAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 522 OF 1912.

February 21, 1913.

Present:—Mr. Justice Sankaran Nair.

VENKATACHELLA CHETTI AND OTHERS —PLAINTIFFS—PETITIONERS

versus

C. K. NARAYANA AIYAR AND OTHERS— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 153, O. VI, rr. 16, 17—Suit for declaration to be converted into one for possession—Court incompetent to convert—Amendment of plaint—Revision of order without jurisdiction.

A plaint may be returned for amendment only if a party applies for it. It is not open to the Court of its own accord to direct a plaint to be returned for amendment or to convert a suit for declaration into one for possession.

When an order directing a plaint to be returned for amendment is without jurisdiction, it is open to revision by the High Court.

Petition, under section 115 of Act V of 1908, to revise the order of the District Court of South Arcot, in O. S. No. 10 of 1912.

Messrs. *K. Naraina Row* and *V. R. Ponnusami Aiyangar*, for the Petitioners.

Messrs. *T. V. Seshagiri Aiyar*, *T. Ethiraja Mudaliar*, *T. Muthukrishna Aiyar*, *T. R. Venkatrama Sastri*, *V. Purushothma Aiyar* and *A. Krishnasami Aiyar*, for the Respondents.

JUDGMENT.—The plaint in the suit for a declaratory decree was admitted on the 1st March. On the 9th August the District Judge passed an order returning the plaint for amendment within ten days, as he was of opinion that when the suit was instituted the plaintiffs were able to seek further relief than a mere declaration.

I am asked to set aside that order in revision. It is urged before me that the plaintiffs were not entitled to possession and the dispossession was subsequent to the 18th March. If this is so, the District Judge is wrong in holding that the suit for declaration will not lie. But I have not heard the respondents' Pleader on this question, as I propose to set aside the order on another point. The plaintiffs' Pleader represented to the District Judge that he was unwilling to amend the plaint and, therefore, did not want the plaint to be returned for that purpose. In these circumstances the District Judge has no jurisdiction under the Code to direct the plaint to be returned for amendment. A plaint may be returned for amendment if a party applies for it. (Order VI, rule 17). Under that provision of law it is not open to the District Judge to insist upon the party amending the plaint for the obvious reason that if he refuses to do so the District Judge has no means of carrying out his order. He can only reject the plaint or dismiss the suit. This he should have done when the Pleader declined to amend the plaint.

The case does not fall within Order VI, rule 16. Nor does section 153 apply, under that section the Court itself may make any amendment. Here it is obvious it is not open to the Court of its own accord to convert the suit for declaration into one for possession. Then it is urged that this is only an interlocutory order and the plaintiffs should have waited for the period allowed for amendment when their plaint would have been rejected. Then it would have been open to them to appeal, when this Court might have dealt with the question on its merits, and decided whether the District Judge was right in holding that the suit for declaration will not lie. This, in my opinion, would, undoubtedly, have been the proper course as it is possible that, when this order is set aside, the District Judge will reject the plaint and the petitioner will have to come to this Court for a decision on the question whether a suit for declaration will lie. But as it appears that the order was passed without jurisdiction, I must interfere. I, therefore, set aside the order directing the plaint to be returned for amendment and direct the District Judge to restore the suit to its file and dispose of it according to law. No order is made as to costs.

Order set aside;

Case remanded.

E. I. RY. CO. *v.* MADHU LAL.

CALCUTTA HIGH COURT.
CIVIL RULE No. 6638 OF 1912.
March 10, 1913.

Present:—Justice Sir Richard Harington, Bart., and Justice Sir Herbert Carnduff, KT.

THE EAST INDIAN RAILWAY CO.,—
DEFENDANTS—PETITIONERS
versus
Babu MADHU LAL—PLAINTIFF—
RESPONDENT.

Railway Company—Claim in respect of damaged goods—Service—Railway administered by Company—Service of claim upon Divisional Traffic Manager instead of upon Agent, if sufficient—Railways Act (IX of 1890), ss. 77, 140.

A claim under section 77 of the Railways Act, in respect of goods, which are delivered in a damaged condition, must be served, under section 140 of the Act, in the case of a Railway administered by a Company, on the Agent; the service of a notice upon the Divisional Traffic Manager is not sufficient and legal.

Nadiar Chand Shaha v. *Wood*, 35 C. 194; 12 C. W. N. 450, relied upon.

Woods v. *Meher Ali Bepari*, 3 Ind. Cas. 479; 13 C. W. N. 24; 4 M. L. T. 427, distinguished.

FACTS.—The facts are stated in the judgment of the Court below.

This is a suit for recovery of Rs. 12-42, the value of two bundles of tobacco containing $3\frac{1}{2}$ maunds from the defendant East Indian Railway Company. It is admitted that there was shortage by one maund.

The defendant has taken an objection to the effect that the Traffic Manager has not been served with a notice. The fact is that the Divisional Traffic Manager has been served with a notice and I am of opinion that the conditions of the law have been sufficiently complied with. About risk-note I do not attach any great importance to it. The Company is bound to take the goods safe to the consignee. I think the value of tobacco has been very much exaggerated. I allow only Rs. 5 per maund as the value of tobacco. The suit is decreed for Rs. 20 only (Rs. 17-8 value of tobacco and Rs. 2-8 as compensation).

The defendant Railway Company obtained this Rule.

Babu *Hari Bhushan Mukherjee*, for the Petitioners.

Babu *Gonesh Dutt Singh*, for the Opposite Party.

JUDGMENT.

HARINGTON, J.—This is a Rule to set aside a judgment given against the East Indian Railway Company on the ground, amongst others, that no claim was served on the Company under the provisions of section 77 of the Indian Railways Act. That section provides that a claim such as the present claim which is made in respect of goods which are delivered in a damaged condition shall not be enforced unless it is made in writing to the Railway administration within six months from the date of the delivery of the goods. Now, section 140 provides how that claim is to be served and enacts that any document required or authorised by this Act to be served on Railway administration may be served, in the case of a Railway administered by the Government, on the Manager and, in the case of a Railway administered by a Railway Company, on the Agent in India of the Railway Company and, then it goes on, in the sub-clauses, to describe how that claim is to be served, which it is unnecessary to deal with in this case. The complaint made by the Railway Company in the present case is that the judgment of the lower Court cannot stand because the sections of the Railways Act to which I have referred have not been complied with. The claim in question was served within six months but it was served on the Divisional Traffic Manager and the learned Vakil for the opposite party argues that that is a sufficient compliance with the provisions of the Act. It is quite clear to me that it is not so. There is a direct authority contrary to the view taken by the learned Vakil which is to be found in the case of *Nadiar Chand Shaha* v. *Wood* (1) and that case laid down that the notice must be served as provided by section 140 and that the service on the Traffic Manager in the case of a Railway administered by the Railway Company instead of on the Agent is not a service within the Act. It is perfectly clear to my mind that that decision is a perfectly correct one. On the other hand, reliance has been placed by the learned Vakil in the case of *Woods, Agent of the Assam Bengal Railway Company* v. *Mehar Ali Bepari* (2). If that case purported to lay down as a matter of law that a service on the Traffic Manager was a sufficient compliance with the Act and was a good service as on the Agent I shall not be prepared to agree with it

(1) 35 C. 194; 12 C. W. N. 450.
(2) 3 Ind. Cas. 479; 13 C. W. N. 24; 4 M. L. T. 427.

But the decision appears to have gone on the finding come to on the particular facts of that case that the Agent had authorised the Traffic Manager to receive the notice: at least, that is the fact, as I follow the judgment. The result is that, in my opinion, this Rule ought to be made absolute on the very short ground that the plaintiff in the action did not comply with the condition precedent to his suit which is found in section 77 of the Railways Act by not serving the claim as provided by section 140 of that Act. On this ground, the Rule is made absolute with costs, the hearing fee being assessed at one gold *mohur*.

CARNDUFF, J.—I agree.

Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1088 OF 1912.

April 7, 1913.

Present:—Mr. Justice Rafique.

MUHAMMAD ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUKHU—DEFENDANT—RESPONDENT.

Practice—Vakalatnama—*Appeal*—*Pleader's name not mentioned in* vakalatnama *by oversight*—*Appointment*—*Presentation*—*Pleadings.*

Where by oversight the name of a Pleader, presenting an appeal, was not mentioned in the body of the *vakalatnama*:

Held, that the Pleader was not duly appointed and the appeal was not properly presented.

Pokhpal Singh v. *Damber Singh*, 6 A. L. J. 110, *Notes*, referred to.

Second appeal from the decision of the Additional Judge of Aligarh, dated the 1st of July 1912.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants brought a suit in the Court of the Munsif of Bulandshahr for possession of certain *abadi* land. The claim was decided against them and an appeal was filed on their behalf in the Court of the District Judge of Aligarh on the 10th July 1911. The appeal was filed by one Munshi Abdul Salam Khan, Vakil, who at the same time filed his *vakalatnama* also. The case was heard by the Additional Judge who remanded it to the lower Court for the trial of certain issues. The remand order was made on the 4th August 1911. The Munsif returned the case with his findings on the 28th November 1911. The parties filed cross-objections on the 13th and 19th December 1911. The case was again remanded on the 22nd January 1912. The Munsif submitted his second finding on the 2nd March 1912. On the 13th April 1912 the respondent filed objections to the finding submitted by the Munsif. Munshi Abdul Salam Khan died prior to the submission of the first finding by the learned Munsif. The appeal was heard on the 1st July 1912 when a preliminary objection was taken to the effect that the memorandum of appeal had not been properly presented to the Court of the District Judge, inasmuch as the name of Abdul Salam Khan was not mentioned in the body of the *vakalatnama*. The learned Additional Judge accepted the preliminary objection and dismissed the appeal. The plaintiffs-appellants have come up in second appeal to this Court. It is contended on their behalf that the omission of the name of the Vakil in the body of the *vakalatnama* was due to an oversight and that considering that the objection was taken by the respondent at a very late stage it should not have been given effect to. There can be no doubt that the omission of the name of Abdul Salam Khan from the body of the *vakalatnama* must have been due to an oversight. But the question is whether such a mistake can be condoned and the appeal can be considered as properly presented. The case of *Pokhpal Singh* v. *Damber Singh* (1) is against the contention for the appellants. It was held in that case that a Pleader whose name was omitted in the body of the *vakalatnama* was not duly appointed and that an appeal presented by him was not properly presented. If Munshi Abdul Salam was not duly appointed by the plaintiffs-appellants and if the appeal filed by him was not properly presented, the fact that the objection was not taken till a very late stage in the case would not validate the presentation of the appeal.

(1) 6 A. L. J. 110 *Notes*.

The appeal, therefore, fails and is dismissed, but considering the special circumstances of the case I make no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 167 OF 1911.

April 11, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.

ISHUR CHANDRA SARKAR—DEFENDANT—APPELLANT

versus

TROYLOKYA NATH SINGHA—PLAINTIFF—RESPONDENT.

Regulation (VII of 1822)—Settlement of fair rent not authorised—Settlement Officer to record existing rent—Jamabandi, *signed by defendant, whether amounts to assent to enhanced rent.*

Regulation VII of 1822 does not authorize the settlement of fair rent. All that the Settlement Officer is entitled to do is to record the existing rent.

As a result of Settlement proceedings, the defendant's rent was enhanced. He never admitted the enhanced rent, but signed the *jamabandi*:

Held, that the mere fact that he signed the *jamabandi* is not sufficient to warrant the inference that he did assent to the enhancement, and that he cannot, therefore, be made liable for the recorded rental.

Appeal from the decree of the Sub-Judge of Murshidabad, dated September 29th, 1910, reversing that of the Munsif of Lalbagh, dated July 30th, 1909.

Babus *Brojo Lal Chakravarti* and *Naresh Chandra Sen Gupta*, for the Appellant.

Mr. *D. N. Sarkar*, for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiff is a *dar-patnidar* in a Government estate named Char Gadi and sues for arrears of rent for the years 1312 to 1315 B. S. at the rate of Rs. 37 per year in respect of a holding measuring 30 *bighas* 9 *kottahs* 5 *ch*. It is alleged that the rental was formerly Rs. 32-11 but that as a result of Settlement proceedings in 1904 it was enhanced at first to Rs. 38 and finally on the defendant's objection fixed at Rs. 37. It is further alleged that the area of the holding was originally 30 *bighas* but was found by the Settlement to be 30 *bighas* 9 *kottahs* 5 *ch*.

In the Court of the Munsif the defendant denied that his holding was situated in Char Gadi. He maintained that in another estate he was in possession of a holding measuring 31 *bighas* 16 *kottahs* at a rental of Rs. 32-11. The Munsif has decreed the suit at this rate.

On appeal the Subordinate Judge is of opinion that having signed the *jamabandi* the defendant is bound by the Settlement proceedings and he has, therefore, decreed the claim at the full rate of Rs. 37.

The defendant now appeals and the only point urged in his behalf is that the learned Subordinate Judge has committed an error in law in holding that the defendant is bound by the rate fixed by the Settlement Officer.

It is admitted that the Settlement was carried out under Regulation VII of 1822. Now although the Regulation contains no provisions strictly defining the powers of Settlement Officers I am of opinion that it does not authorise the settlement of fair rents. All that the Settlement Officer is entitled to do is to record the existing rent. Whatever may have been the view previously held by some Courts it is clear that since Act X of 1859 came into operation this Court has always held that the provisions of sections 7 and 9, Regulation VII of 1821, must be read as qualified by Act X of 1859 and subsequent Rent Acts. See *Nawab Nazim of Bengal* v. *Ram Lal Ghose* (1), *J. P. D'Silva* v. *Raj Coomar Dutt* (2), *Enayetoolah Meah* v. *Nubo Coomar Sircar* (3), *J. W. Ledlie* v. *Sreemutty Doorga Monee Dossee* (4), *Akshay Kumar Dutt* v. *Shama Charan Patitanda* (5).

In the case before us I am satisfied that the defendant has never admitted the enhanced rate. The mere fact that he signed the *jamabandi* is not sufficient to warrant the inference that he did assent to the enhancement and he cannot, therefore, be made liable for the rocorded rental.

But apart from the authorities above cited I am supported in my view of the scope of Regulation VII of 1822 by the history of Settlement Law in Bengal. At the time of the Permanent Settlement rents in the English sense were unknown and a *ryot* was not bound to pay more than the

(1) 6 W. R., Act X Rulings 5.
(2) 16 W. B. 153.
(3) 20 W. R. 207.
(4) 21 W. R. 410.
(5) 16 C. 586.

pergunnah or customary rate. An examination of the enactments passed between 1793 and 1859 shows that enhancements beyond this rate were not contemplated by the Legislature. It certainly does not appear that Regulation VII of 1822 was enacted for the purpose of facilitating enhancements. That Regulation was passed because when the proposals for the Permanent Settlement of the ceded and conquerred Provinces were being considered it was found that little reliance could be placed on the experience gained in Bengal and that it was essential to collect more data. This is clear from the preamble to the Regulation which states that the purpose of the Regulation was not to make any general or extensive enhancement of the *jama* but to ascertain, settle and record the rights of all persons collecting the rent or revenue payable on account of land. When the Courts began to interpret this Regulation as authorising the entry of only admitted rates the Legislature enacted first Act VIII B. C. 1879 and then Chapter X, Act VIII of 1885 for the purpose of enabling the Settlement Officer to settle fair rates.

With a like object Regulation VII of 1822 was repealed in the North Western-Provinces by Act XIX of 1873, which in its turn was repealed by the U. P. Act III of 1901.

I would accordingly hold that where, as in this case, the tenant disputes the rate of rent, a Settlement Officer, acting under Regulation VII of 1822, is not competent to make any enhancement. The landlord's proper remedy is to sue for such enhancement in conformity with the Tenancy Law. The appeal is, therefore, allowed. The decree of the Sub-Judge is discharged and that of the Munsif restored with costs throughout.

JENKINS, C. J.—I agree that this appeal should be allowed and the decree of the Munsif restored.

As the proceedings were under Regulation VII of 1822 and not under the Tenancy Act the defendant was not bound by the enhancement of rent in the absence of his assent, and there is no finding that he did assent. On the contrary it appears that he objected.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 889 OF 1912.

April 1, 1913.

Present:—Justice Sir Henry Griffin, KT., and Mr. Justice Ryves.

HAKIM ALI KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DALIP SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee undertaking to pay a prior mortgage—Failure of contract—Damages—Limitation.

J. mortgaged his property to *B.* He subsequently effected a usufructuary mortgage of the same property to *D.* leaving sufficient out of the mortgage money with *D.* for payment to *B.* Subsequently *J.* sold his equity of redemption to *A.* *D.* did not pay the prior mortgage of *B.* who brought a suit for sale of the property and obtained a decree. In order to save the property *A.* paid the decretal money and brought a suit to recover the same from *D.*:

Held, that *D.* was liable, and that limitation would run from the date the decretal money was paid.

Second appeal from the decision of the District Judge of Meerut, dated the 10th of April 1912.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Chaudhri* (with him Mr. *Harendro Krishna Mukerji*), for the Respondents.

JUDGMENT.—One Jagannath, owner of certain property, mortgaged it to one Behari Lal on the 17th of April 1900. On the 5th of February 1901 he made a second mortgage of the same property and some other property to Dalip Singh and Ram Chander Singh, the respondents in this Court. By this mortgage which was for a sum of Rs. 350, Rs. 184 were left with the mortgagees in order that they should pay off the prior mortgage in favour of Behari Lal. This mortgage, we may mention, was a mortgage with possession for a term of eight years. This sum of Rs. 184 was never paid by Dalip Singh and Ram Chander to Behari Lal. On the 23rd January 1903 Jagannath sold the equity of redemption in the property mortgaged to the plaintiffs-appellants before us leaving with them Rs. 350 for discharge of the second mortgage. A suit was brought on the first mortgage with the result that in order to save the property from sale the plaintiffs-appellants had to pay into Court the sum of Rs. 1,679-5-3 in satisfaction of the decree. In the present suit the plaintiffs seek to recover that amount

from the defendants, Dalip Singh and Ram Chander Singh, who were mortgagees under the deed of the 5th of February 1901. The Court of first instance decreed the suit. The lower Appellate Court dismissed it apparently on the ground that there was no privity of contract between the plaintiffs and the defendants and apparently also because in the opinion of the Court below the suit was barred by time. It appears to us that the plaintiffs stand in the shoes of the original owner, Jagannath. If he had paid the sum of Rs. 1,679-5-3 in satisfaction of the decree obtained on Behary Lal's mortgage he would have been entitled to recover that amount from the defendants-respondents before us because it was owing to the latter's failure to carry out their contract that he became liable to pay this largely increased amount. It appears clear to us that limitation would run from the date on which Jagannath had to pay the decretal amount. The plaintiffs were entitled to all the rights and equities which would have arisen in favour of Jagannath. We think that the view taken by the Court of first instance is correct. We allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiffs-appellants will have their costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2979 OF 1910.
April 11, 1913.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley.

KAILASH CHANDRA ADHIKARY—
DEFENDANT—APPELLANT
versus
KARUNA KANTHA CHOWDHURY
—PLAINTIFF—RESPONDENT.

Hindu Law—Dayabhaga School—Inheritance—Paternal great-grandfather's son's daughter's son—Mother's brother—Who is preferable.

A paternal great-grandfather's son's daughter's son, that is, a granduncle's daughter's son is the preferable heir according to the Dayabhaga School of Hindu Law, than a mother's brother.

Appeal from the decree of the Sub-Judge of Mymensingh, dated June 2nd, 1910, affirming that of the Munsif of Netrokona, dated September 1st, 1909.

Babu *Debendra Nath Bagchi*, for the Appellant.

Babu *Gobinda Chandra Dey Roy*, for the Respondent.

JUDGMENT.—The main question involved in this appeal is whether a paternal great grandfather's son's daughter's son (*i.e.*, a granduncle's daughter's son), or a mother's brother (*i.e.*, maternal uncle) is the preferable heir according to the Dayabhaga School of Hindu Law. The plaintiff brought a suit for rent of certain property which he claimed to have inherited from one Sarat Chander, the last male owner on the death of his mother, Kunjomoni as his granduncle's daughter's son. The defendants Nos. 1 and 2 (the tenants) raised the objection, that he was not entitled to the rent, on the ground that the defendant No. 3 was the heir, of Sarat Chunder. The defendant No. 3 thereupon was added as a party to the suit and he pleaded that he as the maternal uncle of Sarat Chunder was his heir in preference to the plaintiffs. The Courts below have held that the plaintiff is the preferential heir and have decreed the suit for rent in his favour. The defendant No. 3 has appealed to this Court.

According to the doctrine of spiritual benefit the plaintiff is the preferential heir, being competent to offer funeral cakes to the parternal great grandfather of the last male owner in which he participated, whereas the defendant is competent to offer such cakes to his maternal ancestors only, and the first kind of cakes are of superior religious efficacy in comparison to the second. The view that the principle of spiritual benefit governs the law of inheritance in the Dayabhaga, was authoritatively laid down by the Full Bench in the case of *Gooroo Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1) and again by another Full Bench in the case of *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (2). It has been contended on behalf of the appellant that the principle of spiritual benefit is, no test of heirship, at any rate, not the sole test, and that the

(1) 13 W. R. 49 (F. B.); 5 B. L. R. (F. B.) 15.
(2) 9 C. 563; 12 C. L. R. 204.

doctrine had been misunderstood by Mitter, J., in the Full Bench case of *Gooroo Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1) and reliance has been placed on certain observations made by Sastri Golap Chandra Sarkar in his work on Hindu Law, 4th Edition, page 323. An attempt was made in a recent case, *Kedar Nath Roy* v. *Amritalal Mookerjee* (3), to induce the Court to have the matter re-considered by the Full Court on the ground that the Full Bench took an erroneous view of the fundamental principles which underlie the Dayabhaga and, consequently, arrived at incorrect conclusion, but it was unsuccessful. The learned Judges (Mookerjee and Carnduff, JJ.) expressed the opinion that had the matter been *res integra* the view put forward by the appellant would deserve consideration, but that on well established principles the matter should not be re-opened, the law on the subject having been authoritatively laid down by two successive Full Benches, once in 1870 and again in 1883, and previous attempts to re-open the matter having never been successful. We agree with the opinion expressed in that case, and must treat the law as settled by the Full Bench decisions.

It is contended, however, that the precise position of the paternal uncle's daughter's son in the category of heirs was not determined in the case of *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1) and that having regard to the fact that the mother's brother is expressly named as an heir in the Dayabhaga and the great grandfather's son's daughter's son is not mentioned, goes to show that the former is entitled to succeed in preference to the latter. It is further contended that the funeral cake offered by the granduncle's daughter's son although offered to a paternal ancestor of the deceased coming as it does through a maternal line is not preferable to that given by the defendants. It is true the oblations offered by the plaintiff to the great grandfather of the deceased come through a maternal line, but oblations offered to a paternal ancestor of the deceased in which he participates, although coming through a maternal line are of superior efficacy to those offered to maternal ancestors of the deceased.

The argument based upon the ground that the maternal uncle is expressly mentioned and the granduncle's daughter's son is not mentioned in the Dayabhaga has no force. As pointed out by Dawarkanath Mitter, J., in the Full Bench case "Every one who has gone through the Dayabhaga must have perceived that the specified enumeration of each individual heir was not the object which the author had in view. It is perfectly true that a few of the heirs have been mentioned by name here and there; but the great majority of them have been left to be determined by the application of the principle of spiritual benefit. Thus, of the numerous relatives who are entitled to come in as *sapindas* by virtue of their right to offer oblations to the maternal ancestors of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then, again, among the *sakulas* or kinsmen connected by divided oblations, the grandson's grandson is the only person who has been specifically enumerated, and of the *samanodukas*, or kinsmen connected by libations of water, not one even has been so enumerated. In the face of all these facts it is impossible to contend that the mere absence of specific enumeration is any ground whatever for excluding one single individual who is really competent to fulfil the conditions of heirship laid down in the Dayabhaga itself."

No doubt, the precise position of the paternal uncle's daughter's son in the category of heirs was not laid down in that case but in the subsequent case of *Braja Lal Sen* v. *Jiban Krishna Roy* (4) the precise position of the father's brother's daughter's son in the line of heirs was considered and it was held that there could be no doubt that he comes before the *sapinda* relations in the maternal line. The learned Judges in that case (Maclean, C. J., and Bannerjee, J.,) observed as follows:—"This will be seen from the Dayabhaga, Chapter XI, section VI, paragraphs 13 and 20, in the former of which the author indicates the reason for the succesion of maternal kinsmen and for the preference of *sapindas* in the paternal over those in the maternal line, according to the doctrine of spiritual benefit. That reason is shortly this: The wealth of a deceased person, who can no longer have temporal enjoyment, should devolve on those who can confer spiritual benefit on him.

(3) 17 Ind. Cas. 283; 16 C. L. J. 342; 17 C. W. N. 492.

(4) 26 C. 285.

MAJIDA BIBI *v.* FAZL KARIM.

Now the *sapindas* on the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering oblations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer, and, therefore, while both are entitled to inherit his estate, the latter succeed only on failure of the former. After showing that his doctrine is in conformity with the texts of Manu, the author of the Dayabhaga states his conclusion in paragraph 20."

The granduncle's daughter's son would on the same principles succeed in preference to the maternal uncle. Dayabhaga Chapter XI, section 6, verse 9 says: "The succession of the grandfather's and great grandfather's lineal descendants including the daughter's sons, must be understood in a similar manner according the proximity of the funeral offering" and verse 12 says. "On failure of any lineal descendants of the paternal great grandfather down to the daughter's son who might present oblations in which the deceased would participate" the property devolves on the maternal kindred. And in the Dayakrama Sangraha, Chapter 1, section X, verse 13 it is stated (In default of peternal great grandfather's son) "the succession devolves on the paternal grandfather's brother's daughter's son, who present an oblation in which the deceased owner participates, namely to the owner's paternal great grandfather (*i.e.*, his maternal great grandfather)."

We are accordingly of opinion that the Courts below are right in holding that the plaintiff is the preferable heir.

It was next contended that the Court of Appeal below ought to have come to a finding whether the $\frac{1}{3}$rd share of one Nilmoney (plaintiff's mother) constituted the *stridhan* of Kunjomoni, the mother of Sarat Chander, because if it was her *stridhan* it passed to her brother, defendant No. 3. But the question was not raised in the lower Appellate Court. It is said that it is a pure question of law, but the decision of it depends upon questions of facts. For instance it will have to be found whether the possession of Kunjomoni was adverse to Nilmoney, a co-sharer, and if so whether Nilmoney died within twelve years of the suit, in which case the plaintiff being the reversioner will not be bound by any adverse possession by Kunjomoni against Nilmoney. The defendant No. 3 cannot complain that no findings were arrived at on these points, as he did not raise the question at all in the lower Appellate Court, and we cannot allow him to raise the point now. The appeal is accordingly dismissed wtih costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 358 OF 1910.

April 16, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

MAJIDA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Malik FAZL KARIM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale or mortgage—Onerous character of mortgage, effect of—Improbability of the redemption of mortgage, effect of—Transfer, short of sale, to circumvent the law of pre-emption not fraudulent—Evidence Act (I of 1872), s. 92—Exclusion of oral evidence—Third party.

The onerous character of a mortgage cannot alter the real nature of the transaction and convert it into a sale.

The fact that it is highly improbable that a mortgage would be redeemed would not make it any the less a mortgage, for it is capable of redemption, however remote the chance.

Dhan Singh v. *Bodh Singh*, 3 O. C. 213; *Badri Singh* v. *Chandika Singh*, 14 Ind. Cas. 8; 15 O. C. 1, *Tikaya Ram* v. *Dharam Chand*, 45 P. R. 1895, relied upon.

A person is not forbidden to circumvent the law of pre-emption by taking a transfer which falls short of a sale, but which may eventually have the same effect as a sale. There is nothing fraudulent in such a transaction.

The rule contained in section 92 of the Evidence Act applies only to parties to the contract and does not cover the case of a third party not privy to the contract. A pre-emptor is at liberty to produce oral evidence to prove that what purports to be a mortgage is in reality a sale.

MAJIDA BIBI *v.* FAZL KARIM.

Appeal against the decree of the District Judge, Fyzabad, dated 11th May 1910, confirming that of the Munsif, Fyzabad, dated 26th February 1910.

Mr. *Sami-ullah Beg*, for the Appellants.

Mr. *P. C. Gupta*, holding brief of Mr. *J. K. Banerji*, for the Respondents.

JUDGMENT.—This appeal raises a point which has more than once been the subject of discussion in this Court, *viz.*, whether a deed which purports to create a mortgage should by the stringency of its terms and other circumstances attending its execution be considered to effect a sale and so form a basis for the suit of a pre-emptor. The facts which have given rise to this appeal are as follows:—

On the 18th of June 1903, Malik Fazal Karim, defendant-respondent No. 1, executed a deed of mortgage by conditional sale in favour of Sheikh Abdul Ghani, defendant-respondent No. 2, in respect of 1 *bigha* 13 *biswansis* land situate in *Mauza* Bhadokhar in lieu of Rs. 210.

Under the terms of the said deed, the mortgage was not redeemable for 30 years and the loan carried Rs. 12-8 per cent. per annum interest. The income of the land was to be appropriated by the mortgagee towards part payment of interest. The income of the land being Rs. 9 only, the balance of interest, namely, Rs. 17-4 was to be added to the principal every year. The principal together with unrealized interest was payable in the 31st year in the month of *Jeth* in default of which the land stood sold to the mortgagee.

On the 17th of June 1909, *Musammat* Majida Bibi, the mother of the appellants, instituted a suit against Fazl Karim and Abdul Ghani in the Court of the Munsif of Fyzabad for the recovery of possession of the land transferred by the deed of 18th of June 1903, on the allegation that the transaction evidenced by that deed was in reality one of sale and had been fraudulently drawn up in the form of a mortgage in order to defeat her right of pre-emption.

Fazl Karim did not defend the suit. Abdul Ghani resisted the claim. He did not deny the right of *Musammat* Majida Bibi to pre-empt in case the transaction of 18th of June 1908, was considered to be a sale. But he denied it to be a sale. He said that it was nothing more than what the deed of 18th of June 1908, showed it to be, *viz.*, a mortgage by conditional sale. Both parties produced evidence in the Munsif's Court to show the real nature of the transaction. The learned Munsif on the evidence before him came to the conclusion that Fazl Karim wanted to sell the land in suit to Abdul Ghani, but the latter would not purchase it for fear of the claim of pre-emption. He arranged to take and did take a mortgage. The claim was accordingly dismissed. *Musammat* Majida preferred an appeal to the District Judge.

The learned Judge disposed of the appeal against her without considering the oral evidence as to the nature of the transaction on the ground that such evidence was inadmissible under section 92 of the Evidence Act. He held that the deed of 18th of June 1908, was on the face of it a mortgage-deed and hence it gave no cause of action for a suit for pre-emption.

Musammat Majida Bibi preferred a second appeal to this Court. She died during the pendency of her appeal and her three sons were brought on the record as her legal representatives by an order of this Court, dated 15th of February 1912.

The learned Counsel for the appellants attacks the decree of the lower Court on several grounds. He contends that the learned Judge was in error in excluding oral evidence and the terms of the deed of 18th of June 1908, from his consideration when discussing the merits of the appeal.

The oral evidence and the terms of the deed taken singly and more so, when considered together, prove that the transaction of 18th of June 1908 was a sale and not a mortgage. It was fraudulently drawn up in the form of a mortgage to defeat *Musammat* Majida Bibi's right of pre-emption.

We may at once say that the oral evidence in the case was erroneously excluded from consideration by the learned Judge when discussing the merits of the appeal before him.

The rule given in section 92 of the Evidence Act applies to parties to the contract and does not cover the case of a third party not privy to the contract. It could not, therefore, apply to the present case so as to prevent *Musammat* Majida Bibi from giving evidence to show that the transaction was

fraudulent. The evidence produced by her on the point should have been considered by the lower Appellate Court. The latter should also have discussed the question whether the terms of the deed of 18th of June 1908 were such as to lead to an inference that the transaction between the respondents was a sale and not a mortgage. We have, therefore, now to see whether the oral evidence or the terms of the deed or both taken together bear out the contention of the appellants that the real nature of the transaction of 18th of June 1908, was that of a sale. To take up the oral evidence first.

There are three witnesses who speak to that transaction, *viz.*, the two respondents and Najabat Ali.

Fazl Karim was examined by *Musammat* Majida Bibi as her witness. Abdul Ghani went into the witness-box in support of his case and examined Najabat also. The latter is an attesting witness to the deed of 18th of June 1908, and identified Fazl Karim before the Sub-Registrar.

Fazl Karim says that "he agreed to sell the plots comprised in the deed of 18th of June 1908 to Abdul Ghani for Rs. 210. The transaction agreed to was that of sale". But he goes on to say that at the time the transaction was going to be reduced to writing Abdul Ghani asked the witness to execute a mortgage. As the latter was in need of money and had been paid in full the sale-price agreed upon he raised no objection to the proposal. A draft of the proposed mortgage was shown to him which he read and the terms of which he understood. He admits that Abdul Ghani did not say at the time that a mortgage-deed was required instead of a sale-deed in order to defeat the claim of pre-emption. But according to Fazal Karim that must have been the real motive of Abdul Ghani in taking a mortgage-deed instead of a sale-deed, though he, Abdul Ghani, was paying the full sale-price.

Abdul Ghani and Najabat Ali do not bear out Fazal Karim. They give quite a different version of the affair. Abdul Ghani says that he never intended to purchase the land in suit. He offered to take a mortgage for thirty years and Fazl Karim agreed to give one—in fact the latter wrote the draft of the mortgage. Najabat Ali says that Fazl Karim was in need of money for deposit in Court on account of his redemption decree about the land in suit and some other plots. He asked the witness to tell Abdul Ghani and one Husain Ali—a relative of *Musammat* Majida Bibi that he, Fazl Karim, would sell some plots of land to the highest bidder. The witness delivered the massage to both Abdul Ghani and Husain Ali. The latter agreed to purchase the plots proposed to be sold for Rs. 250, but went back on his offer at the last moment. Fazl Karim had to borrow Rs. 70 of Abdul Ghani for deposit into Court. After taking the loan Fazl Karim made an offer of sale of the land in suit to Abdul Ghani who declined to purchase it for fear of the claim of pre-emption. He, however, offered to take a mortgage. Fazl Karim accepted the offer and a mortgage was effected on 18th of June 1908. The learned Counsel for the appellants would have us believe Fazl Karim in preference to the other two witnesses. He argues that Fazl Karim is a disinterested witness, in no way favourably disposed to *Musammat* Majida Bibi with whom he had been litigating about the land in suit for some time. He describes the real nature of the transaction by stating that he sold the land in question to Abdul Ghani but at the latter's request a mortgage-deed instead of a sale-deed was executed presumably to defeat the right of pre-emption. Fazl Karim's statement derives support from the fact that the full sale-price was paid. Why should the price agreed upon for sale have been paid for a mortgage? Besides Najabat a witness for Abdul Ghani bears out Fazl Karim except that the witness adds the circumstance of an alleged refusal of Abdul Ghani to purchase the land for fear of the claim of pre-emption. The refusal deposed to by Najabat was an after-thought and was made in the interests of Abdul Ghani. The latter's denial that there was no talk of sale of the land in suit between him and Fazl Karim is obviously untrue as his own witness Najabat contradicts him on the point.

We will take without expressing an opinion on the criticism of the evidence by the apppellant's learned Counsel, the version of Fazl Karim to see whether the transaction of 18th June 1908, was a sale or a mortgage. He says that there had been a talk of sale of the land in suit between him and Abdul Ghani for a year or two prior to 18th of June 1908. But at the time that the con-

tract was going to be completed and reduced to writing Abdul Ghani declined to take a sale. He preferred to take a mortgage. He presented the draft of a mortgage-deed to Fazl Karim who read it and understood its terms before executing it. It is clear from the evidence of Fazl Karim that if Abdul Ghani had at any time intended to purchase the land he had changed his mind by 18th of June 1908. Fazl Karim admits that at the time the contract between him and Abdul Ghani was going to be drawn up no one suggested that the land had really been sold but the contract in the form of a mortgage should be drawn up in order to defeat the right of pre-emption. He, however, thinks that that must have been the motive of Abdul Ghani as the latter paid for mortgage the price agreed upon for sale. The inference of Fazl Karim is not legitimate. Abdul Ghani may have thought that the price he was paying for obtaining the mortgage was not high considering the length of the mortgage period and the rate of interest on the loan. Even if the inference of Fazl Karim be conceded to be correct it does not prove the transaction of 18th of June 1908, to be a sale. All that can be said is that Abdul Ghani for fear of the claim of pre-emption accepted a mortgage instead of purchasing the land.

The allegation of *Musammat* Majida Bibi that the two respondents had really entered into a transaction of sale, but had fraudulently in order to defeat her right of pre-emption drawn it up in the form of a mortgage has not been proved by the evidence of Fazl Karim or any other witness.

But it is argued for the appellants that as the evidence shows that the mortgage in question was taken to defeat the right of pre-emption and is so onerous that it will never be redeemed, it ought to be construed as a sale. The argument involves two assumptions. It assumes that a person may not defeat the law of pre-emption by taking an onerous mortgage which will probably eventually have the effect of a sale and that such a mortgage where the mortgaged property is capable of pre-emption should be construed as a sale on the suit of the pre-emptor. The onerous character of a mortgage cannot alter the real nature of the transaction and convert it into a sale, the fact that the redemption of a mortgage is highly improbable does not make it any the less a mortgage, for it is capable of redemption however remote the chance of its redemption.

A similar contention was advanced in the case of *Dhan Singh* v. *Bodh Singh* (1) and was negatived. In that case the terms of the mortgage were much more onerous and made it quite unlikely that it would ever be redeemed.

Mr. Spankie in disposing of the contention that the onerous character of the mortgage should be taken to imply an intention to sell remarked, "that the fact, that the terms of the mortgage were such that redemption would be unlikely, could not alter the real nature of the transaction and convert what was, and what was intended to be, a mortgage, though one of which redemption was most unlikely, into a sale"—vide *Dhan Singh* v. *Bodh Singh* (1). This view was adopted with approval by this Bench in a recent case. We held that in the absence of all evidence explaining the nature of the transaction a Court is not justified in finding that the mortgage-deed furnished evidence of a transaction of sale merely because its terms were so stringent as to render it highly improbable that redemption would ever take place—vide *Badri Singh* v. *Chandika Singh* (2). In another case which came up before the Chief Court of Punjab where the terms of the mortgage were much more burdensome than those of the mortgage in suit and where the mortgagee had not only made admissions that he had purchased the property but had treated it, as if he has purchased it. Mr. Justice Stogdon held that the mortgage could not be construed as a sale. In that case one Beli Ram had executed a mortgage of a house in favour of Tikaiya Ram for thirty years with conditions that made it quite improbable that the mortgage would ever be redeemed. Tikaiya Ram re-built the house and publicly said that he had really purchased the house. On a suit by the pre-emptor Tikaiya Ram pleaded that he was a mortgagee and not a purchaser. For the pre-emptor it was contended that the character of the mortgage and

(1) 3 O. C. 213.
(2) 14 Ind. Cas. 8; 15 O. C. 1.

the conduct of Tikaiya Ram showed that the transaction between him and Beli Ram was a sale and that the form of the transaction had been altered to one of mortgage in order to defeat the right of the pre-emptor. Mr. Justice Stogdon disposed of the contention in the following words:—

"Considering the onerous terms of the mortgage-deed, there cannot be any reasonable doubt that Beli Ram intended to renounce all claim to the house, and that it was understood between the parties that it should never be redeemed. As the terms of the agreement are of such a nature as to preclude all possibility of Beli Ram's ever being able or willing to redeem the house, the transaction can have been represented as a mortgage only for Tikaya Ram's benefit. As far as Beli Ram was concerned it made no difference to him whether it was represented as a sale or as a mortgage. Either way the house was lost to him, but it made a great deal of difference to Tikaya Ram. If the transaction had been represented as a sale, plaintiff might have claimed pre-emption at once. The reason why it was represented as a mortgage is, therefore, clear, but I cannot say that it is equally clear that that representation was false. It was open to Tikaya Ram to defeat the law of pre-emption by any legitimate means, and it is quite conceivable that with this end in view he may have deliberately refrained from becoming full proprietor of the house, and may have exposed himself to the chance, however slight, of having it redeemed from him at the end of 30 years. If he did this, I do not see why the Courts should go out of their way to help a pre-emptor, who is surely not a person in whose favour it is necessary to stretch the law, and say that the transaction is certainly a mortgage, but it will probably eventually have the same effect as a sale, therefore, it is a sale. Plaintiff alleges fraud and he must prove it. The mere fact that defendants have contrived a means of circumventing him does not prove that they have committed a fraud. It is not safe for the Courts to attribute meanings to the terms of the deeds other than those plain on the face of them. If such a course were generally adopted, any mortgage, the terms of which were at all onerous, or which it was not probable the mortgagor would be able to redeem, might be construed as a sale. The decisions of the Courts would be based on surmise, and there would be a wide divergence of opinion as to how onerous a mortgage must be in order to be held to be a sale"—vide, *Tikaya Ram* v. *Dharam Chand* (3).

We are in entire accord with these remarks. We think that the onerous nature of a mortgage does not convert it into a sale. Nor is it forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale. There is nothing fraudulent in such a transaction. The right to sue accrues to the pre-emptor only where there is in existence a contract for sale of property by virtue of which a third person whose right to acquire the property is inferior to that of the pre-emptor has obtained a right to acquire.—vide *Badri Singh* v. *Chandika Singh* (2). In the present case the deed of 18th of June 1908, cannot be construed to be a contract of sale. It gave no cause of action to *Musammat* Majida Bibi, the mother of the appellants, to sue on the ground of pre-emption.

The appeal, therefore, fails and is dismissed.

Appeal dismissed.

(3) 45 P. R. 1895.

CALCUTTA HIGH COURT.

CIVIL RULE No. 239 OF 1913.

April 18, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice H. N. Roy.

HARI CHARAN GHOSH—CLAIMANT—PETITIONER

versus

MANMATHA NATH SEN AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY.

Execution of decree—Claim—Claim allowed decree-holder not appearing—Subsequent setting aside of order—Jurisdiction—Civil Procedure Code (Act V of 1908) O. IX, r. 13, whether applicable to execution proceeding—Civil Procedure Code (Act V of 1908), s. 141.

Section 141 of the Civil Procedure Code has not the effect of making all the procedure provided by the Code applicable to proceedings in execution.

Order IX, rule 13, does not apply to a proceeding in execution.

Therefore, where a claimant makes an application under Order XXI, rule 100, and the application is

granted under rule 101 in the absence of the decree-holder, the Court has no jurisdiction to set aside the *ex parte* order under Order IX, rule 13.

Rule against an order of the Munsif of Baraset, dated Februay 8th, 1913.

Babu *Mohini Mohan Chatterji*, for the Petitioner.

Babus *Shiba Prasanna Bhattacharyya* and *Probodh Chandra Bose*, for the Opposite Party.

JUDGMENT.

JENKINS, C. J.—This is a Rule obtained at the instance of a claimant under Order XXI, rule 100, Civil Procedure Code, calling upon the opposite party, the decree-holder, to show cause why the order of the Munsif should not be set aside on the ground that it was made without jurisdiction.

The claimant applied under rule 100, and the decree-holder not appearing he obtained an order in his favour under rule 101. Rule 103 provides that "Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be conclusive." The claimant, therefore, maintains that the order in his favour, though made in the absence of the decree-holder, is conclusive: and, his complaint is that notwithstanding the terms of rule 103, the Munsif has set aside the order made under rule 101. The Munsif appears to have acted under Order IX, rule 13. That rule, as it is expressed, clearly does not apply to a proceeding in execution; but an attempt has been made, before us to uphold the Munsif's order on the terms of section 141 of the Code, which provide that "the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction." This section re-produces with modification section 647 of the previous Code. But in section 647 there was an explanation in these terms: "This section does not apply to applications for the execution of decrees, which are proceedings in suits." That explanation has been omitted, and it has been argued before us that this omission is an indication that the Legislature in passing the present Code intended that section 141 should have a wider operation than section 647. There is a certain amount of force in this argument, but it overlcoks the history of this section and the case-law. At one time there was a considerable divergence of opinion between various Courts as to whether section 647 applied to execution proceedings: and it was in consequence of this that by Act VI of 1892 this explanation was introduced into the section of the Code of 1882. But after this alteration in the law, the Privy Council by a case reported as *Thakur Prasad* v. *Fakir Ullah* (1) decided on section 647 as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the explanation came to be omitted. This may have been an unfortunate way of proceeding, because it involves some knowledge of the history of section 647 and of the decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the Legislature. The result is that section 141 does not make applicable to proceedings in execution all the procedure provided by the Code, and I think for very good reason; as is indicated by Mr. Justice Mookerjee in a decision which has been brought to our notice, to hold otherwise would lead to complications and to results which never could have been contemplated. It is not as though there was any necessity in the interest of justice that the provision of rule 13, Order IX, should be applicable to proceedings in execution, because, the order is not conclusive but is subject to the right of the person aggrieved to bring a suit.

I, therefore, hold that Order IX, rule 13, is not applicable to a proceeding under rules 100 and 101 of Order XXI and that the learned Munsif had not the jurisdiction which he purported to exercise.

We must, therefore, make the Rule absolute.

Having regard to all the circumstances we will not make any order as to costs.

ROY, J.—I agree.

Rule made absolute.

(1) 17 A. 106; 22 I. A. 44.

KARIM BUKSH *v.* MAHABIR BANIA.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 35 OF 1913.
February 24, 1913.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
Sheikh KARIM BUKSH AND ANOTHER—PETITIONERS—APPELLANTS
versus
MAHABIR BANIA AND ANOTHER—OBJECTORS—RESPONDENTS.

Insolvency, petition in—Mis-statement of amount and particulars of claims against petitioner—Failure to give true account of value of property—Whether valid cause for not making order for adjudication Provincial Insolvency Act (III of 1907), ss. 11 (1) (*d*) (*e*), 15, *sub-s.* (1).

The fact that a petitioner in insolvency has mis-stated the amount and particulars of all the pecuniary claims against him and has not given a true account of the value and particulars of all his property in his petition of insolvency, as required by section 11, sub-section (1) clauses (*d*) and (*e*), does not disentitle him to an order for adjudication.

Udai Chand Maity v. *Ram Kumar Khara*, 7 Ind. Cas. 394; 12 C. L. J. 400; 15 C. W. N. 213; *Sheikh Samir-ud-din* v. *Kadar Moyee Dasi*, 7 Ind. Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244; *Preonath Roy* v. *Nibaran Chandra Sirkar*, 15 Ind. Cas. 870; 15 C. L. J. 631 and *Sheikh Golam Rahman* v. *Sheikh Wahed Ali*, 16 Ind. Cas. 470; 16 C. W. N. 853, referred to.

Appeal from the order of the District Judge of Midnapur, dated January 15th, 1913.

Babu *Manmatha Nath Mukherjee*, for the Appellants.

Mr. *K. B. Dutt*, Counsel, and Babu *Tarakeswar Pal Chowdhury*, for the Respondents.

JUDGMENT.—This appeal is directed against an order refusing an application in insolvency. The Court below has found upon the evidence that the petitioner has mis-stated the amount and particulars of all the pecuinary claims against him and has not given a true account of the value and particulars of all his property; on this ground, the Court has dismissed the application. On behalf of the appellant it has been contended that these are not matters which can be taken into consideration under sub-section (1) of section 15 of the Provincial Insolvency Act and that as the petitioner is indisputably indebted to the extent of a larger sum than Rs. 500 and has made an application to be adjudged an insolvent he is entitled, as a matter of course, to an order of adjudication. In support of this proposition reliance has been placed upon the cases of *Udai Chand Maity* v. *Ram Kumar Khara* (1), *Sheikh Samiruddin* v. *Kadar Moyee Dasi* (2) and *Preonath Roy* v. *Nibaran Chandra Sarkar* (3). On the other hand, the learned Counsel for the creditors-respondents has invited our attention to some observations in the case of *Sheikh Golam Rahman* v. *Sheikh Wahed Ali* (4). We are of opinion that the fact that the appellant made incorrect statements in his petition of insolvency as to the particulars required to be stated under clauses (*d*) and (*e*) of sub-section (1) of section 11 does not disentitle him to an order for adjudication. It is impossible to maintain the position that the right to present a petition within the meaning of sub-section (1) of section 15 is dependent upon the accuracy of the statements inserted in the petition under clauses (*d*) and (*e*) of section 11. But it has been suggested that the view we take may facilitate applications by unscrupulous debtors, anxious to avail themselves of the benefit of the provisions of the Provincial Insolvency Act. We are not concerned, however, with the wisdom of the policy of the Legislature in this respect or the effect of statutory provisions the meaning and scope whereof are beyond controversy. But we may point out that the provisions of section 43, if applied whenever occasion arises, are well calculated to deter unscrupulous debtors in their attempt to gain an undue advantage under the provisions of the Provincial Insolvency Act. In our opinion, the order of the District Judge cannot be supported, and must be discharged.

The result is that this appeal is allowed, and the order of the Court below set aside. We pass the order which ought to have been passed by the Court below, namely an order of adjudication under section 15. The record will be returned to the Court below in order that the subsequent steps may be taken. There will be no order for costs in this appeal.

Appeal allowed.

(1) 7 Ind. Cas. 394; 12 C. L. J. 400; 15 C. W. N. 213.
(2) 7 Ind. Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244.
(3) 15 Ind. Cas. 870; 15 C. L. J. 631.
(4) 16 Ind. Cas. 470; 16 C. W. N. 853.

BHAGIRATHI DASS *v.* BALESWAR BAGARTI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 4172 OF 1910.
March 6, 1913.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
BHAGIRATHI DASS AND OTHERS—DEFENDANTS—APPELLANTS
versus
BALESWAR BAGARTI—PLAINTIFF—RESPONDENT.

Party—Litigation—Inconsistent positions—Party if allowed to take up inconsistent pasitions—Statement that certain Hindu widow had no title—Subsequent statement that she was in possession as Hindu mother—Whether subsequent statement can be allowed] to be made.

A litigant is not allowed to occupy inconsistent positions in Court; he cannot be allowed to approbate and reprobate.

Bhaja Chowdhury v. *Chuni Lal Marwari*, 5 C. L. J. 95 at p. 105; 11 C. W. N. 284, referred to.

Where a person, when he was joined as a party to a foreclosure suit, stated that a certain Hindu widow had no title and that the title to the property was in himself, and he was consequently dismissed from that suit:

Held, that he could not subsequently be permitted to take up a position inconsistent with the position previously adopted by him and to assert that the widow was in possession as a Hindu mother and that he himself was entitled to succeed on her death.

Appeal from the decree of the District Judge of Sambalpur, dated September 15th, 1910, reversing that of the Sub-Judge of that District, dated April 23rd, 1910.

Dr. *Kash Behary Ghose* and Mr. *G. Sircar*, for the Appellants.

Mr. *Sinha*, Babus *Jogendra Chandra Ghose* and *Uma Charan Laha*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in a suit for declaration of title to village Resum and for recovery of possession thereof. The subject-matter of the litigation belonged admittedly to one Lukhan who died in 1859. After his death, his paternal grandmother, Mathura came, into possession of the property though it is admitted that his mother, Bhamo, was entitled to succeed as his heiress. His grandmother continued in possession till 1866 when she was ousted by his uncle, Samo, who died in 1878. After the death of Samo, Bhamo, the mother of Lukhan, obtained possession. This led to a dispute between Bhamo and a cousin of Lukhan, by name Satyabadi, and there was a litigation between them which ultimately terminated in favour of Bhamo. On the 30th April 1899, Bhamo executed a conditional mortgage in favour of the predecessor of the defendants. On the 30th September 1904, the mortgagee obtained a foreclosure decree. To this suit the present plaintiff was joined as a defendant on the allegation that he was in possession as a donee of the equity of redemption from the mortgagor. He repudiated, however, the title of the mortgagor and set up title in himself, with the result that he was dismissed from the suit. On the 13th May 1905 the decree *nisi* was made absolute. The mortgagee decree-holders, however, were unable to obtain possession and on the 19th June 1906 sued to eject the present plaintiff. In that suit the mortgagees stated explicitly that their mortgagor Bhamo was in sole, exclusive and adverse possession of the village Resum for over thirty years. This was controverted in the written statement and it was stated that Bhamo had never been in adverse possession of the disputed property or held it as owner. It was further stated on behalf of the defendant that the property belonged to him and the undoubted possession of Bhamo was sought to be explained on the ground that she was his guardian and managed the property on his behalf. On these pleadings an issue was raised in the following terms: Was Bhamo in adverse possession of the village for over twelve years as alleged? The Subordinate Judge found upon the evidence that her title had been perfected by adverse possession for over twelve years as alleged, and that she had become the owner of the village Resum. In this view, the Subordinate Judge decreed the suit on the 17th September 1906 and declared that the then defendant, now the plaintiff, had no title to the land. This judgment was confirmed on appeal by the District Judge. In his judgment the District Judge stated that the question was whether Bhamo was the sole owner of the village or not and held that the evidence adduced showed that her possession was in her own right. He consequently agreed with the lower Court in its conclusion, that Bhamo was the sole owner of the village in suit. This decree was ultimately affirmed by this Court on the 7th April 1908 [*Baleswar Bagarti* v. *Bhagirathi*

Das (1)]. Shortly after the decree of this Court, Bhamo died, and on the 2nd April 1909 Baleswar who had been defeated in the previous litigation commenced the present action for declaration of title and recovery of possession. His allegation now is that Bhamo was in possession as a Hindu mother, and that upon her death, he is entitled to succeed to the property as the reversionary heir to her son the last full owner. The defendants contend that the claim is barred by the principle of *res judicata* and that it had been conclusively established in the previous litigation that the plaintiff has no title and that Bhamo had an absolute interest in the village in dispute, which, by virtue of the decree in the foreclosure suit, had passed to the defendants. The Subordinate Judge held that the suit was barred by the doctrine of *res judicata*. Upon appeal that decision has been reversed by the District Judge.

The substantial question in controversy in this appeal is, whether or not the claim is barred by *res judicata*. In support of the plea that the claim is so barred, reference has been made to the decisions in the three previous suits. The first of these is the litigation of 1879 between Bhamo on the one hand and Satyabadi on the other. It has not been seriously contended that the decision in that litigation can in any way bar the present suit. In fact as was pointed by this Court in *Baleswar Bagarti* v. *Bhagirathi Das* (1), that decision cannot operate as *res judicata*, for this reason, amongst others, that the present plaintiff was not a party to that decision and Satyabadi cannot be said to have been a party to that suit in a representative character.

The second litigation to which reference is made is the suit for foreclosure brought on the conditional mortgage. It has been argued on behalf of the appellant that the present plaintiff was brought before the Court in that litigation and that if his present allegations are well-founded in fact, it was incumbent upon him to resist the claim for foreclosure on the ground that the mortgage had been executed by Bhamo under circumstances which did not make it binding upon him as reversionary heir to the estate of the last full owner; and in support of this view reference has been made to the cases of *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (2), *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (3), *Srinath Dass* v. *Hari Pada Mitter* (4) and *Nilkant Banerji* v. *Suresh Chandra Mullick* (5). It has been argued on the other hand that a reversionary heir is not a proper party to a mortgage suit because he cannot be invited to redeem the mortgage as pointed out in the case of *Ram Chandar* v. *Kallu* (6). It has also been contended that the principle of the decision in *Nilakant Banerji* v *Suresh Chandra Mullick* (5) has no application, because in the foreclosure suit the mortgagees did not seek to enforce their security on the assumption that it had been granted by a Hindu mother in respect of an estate in which she had only a limited interest. It is not necessary for the purposes of the present case to decide the general question raised on behalf of the appellants, namely whether a reversionary heir is a proper party to a mortgage suit, though it may be conceded that there is a fundamental distinction between two classes of cases, namely, the case where a mortgagee sues a widow to enforce a mortgage executed by her husband, and the case where a mortgagee sues a widow to enforce a mortgage executed by herself. In the former case no question of propriety of the transaction arises, in the latter case if the mortgagee seeks to obtain a decree entitling him to proceed against not merely the qualified interest of the widow but the entire inheritance, the question of legal necessity arises which can be finally decided only in the presence of the reversioner. But it does not follow that a reversionary heir when so drawn into the litigation is not entitled to urge that as he cannot be called upon to redeem he would prefer to be left alone with liberty to contest the title of the mortgagee or of the purchaser at the sale in execution of the mortgage decree if he should ever succeed

(1) 35 C. 701 at p. 703; 7 C.L.J. 563; 12 C.W.N. 657.

(2) 23 W. R. 174; 15 B. L. R. 142.
(3) 11 M. I. A. 241; 20 Eng. Rep. 92.
(4) 3 C. W. N. 637.
(5) 12 C. 414; 12 I. A. 171.
(6) 30 A. 497; A. W. N. (1908) 225; 5 A. L. J. 631.

as the actual reversionary heir. In the present case, however, as already explained the mortgagees did not sue on the assumption that they had taken a mortgage from a Hindu mother in possession of the estate of her son, nor did they join the plaintiff in their suit on the assumption that he was the reversionary heir to such estate. Their theory, on the other hand, was that the mortgagor was the absolute owner of the property and was competent to deal with it in any way she chose. The present plaintiff was brought on the record as an alleged transferee of the equity of redemption from the mortgagor and the obvious object of the mortgagee was to give him an opportunity to redeem. He took up the position that the mortgagor had no title whatsoever to the property which belonged to himself. Under these circumstances he was rightly discharged from the suit. *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (7). This may preclude him from now asserting that he had, at the time of the previous litigation, a subsisting interest in the equity of redemption [*Nilkant Suresh Banerji* v. *Chandra Mullick* (5)] but in view of the frame of that suit and the scope of the present litigation, it cannot be successfully contended that the decision therein operates as *res judicata* upon the question now in controversy.

The third litigation to which reference is made in support of the plea of *res judicata* is the suit for recovery of possession. It is argued on behalf of the appellants that upon the pleadings therein the question was raised in the fourth issue whether or not Bhamo had acquired an absolute title in the village Resum by adverse possession for the statutory period. This question was decided in favour of the mortgagee; it was on this basis that a decree for possession was made in their favour and a declaration was made against Baleswar that he had no interest whatsoever in the property. It is consequently asserted that this decision operates as *res judicata*. On behalf of the plaintiff-respondent it is contended that it is not *res judicata* because it was not necessary for the plaintiff in that suit to allege that Bhamo was in possession as a Hindu mother, because such a defence, if taken, would have meant a confession of judgment. On this basis it is argued that the plaintiff is at liberty to contend that the decision in the previous suit had become practically inoperative by reason of the death of Bhamo, that there has been a complete change of circumstances and that he can now succeed on a ground not asserted in the previous litigation. We are of opinion that this view is unsound. The decision in the suit for possession to the effect that Bhamo was the absolute owner of the property is conclusive between the parties and cannot be ignored. Besides, the plaintiff cannot resile from the position he deliberately adopted on two previous occasions. When he was joined as a party to the foreclosure suit, he stated that Bhamo had no title and that the title to the property was in himself, he was consequently dismissed from that suit. When on the basis of the decree in the foreclosure suit he was sued in ejectment he pleaded that he was the owner of the property and that the then plaintiff had acquired no title by virtue of the decree founded on a mortgage granted by Bhamo who had no interest whatsoever in the property. That defence was negatived. The plaintiff cannot now be permitted to take up a position inconsistent with the position previously adopted by him. It is well-settled that a litigant is not allowed to occupy inconsistent positions in Court, he cannot be allowed to approbate and reprobate. If parties in Court were permitted to assume inconsistent position in the trial of their causes, the usefulness of Courts of Justice would, in most cases, be paralysed, [*Bhaja Chowdhury* v. *Chuni Lal Marwari* (8).] The conclusion follows that the plaintiff is bound by his allegations in the suit for recovery of possession and cannot now be permitted to assert that Bhamo was in possession as a Hindu mother and that he himself was entitled to succeed on her death.

The result is that this appeal is allowed, the decree of the District Judge reversed and that of the Court of first instance restored with costs throughout.

Appeal allowed.

(7) 33 C. 425; 3 C. L. J. 205.

(8) 5 C. L. J. 95 at p. 105; 11 C. W. N. 284.

Musammat RAMDEI *v.* NANDAN SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 985 OF 1911.
APRIL 25, 1913.
Present:—Justice Sir George Knox, KT., and Mr. Justice Rafique.
Musammat RAMDEI—APPLICANT
versus
NANDAN SINGH—RESPONDENT.

Review—Sufficient cause Civil Procedure Code (Act V of 1908), *O. XLVII, r.* 1.

In a mortgage suit the defendant raised several pleas one being of limitation. The Court of first instance arrived at a decision on all of them but dismissed the suit mainly on the ground of limitation. The plaintiff appealed to the District Judge who agreed with the Munsif that limitation barred the claim. In second appeal the High Court differing from the Courts below on the point of limitation decreed the plaintiff's suit. The fact that there were other points also to be determined by the lower Appellate Court was, somehow, not brought to the notice of the Court at the time of the pronouncement of its judgment:

Held, that the circumstances of the case did not furnish sufficient cause for review of the judgment of the High Court.

Application for review of judgment reported as 17 Ind. Cas. 632.

Mr. *Sital Prasad Ghose*, for the Applicant.

Mr. *Parmeshwor Dyal* (for the Hon'ble Mr. *Gokul Prasad*), for the Opposite Party.

JUDGMENT.—Thakur Nandan Singh brought a suit in the Court of the Munsif of Benares and in that suit he prayed that certain moneys, which he alleged to be due to him on account of two separate mortgage-deeds, might be awarded to him with costs of the suit etc., or that a decree might be passed under Schedule I, Order XXXIV, rule 4 of the Code of Civil Procedure, and certain property which he specified in the plaint might be brought to sale by auction. The amount which he said was due to him was Rs. 1,628 odd. One of the persons whom he arrayed as a defendant was *Musammat* Ramdei and he arrayed her as a defendant because she was in possession of the property in dispute and had purchased it at an auction sale with full knowledge and information, so he said of the mortgage-deeds now sued on.

Musammat Ramdei defended the suit *inter alia*. She objected that she purchased the property in good faith at a public auction sale. According to her when the property was put to sale the plaintiff, Nandan Singh, made no mention of his mortgage-deeds nor did he have any mortgage-deed entered in the proclamation. She added that she had built a house upon the property at considerable cost. She also sets up a plea of limitation.

The Court of first instance went into the pleas raised by *Musammat* Ramdei and by others, arrived at a decision on them but dismissed the suit on the ground that it was barred by limitation.

The plaintiff appealed to the District Judge who agreed with the Munsif that limitation barred the claim.

Thakur Nandan Singh then appealed to this Court. The case came before a Bench of Judges and the only points argued before them, indeed the only point raised in the memorandum of appeal was the question of limitation. This Court came to the conclusion that the plea of limitation was not entitled to any force. At the time of considering the decree which should be given the parties who were represented by very learned Counsel never called the attention of the Court to the fact that there remain other points which call for decision and that the decree which had been given by the lower Appellate Court was only so far modified that the plaintiff got a decree for sale of the property situate at Mohalla Taksal with proportionate costs.

Musammat Ramdei has since put in a petition in which she asks for review of judgment. She does not, in her application for review, distinctly state on what particular ground she makes this application. What she wishes this Court to understand is that there is a mistake apparent on the face of the record, *i.e.*, in her opinion this Court had decreed the claim of the plaintiff for property which was not covered by the mortgage-deed in his favour.

We have heard all that can be urged on her behalf. We do not think that she has set out sufficient cause for review of judgment and we, therefore, have no alternative but to dismiss the application. Even if her opinion be correct on which we pronounce no opinion, her learned Counsel should have called the attention of the Court to this matter. There would be endless applications for review if we acceded to her application and opened up her case upon such insufficient ground.

KAYAROHANA PATHAN *v.* SUBBARAYA THEVAN.

The application is dismissed with costs which in this Court will include fees on the higher scale.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 695 OF 1912.

March 28, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyer.

KAYAROHANA PATHAN—PLAINTIFF—APPELLANT

versus

SUBBARAYA THEVAN AND ANOTHER—DEFENDANTS NOS. 2 AND 10—RESPONDENTS.

Hindu Law—Inheritance—Exclusion—Leprosy as a ground must be sanious or ulcerous—Texts considered.

The defendant in the case was sought to be excluded from inheriting his paternal uncle's son's estate on the ground of leprosy. The finding of the Courts below was that he was suffering from the anæsthetic form of leprosy and that it was in the medium stage. The medical opinion was that the disease was incurable:

Held, that the defendant was not debarred from inheriting and that, to be a bar, the leprosy must be of the sanious or ulcerous type.

Janardhan Pandurang v. *Gopal Pandurang*, 5 B. H. C. R. 145 (A. C. J.); *Ananta* v. *Ramabai*, 1 B. 554; and *Rangayya Chetty* v. *Thanicachala Mudali*, 19 M. 74, followed.

The curability or otherwise of a disease is very much a matter of opinion and what is regarded as incurable at one time may be regarded as curable at another. Many of the grounds of exclusion would not now be enforced by the Courts.

Vedanayaga Mudaliar v. *Vedammal*, 27 M. 591 at 598; 14 M. L.J. 297, *Venkata Subba Row* v. *Purushottam* 26 M. 133; 12 M. L. J. 262, *Bai Amrit* v. *Bai Manik*, 12 B. H. C. R. 79, referred to.

Quære:—Whether in a real case of inheritance to a deceased person, as opposed to a case of partition, even leprosy of the sanious or ulcerous type would be recognized as a bar in this Presidency at the present day.

Muthu Velayuda Pillay v. *Parasathi*, Mad. Sud. Decns. for 1860, page 239; *Ananta* v. *Ramabai*, 1 B. 554; *Rangayya Chetty* v. *Thanikachala Mudali*, 19 M. 74; *Helan Dasi* v. *Durgadas Mundal*, 4 C. L. J. 323; *Ranchod* v. *Ajoobai*, 9 Bom. L. R. 1149, referred to.

The texts relating to exclusion from inheritance and the grounds therefor discussed.

Second appeal against the decree of the Subordinate Judge of Nagapatam, in A. S. No. 708 of 1910, preferred against that of the District Munsif of Thiruthoraipundi, in O. S. No. 113 of 1909.

Mr. *C. S. Venkatachari*, for the Appellant.

Mr. *C. V. Ananthakristna Iyer*, for the Respondent.

JUDGMENT.—The question for decision in this second appeal is whether the defendant is disentitled to inherit his paternal uncle's son's estate by reason of his suffering from leprosy. The plaintiff is the sister's son of the deceased owner. The medical evidence is that the defendant is suffering from the anæsthetic form of leprosy and that it is in the medium stage. The District Munsif decided against the defendant on the ground that according to the opinion of the medical witness the disease was incurable. The Subordinate Judge held that the defendant was not excluded because the disease was not of the sanious or ulcerous type and was not virulent and he was not regarded as unfit for association by his castemen. The *Mitakshara*, which is the predominant authority applicable in this Presidency, does not expressly mention leprosy as a ground of exclusion from inheritance. It states "an impotent person, an outcaste, and his sons, one lame, a mad man, an idoit, a blind man and persons afflicted with an incurable disease and others (similarly disqualified) must be maintained excluding them, however, from participation. *Mitakshara*, Chapter II, section 10, Pl. 1—"Pl. 6 states with regard to the persons enumerated in Pl. 1 that they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment." Placitum provides "if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class' shares the distribution is based." Of the Smriti writers the only one who expressly excludes a leper is Devela: Manu excludes one who is a Nirindriya, that is, devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him. See Buhler, Ch., IX, Sloka 201. Apastamba and Vasista do not exclude him. Narada excludes persons afflicted with a chronic or acute disease (See Sacred Books of the East,

Vol 33, page 194). Or, as otherwise translated an acute or agnozing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute disease in the Ratnakara. Yajnavalkya and Vishnu exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu Law books generally lay down that to be a ground of exclusion it must be of the sanious or ulcerous and not of the anæsthetic type. See *Janardhan Pandurang* v. *Gopal Pandurang* (1), *Ananta* v. *Ramabai* (2) and *Rangayya Chetty* v. *Thanikachala Mudali* (3). The ancient texts apparently based the exclusion on the ground of the incapacity of the sufferer to perform the funeral and other obsequial rights of the deceased. The texts relate in terms to the right to partition on the distribution of an estate amongst several sons of a deceased owner; and the *Mitakshara* expressly provides that the share of the excluded sufferer should be restored to him if he is subsequently cured. It may be doubted whether the rule of exclusion would apply to a case of strict inheritance, as a person who is once excluded from inheritance, which consequently vests in another, is not entitled to claim it again subsequently. All the reported cases on the subject, *Muthuvelayuda Pillay* v. *Parasakthi* (4), *Ananta* v. *Ramabai* (2), *Rangayya Chetty* v. *Thanikachala Mudali* (3) and *Helan Dasi* v. *Durgadas Mundal* (5) relate to the right to partition. In *Ranchod* v. *Ajoobai* (6) the question was one of inheritance proper. The leprosy in that case was held to be of the anæsthetic type, and it was held that the sufferer was not excluded. The question whether the texts were applicable to a case of real inheritance was not raised at the arguments in the case. The precedents cited in West and Buhler's Digest of Hindu Law also refer to cases of partition. In one case, the Pandit was asked whether the nephew of a deceased person was entitled to the certificate of heirship in preference to his son who was insane. In his answer he expressly referred to the fact of the son and nephew being united in interest as the ground for holding that the nephew was entitled to preference. It cannot, however, be denied that the texts have been applied to the right of inheritance in the case of blindness and dumbness although not in the case of leprosy. It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the *Mitakshara*. The author refers to them by the expression "others similarly disqualified." How wide the reasons for exclusion were, will appear from Colebrooke's Digest, Vol. II, pages 424 to 435. Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete. See Mayne's Hindu Law, paragraph 592 and *Vedanayaga Mudaliar* v. *Vedammal* (7). In *Venkata Subba Row* v. *Purushottam* (8), Bhashyam Iyengar and Moore, JJ., abstained from expressing an opinion on the question whether lameness was a ground of exclusion, although a "*pangu*" is expressly named by Yajnavalkya amongst excluded persons. Sir Thomas Strange refers to the opinion of Colebrooke that all the texts of exclusion cannot be said to have been abrogated or to be obsolete although the Courts would not go into proof of several of them, such as the claimant being addicted to vice or profusion or being guilty of neglect of obsequies and duties towards ancestors. "But" Colebrooke observed "expulsion from caste, leprosy and similar diseases, natural deformity from birth resulting from an uncanonical marriage would doubtlessly now exclude, and I apprehend it would have to be so adjudged in our Adawlets." See Strange's Hindu Law, Vol. I, page 159. It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steele's Law of Castes it is observed that the rules of exclusion are largely qualified by custom and that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons and that in eighty-three castes blind persons married and having families might inherit. In *Bai Amrit* v. *Bai Manik* (9) a boy bordering on idiocy was allowed to transmit a heritable right to his widow. See West and Buhler's Digest, Introduction, page 155.

(1) 5 B. H. C. R. 145 (A. C. J.).
(2) 1 B. 554.
(3) 19 M. 74.
(4) Mad. Sud. Decns. for 1860, p. 239.
(5) 4 C. L. J. 323.
(6) 9 Bom. L. R. 1149.
(7) 27 M. 591 at p. 598; 1 M. L. J. 297.
(8) 26 M. 133; 12 M. L. J. 262.
(9) 12 B. H. C. R. 79.

Again there is a difference of opinion amongst Hindu writers whether the disability to inherit could not be removed by the performance of expiatory ceremonies. According to some authors, expiation, though productive of spiritual benefit would not in cases of major sins and serious diseases indicative of such sins, render the sufferer fit for social intercourse or to inherit. This was the view taken in Bengal Sudder Adawlat Decisions, Vol. 2, page 108 referred to in the Vyvasthachandrika, Vol. 2, Precedents page, 492. But others are of a different opinion. These considerations would have to be borne in mind if we had to pronounce a definite decision on the question whether in a case of inheritance proper leprosy of the sanious or ulcerous type would be a ground of disqualification in this Presidency at the present day, but it is not necessary to do so, as the finding is that the defendant in this case is not suffering from leprosy of that type. It is contended for the appellant that as according to the medical opinion the disease is incurable, the case is one which falls within the text of the *Mitakshara*: but the question is not whether according to modern medical opinion the disease is curable though of anæsthetic type. Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion, on which the medical profession itself might be divided. The test would, moreover, be an indefinite one for legal purpose, as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test. The result is that we must dismiss the second appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 655 OF 1910.

July 3, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Shah Din.

NAGINDRA NATH BANERJEE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

P. N. BANERJEE AND OTHERS—DEFENDANTS RESPONDENTS.

Succession Act (X of 1865), s. 58—Alterations in the Will—Unattested and unimportant—Probate—Validity of Will—Amending Act (VIII of 1903), s. 2—District Judge to grant Probate beyond Province.

In a case of probate, it is immaterial that the Will was executed long before the death of the testator, or that the circumstances under which it was written have changed before that event.

Section 58, Act X of 1865, applies only to alterations made *after* the execution of the Will.

Where alterations made in a Will are unattested and the intention of the Will is perfectly clear even without them and is not affected by them, the Will admitted to Probate will be the Will as it originally stood without the unattested alterations.

The Probate Court has nothing to do with the validity of the Will propounded before it.

Section 2 of Act VIII of 1903 gives jurisdiction, under certain conditions, to a District Judge to grant Probates having effect throughout British India.

Miscellaneous first appeal from the order of the District Judge, Rawalpindi, dated 25th April 1910, rejecting the application.

Bhagat *Gobind Das*, for the Appellants.

Mr. *Fazal Ilahi*, for the Respondents.

JUDGMENT.—This is an appeal under section 263, Act X of 1865, against the order of the District Judge refusing to the appellants Probate of a Will executed on the 20th September 1893 by Mr. Jodu Nath Banerji in favour of a married daughter and two sons to the exclusion of two other sons. The appeal has been referred to a Division Bench by order of the learned Chief Judge dated the 30th November 1910.

The grounds upon which the District Judge has refused Probate are that the Will is very old, that there are some unattested alterations in the document, and that there is serious doubt whether the attesting witnesses, both of whom are dead, actually affixed their signatures at the time of execution of the Will by the testator. These are the grounds upon which the District Judge has really based his order, though he has incidentally also referred to irrelevant consideration that the testator never communicated the contents of his Will

to the two disinherited sons and that there were no good reasons shown why those sons should be disinherited. These latter points covered questions with which the District Judge was in no way concerned. The sole point to be determined was whether the circumstances under which the Will has been propounded were so doubtful that Probate should be refused.

After examining the case very carefully we think it impossible to uphold the District Judge's decision in any of the points taken by him. The testator died at Rawalpindi on the 11th December 1908. The Will was propounded by the legatees without delay in June 1909 and we can see no reason for supposing that the Will is not in every way genuine. Even now Counsel for the respondents is unable to say that the Will is a forgery and we think that any suggestion of forgery is entirely unjustified. The mere fact that the Will was executed in 1893 is immaterial. It has been produced from lawful custody and there is no indication that the Will was ever superseded even though the circumstances under which it was written may have altered before the testator's death. The real object appears to have been to benefit his married daughter by leaving to her the property concerned which is valued at some Rs. 3,000, at her request the names of her two younger brothers, who were minors at the time, were excluded among the beneficiaries under the Will on the ground that the expense of starting them in the world had still to be undertaken. It is no answer to the application to say that these minor sons have long since grown up and at the time of the testator's death did not require to be specially provided for more than the objecting sons who are understood to be comparatively well-to-do.

As regards the alterations in the Will we are quite clear that this did not invalidate the document. There is no proof and no probability that the alterations were made after execution of the Will and section 58, Act X of 1865, has no application. The alterations are in themselves of no special importance and were evidently intended to merely make the terms of the Will more explicit and formal. After consulting Henderson on the Law of Succession, 3rd Edition, 1909, and Theobald on Wills, 7th Edition, 1908, we think that the right construction to place on these alterations is that they should at most be disregarded. They are unattested and may be left out of account, the intention of the Will having been perfectly clear even without them and being not affected by them.

As regards the attestation of the witnesses we see nothing suspicious in the document. Both the witnesses are dead but *prima facie* their signatures, one in English and one in Bengali, are perfectly genuine. Mrs. Benodini Mitter the daughter identifies the English signature of Luckhey Narain Das and we are satisfied that her statement on the point should be accepted. It is true that the Will was first drawn up on the 21st August 1893 and not finally signed till the 20th September 1893. Here again, however, we see nothing suspicious in the document. The attestation clause, the signature of the testator, and the marginal signatures of the two attesting witnesses follow after the original writing bearing date 21st August 1893, and from the appearance of the document we think it clear that execution did actually take place in the presence of the witnesses on the latter date. If the Will had been actually signed and attested on the 21st August 1893, there would be no object in the testator's adding the latter date 20th September 1893. There is no reason for assuming any sort of fraud or irregularity in what is apparently a quite straight-forward document.

Our conclusion is, therefore, that the District Judge has wrongly declined to grant Probate. We have nothing to do with the validity of the Will and it is unnecessary for us to discuss that point. All we need say is that so far no adequate reason has been brought forward for believing that the Will is in any way invalid. The appeal is accordingly allowed and the record will be returned to the District Judge, Rawalpindi, with direction to him to grant Probate with copy of the Will annexed under section 254 of the Act. By way of precaution we observe that sections 242 and 242 (*a*) of the Act have been amended by section 2 of Act VIII of 1903. The effect of the amendment is to give the District Judge of Rawalpindi jurisdiction but it will be necessary for him to certify that the value of the property and estate affected beyond the limits of the

province does not exceed Rs. 10,000 and he will also have to comply with the provisions of the amended section 242 (*a*). The Will as admitted to Probate will be the Will as it originally stood without the unattested alterations.

We make no order as to the costs of this Court.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL SUIT NOS. 185 AND 186 OF 1908.

March 5, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

IN APPEAL SUIT NO. 185 OF 1908.

MUTHUSAMIER AND OTHERS—DEFENDANT NO. 5 AND HIS LEGAL REPRESENTATIVES —APPELLANTS

versus

SREE SREE METHANITHI SWAMIYAR AVERGAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 4 AND 6 TO 13 —RESPONDENTS.

IN APPEAL SUIT NO. 186 OF 1908.

ANNASAMIER—DEFENDANT NO. 4 —APPELLANT

versus

SREE SREE METHANITHI SWAMIYAR AVERGAL AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Mutt—*Lease of* inam—*Powers of Matadhipathi—Alienations, how far binding on successors—Limitation Act* (*XV of* 1877), *Sch. II, Arts.* 12, 134, 144—*Revenue sale for arrears of local cess—Madras Local Boards Act* (*V of* 1884), *ss.* 59, 76—*Procedure—Madras Revenue Recovery Act* (*II of* 1864), *ss.* 3 (10), 32, 42 A, 64 (2), 66, 73—*Civil Procedure Code* (*Act V of* 1908), *s.* 92 (1).

The *inam* in suit was leased out in 1872 to a *Brahmin*, Mudgula Chariar, by the then Matadhipathi. The lessee assigned his interest to the 1st and 2nd defendants and to predecessors of 12th and 13th defendants. The lessor died in 1890 and was succeeded by another Swamiar, who acting on behalf of the original lessor in 1889, leased the *inam* to 6th defendant, cancelling the lease of 1872. But as the 6th defendant could never obtain possession, the Swamiar treated the occupants under the old lease as tenants and collected rents from them. A portion of the land was also sold in auction to the 5th defendant by the Revenue Authorities for default of payment of local cesses.

In 1906, the plaintiff succeeded to the office as Swamiar and sued to set aside the lease of 1872 and recover possession of the *inam*:

Held, that the right of the Matadhipathi to the properties of the *Mutt* is an absolute right to dispose of the income, subject to the upkeep of the *Mutt*.

Vidyapurna Tirtha Swami v. *Vidyanidhi Thirthaswami*, 27 M. 435; 14 M. L. J. 105, referred to.

Kailasam Pillai v. *Nataraja Thambiran*, 5 Ind. Cas. 4; 7 M. L. T. 1; 19 M. L. J. 778; 33 M. 265 (F. B.); followed.

Though the lease of 1872 was beyond the powers of the lessor, he could not have avoided it during his own life-time. An alienation by the head of a religious foundation is not necessarily utterly void and of no effect.

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 14 C. W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857; 19 M. L. J. 530; 10 C. L. J. 284 (P. C.); 36 C. 1003; 36 I. A. 148, *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami*, 27 M. 435; 14 M. L. J. 105 relied upon.

Narsaya Udpa v. *Venkataramana Bhatta*, 16 Ind. Cas. 53; 12 M. L. T. 218; (1912) M. W. N. 870; 23 M. L. J. 260; *Shyama Charan Nundy* v. *Abhiram Goswami*, 33 C. 511; 3 C. L. J. 306; 10 C. W. N. 738, referred to.

Though a Matadhipathi is in a certain sense an owner in fee simple yet in many respects he has only the powers of a tenant for life. His position is similar to that of a corporation sole in England.

Vidyapurna Tirthaswami v. *Vidyanidhi Thirthaswami*, 27 M. 435; 14 M. L. J. 105, *Knight* v. *Moseley* Ambler 176, *Mulliner* v. *Midland Railway Co.*, 11 Ch D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 27 W.R. 330, referred to.

His position is not, in fact, that of a tenant for life. *Kailasam Pillai* v. *Nataraja Thambiran*, 5 Ind. Cas. 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778 (F. B.) referred to.

A Matadhipathi cannot make nor validate a transfer beyond his tenure of office. As the 5th defendant never paid any rent to the *Mutt*, after the revenue sale to him it must be deemed that the owner's interest is sold by the Revenue Authorities. Since the sale took place without notice to the *Mutt*, it was irregular and liable to be set aside. But such a suit was barred whether under section 59 of Act II of 1864 or Article 12 of the second Schedule to the Limitation Act.

Per *Sadasiva Aiyar, J.*—The position of a Matadhipathi is in many ways analogous to that of the estate of a Hindu female heir to a male's estate. Therefore he can contest an alienation and sue for possession within 12 years of his becoming Matadhipathi.

Bijoy Gopal Mukerji v. *Krishna Mahishi Debi*, 34 C. 329 (P. C.) 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87, referred to.

Section 92 (1) of the Civil Procedure Code is to be applied to *Mutts* and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable religious institution like a *matam*.

Narsaya Udapa v. *Venkataramana Bhatta*, 16 Ind. Cas. 53; 12 M. L. T. 218; (1912) M. W. N. 870; 23 M. L. J. 260; *Kasi Chetty* v. *Srimathu Devasikhamony Nataraja Dikshitar*, 16 Ind. Cas. 622; (1913) M. W. N. 181, referred to.

It is clear from section 3 (10), section 64 (2) and sections 66 and 73 of the Local Boards Act (V of 1884) that it is the *inamdar* (*matam*) who is liable for the road-cess and not any tenant of the *matam*. The procedure laid down for sales under this Act is the same as that

under the Revenue Recovery Act, in virtue of section 76 of the Local Boards Act.

But the substantive provisions of the Revenue Recovery Act (sections 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act.

Ramachandra v. *Pittchaikanni*, 7 M. 434, *Chinnaswami Mudali* v. *Tirumalai Pillai and Secretary of State for India*, 25 M. 572, relied upon.

The irregularities complained of cannot be made the basis for attacking the sale after the time fixed by law for the setting aside of such a sale had expired.

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.), referred to.

Appeals against the decree of the Temporary Subordinate Judge of Madura, in O. S. No. 16 of 1908.

Messrs. *R. Kuppuswami Aiyar* and *C. V. Ananthakrishna Aiyar*, for the Appellants in Appeal No. 185 of 1908.

Messrs. *S. Srinivasa Aiyangar* and *K. V. Krishnaswami Aiyar*, for the Appellant in Appeal No. 185 of 1908

Messrs. *T. Subrahmania Aiyar* and *K. Srinivasa Aiyangar*, for the Respondents in both.

JUDGMENT.

MILLER, J.—In 1872 the Matadhipathi Sukgnana Nidhi Swamiar made an alienation of the *inam* in dispute by way of a lease in perpetuity to a *Brahmin*, Mudgala Chariar, who enjoyed it till 1884 and then sub-leased or assigned his interest to the 1st and 2nd defendants and to predecessors of the 12th and 13th defendants.

The lessor died in 1890 and was succeeded by Sri Sathi Nidhi Swamiar, a person who had been managing the affairs of the *Mutt* on behalf of his predecessor during the later years of his life. In 1889, before his predecessor's death, he, on behalf of the Matadhipathi, leased the *inam* to the 6th defendant, cancelling the lease of 1872. The 6th defendant was, however, never able to obtain possession, and from 1893 onwards at any rate, the Swamiar was collecting the rent reserved by the old lease of 1872, from the persons then occupying as transferees of the lessee, and in 1903 the litigation about the 6th defendant's lease having come to an end, he treated the occupants under the old lease as the tenants and recovered rent from them apportioned according to the shares held by them in the *inam*.

In 1906 Sri Sudhi Nidhi Swamiar died and was succeeded by the plaintiff who sues to set aside the lease and recover possession of the *inam*.

The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the Matadhipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890.

The respondents do not contend for the view taken by the Subordinate Judge, that each Matadhipathi has what I may call an independent life-estate in the *Mutt*, and is in no way bound by any prescription by which his predecessor may have lost his title.

As this view is not now supported, it is sufficient to say that it is not justified by the judgment of Bhashyam Iyengar, J., in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) on which the Subordinate Judge seems to base it.

The Subordinate Judge, however, also holds that at any rate the lease was good for the life-time of Sukgnana Nidhi Swamiar, and was adopted by his successor and allowed to run on, and this view is that which is now pressed upon us.

We are bound by the decision of the Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran* (2), the effect of which is, as I understand it, to accept generally the view of a Matadhipathi's position taken by the learned Judges in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1).

In that case Bhashyam Iyengar, J., holds that the *corpus* of the *Mutt* property is inalienable except in special circumstances, but that the produce, subject to the upkeep of the *Mutt*, is at the absolute disposal of the Matadhipathi, and he recognises what is further emphasised by the Full Bench,

(1) 27 M. 435; 14 M. L. J. 105.

(2) 5 Ind. Cas 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778 (F. B.).

that there may be properties vested in the Matadhipathi as a bare trustee.

I may, therefore, here state my opinion on the evidence that the *inam* in question now is not so vested in the plaintiff; the *inam* registers show that it was granted for the support of the *Mutt* and the oral evidence is not inconsistent with that. The register shows further that at the time of the *inam* settlement the produce was used for certain purposes and was not of itself sufficient for the upkeep of the *Mutt*, but that is not sufficient to warrant us in holding that the grant was for those specific purposes. The statement as to the purposes to which the income was then being applied was obviously made as showing that the *inam* might properly be confirmed for the support of the *Mutt*. I take it, therefore, that the *inam* is one in which the Matadhipathi has, subject to the upkeep of the *Mutt*, that which is called, in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1), an absolute right to dispose of the income. It may still be open to us in this Court to hold that even this right is not altogether an absolute right, but that is a question which it is not necessary to decide in this case.

There is nothing in this case to suggest that the lease in question operated to the detriment of the upkeep of the *Mutt*. If it did so operate, if it reduced the income below what is necessary for the upkeep of the *Mutt*, it is possible that it might be held to be absolutely void *ab initio*; that may be a difficult question, but fortunately it does not arise. Before us no one has suggested that as a fact the *Mutt* was not adequately maintained by Sukgnana Nidhi Swamiar or by his successor.

Now, if the Matadhipathi has the management of the land and an absolute right to dispose of the income thereof, it seems difficult to withhold from him the right to make for his own life or rather for the period during which he occupies the position of head of the *Mutt*, a lease of a portion of the property for any rent however small which he may deem sufficient; he may, subject to the reservation of a sufficient fund for the upkeep of the *Mutt*, make gifts of the rents received to any one whom he chooses to favour.

It is unnecessary to decide whether there exist any means of preventing him from so dealing with the surplus income as to create a scandal and bring the *Mutt* into disrepute: here all that has been done is to give land on a favourable rent to one who, we may presume was a sufficiently pious Brahmin.

It is suggested that to allow transfers by way of lease to be made by successive Matadhipathis, each for the period of his headship of the *Mutt*, would be destructive of the institutions of which they are the heads: all the property, it is argued, even the *Mutt* buildings, might be alienated to a Christian, a Muhammadan or an outcaste. It is probable, however, that inasmuch as the upkeep of the *Mutt* is the first consideration and the Matadhipathis' interest is subject to that consideration, to the law, if any one is entitled to put it in motion, would be able to prevent the transfer of the *Mutt* buildings to any person incapable of continuing or unwilling to continue, to maintain the institution in accordance with the objects and views of its founder and the conditions laid down by him or imposed by usage. And it seems quite immaterial whether the lands are cultivated by a Christian or Muhammadan farmer, provided he is a good husbandman and pays his rent with regularity.

In *Abhiram Goswami* v. *Shyama Charan Nandi* (3) the Privy Council, as I understand the case, adopted what their Lordships call the 'most favourable construction' (of the powers of the alienor I presume) and were of opinion that the alienation was good for the life of the alienor; and his immediate successor being insane, prescription would not run against him; and Article 134 being inapplicable, the plaintiff was not barred.

Their Lordships do not, it is true, expressly state the case in this way, but I find it impossible to accept the contention on behalf of the appellants that they may have confined their attention to Article 134 of the second Schedule of the Limitation Act (XV of 1877), and have overlooked the possibility of the extinction of the plaintiff's title by reason of Article

(3) 4 Ind. Cas, 449; 36 C. 1003: 14 C W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857 (P. C.); 19 M. L. J. 530; 10 C. L. J. 284; 36 I. A. 148.

144. The report of the argument both in *Shyama Charan Nandy* v. *Abhiram Goswami* (4) and in *Abhiram Goswami* v. *Shyama Charan Nandi* (3) indicates that that is very unlikely, and I agree with the learned Judges who in *Narsaya Udpa* v. *Venkataramana Bhatta* (5) expressed the opinion that their Lordships proceeded on the view that the alienation was good for the life-time of the alienor. *Abhiram Goswami* v. *Shyam Charan Nandi* (3) is, therefore, an authority that an alienation by the head of a religious foundation is not necessarily utterly void and of no effect. In reliance upon this authority and on *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) I am prepared to hold in the present case that the lease of 1872, though beyond the powers of the lessor, was a lease which he could not have avoided during his own life-time.

And I thank we may deduce from *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) the further rule that the lease is voidable by the lessor's successors, in very much the same way that an alienation by a Hindu widow in excess of her powers is voidable by her successors. Both the learned Judges in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) hold that a Matadhipathi has an estate very closely resembling that of certain ecclesiastical corporations sole in England. Bhashyam Iyengar, J., at page 457 holds that he is "as much a corporation sole as a Bishop admittedly is" and at page 456 cites the decision of Lord Hardwicke in *Knight* v. *Mosely* (6) and of Sir George Jessel in *Mulliner* v. *Midland Railway Company* (7) as showing that the nature of the estate vested in certain corporations sole is "the fee simple qualified and under restrictions in right of the Church."

Subramania Aiyar, J., too, takes the same view ; the Swamiar for the time being is "a real owner and not a mere trustee. He is, as he would be described in England, a corporation sole" (page 442).

Consequently it seems to me that when the learned Judges speak of 'an estate for life in the corpus,' and of the individuals composing the line of succession as being 'in the position of tenants for life,' they do not mean that the estate is in fact that of a tenant for life (Sankaran Nair, J., in *Kailasam Pillai* v. *Nataraja Thambiran* (2) expressly says it is not), but rather what Sir George Jessel pointed out in the case to which Bhashyam Iyengar, J., refers "though in a certain sense owners in fee simple yet in many respects they (certain corporation sole) had only the powers of tenants for life."

Being "owners of an inheritance," Matadhipathis could, but for 'restrictions and qualifications in right of' their *Mutts*, make leases so as to bind their successors ; in this country we have no statute which declares alienation by the head of a *Mutt* to be 'utterly void and of no effect' and we are not bound to hold that the restrictions and qualifications which attach to the estate are, as regards their effect, different from those which prevent a Hindu widow from binding her successors by unjustifiable alienations by way of lease. There are, no doubt, differences in respect of the purposes which will justify an alienation, but there seems to be no reason to hold that the differences extend also to the duration of the lease as a valid transfer. Of course, the successor of a Matadhipathi will be unable to validate it for all time. In that respect he will be like a female succeeding to a widow, say a daughter succeeding her mother as her father's heir ; he will be able to validate the transfer only for the period during which he holds the office, and will be unable to bind his successor, but he will be able to avoid the lease altogether or affirm it for this period, and it will not be absolutely nullified by the death of the alienor.

This being my view of the position, I have to consider the question whether the plaintiff's immediate predecessor, Sri Sudhi Nidhi Swamiar, adopted the lease and ratified it so far as he could ratify it. In 1889, before he became Matadhipathi, and purporting to act for his predecessor, he gave, as I have already stated, another lease to the 6th defendant: he is not, however, shown to have done anything to support the 6th defendant's fruitless efforts to obtain possession, and from 1893, if not before that, he accepted rent from the transferees of the original lessee. I cannot find that after he became Matadhipathi he did anything to

(4) 33 C. 511; 3 C. L. J. 306; 10 C. W. N. 870.
(5) 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 738.
(6) Ambler 176; 27 Eng. Rep. 118.
(7) (1879) 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 27 W. R. 330.

indicate an intention to avoid the lease, and, on the other hand, by accepting rent he did make clear his intention of adopting it. I am, therefore, able to accept the finding of the Subordinate Judge on this point.

The question of forfeiture does not in these circumstances require decision, and the only one remaining which I find it necessary to decide, is one which arises in Appeal No. 185, the 5th defendant's appeal, and not in No. 186.

It is thus owing to the failure of the holders of a portion of the land to pay the local cesses payable by the *inamdar*, there was a sale by the Revenue Authorities, and the 5th defendant became the purchaser. The question is whether he bought the right of the *Mutt*, or only that of the lessee in occupation. I am not able to agree on this point with the Subordinate Judge that the interest of the *Mutt* was not sold.

The facts are that the Deputy Tahsildar gave no notice of the sale to the *Mutt* but issued his notice only to Ramachariar, who had been paying the taxes. Ramachariar told the Deputy Tahsildar that he had sold his interest in the land to Narayanachariar and the Deputy Tahsildar put up the land for sale as that of Narayanachariar, and the sale-proceeds, after payment out of them of the amount due to the Local Board, were paid over to Narayanachariar: possession of the land was obtained by the 5th defendant but I do not find anything to show whether after the sale the *Mutt* continued to receive any rent for the land sold.

I have had considerable doubt whether on this evidence I ought not to hold that the Deputy Tahsildar sold and the 5th defendant bought the interest of the permanent lessees alone. If the 5th defendant had paid rent to the *Mutt*, that would have been clearer, but it is not shown that any rent was paid. On the whole, I think the Deputy Tahsildar intended to sell the defaulter's interest, *i. e.*, the interest of the owner, from whom the cesses were due, but thought that the person in occupation was the owner; the purchaser seems to have been under a similar mistake and to have thought that his purchase entitled him to possession as well as ownership.

The result is that the Deputy Tahsildar sold the interest of the defaulter, the *Mutt*, without giving notice to the Matadhipathi. The sale was irregular and liable to be set aside, but passed the title and at the date of this suit it was too late to set it aside whether section 59 of the Act II of 1864 or Article 12 of the second Schedule to the Limitation Act be the provision of law applicable to the case.

Appeal No. 185 will, on this ground, have to be allowed and the suit, so far as it is for possession of the land, dismissed; the alternative prayer of the plaintiff for payment to him of the surplus sale-proceeds received by the 3rd defendant may be allowed, and the decree will be modified accordingly and will be that which my learned brother sets out in the judgment which he will now deliver.

Appeal No. 185 is dismissed with costs.

SADASIVA AIYAR, J.—Appeal No. 186 is the principal appeal. It has been brought by the 4th defendant, who is in possession of three-fourths share of the plaint village under deeds executed by the owners of the permanent lease right, which permanent lease right was created by the deed of 1872 in favour of Mudgala Chariar by the former Matadhipathi. I entirely agree, for the reasons given by my learned brother in the judgment just now pronounced by him, that the plaintiff was entitled to repudiate the lease as soon as he became Matadhipathi in March 1906 and to bring his suit for possession within twelve years of his becoming Matadhipathi The Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (8), held that a reversioner, after the death of a Hindu widow, was entitled to bring his suit for possession within twelve years of her death, repudiating *in pais* the widow's alienation, and that such repudiation may be indicated by the institution of the suit itself. The position of a Matadhipathi is, (as pointed out by my learned brother), neither that of an absolute owner, (as he cannot ordinarily alienate the corpus), nor that of a mere tenant for life, (as he represents fully the ownership of the *Matam* properties for certain purposes), and is, therefore, in many ways analogous to that of the estate of a Hindu female heir to a males estate. A Matadhipathi has been

(8) 34 C. 329 (P. C.); 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87.

compared to a corporation sole in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) but (speaking for myself) I do not like to dwell on that analogy, as (unless we are very careful), that analogy might not only mislead us into the complication and difficulties of considering and construing the varied opinions given in English cases about corporations sole, but there is this fundamental distinction, namely, that whereas "the properties belonging to an English Bishop" (a corporation sole under the English Law) "including his savings from the revenues of the benefice, devolve upon his legal representatives or heirs", the savings of a Matadhipathi devolve upon the succeeding Matadhipathi. I am also not at all sure that as regards even the income of the *Mutt* properties, a Matadhipathi has an absolute and unqualified power of disposition as a Bishop over the income of his benefice, that is, to squander it away in even immoral or extravagant ways. I should be very loath to come to the conclusion that section 92 (1) of the Civil Procedure Code (corresponding to old section 539) does not apply to *Mutts*, as was suggested during the course of the arguments in these cases, and that the public and the Advocate-General and the Courts of Justice are powerless to stop the wholesale misuse of the income of a charitable and religious institution like a *Matam*. In a recent case, the right to protect the religious institution was allowed to a mere disciple in management of the *Mutt* by my learned brother and Abdur Rahim, J. See *Kasi Chetty* v. *Srimathu Devasikhamony Nataraja Dikshitar* (9). I concurred with Sundara Aiyar, J., in the judgment reported of *Narsaya Upada* v. *Venkataramana Bhatta* (5) and I adhere to the opinion expressed therein as to the effect of the three recent Privy Council decisions beginning with *Abhiram Goswami* v. *Shyama Charan Nandi* (3) discussed therein. In the result I agree with my learned brother that Appeal No. 186 should be dismissed with costs.

As regards Appeal No. 185, my conclusion is that it should be allowed. This appeal has been brought by the 5th defendant, who purchased the remaining one-fourth share in the village in a revenue sale held for recovery of road-cess due by the *Matam*. It is clear from section 3 (10), section 64 (2) and sections 66 and 73 of the Local Boards Act (V of 1884) that it is the *inamdar Matam* that was liable for the road-cess and not any tenant of the *Matam*. The revenue sale was held according to the procedure laid down by the Revenue Recovery Act, such procedure having been incorporated into the Local Boards Act by section 76 of the latter Act. By Exhibit J1 (*b*), Ramachariar, on whom notice was served as the defaulter (that is, I take it as the landlord *inamdar*) informed the Deputy Tahsildar in April 1902 that he had sold away his "$\frac{1}{4}$th share in the village" to Narayanachariar and that the amount should be collected from Narayanachariar, who was in possession of the one-fourth share in the village. Ramachariar did not inform the Deputy Tahsildar that he and Narayanachariar were not landlords but only lessees.

Exhibit J1 (C) shows that one-fourth share in the village itself was intended to be sold and not merely a lease right therein, I find it difficult to hold that what was sold was the right not of the defaulter, but the rights of a lessee of the defaulter, which lessee could not be made legally liable for the road-cess and whose lease rights also could not be made liable, as a sale held for road-cess under the Local Boards Act is not a sale free of encumbrances or under-tenures, but only the rights of the landholder as they stood on the date of sale. Though the sale *procedure* was that prescribed by the Revenue Recovery Act, the substantive provisions in the Revenue Recovery Act (sections 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act. See *Ramachandra* v. *Pitchaikanni* (10) and *Chinnaswami Mudali* v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India* (11). It seems to be better to hold (if it can be fairly so held) that a sale conducted by a Revenue Officer was conducted with jurisdiction, though irregularly, than to hold that it was conducted wholly without jurisdiction,

(9) 16 Ind. Cas. 622; (1913) M. W. N. 181.

(10) 7 M. 434.
(11) 25 M. 572.

MOHIDEEN KUTTI *v.* PARKER.

Purchasers in sales held by Revenue Officers for realisation of public taxes should not have their title remaining in jeopardy for long, and public policy seems to me to require that, when such sales are attacked long afterwards on the ground of want of jurisdiction in the Officer conducting the sale, such ground should be strictly established by cogent evidence, which seems to me to be wanting in this case. (That the plaintiff himself thought that the sale was intended to convey away the *Mutt's* interest seems to be indicated by paragraphs 8 and 11 of the plaint. In paragraph 8 he calls the sale an "irregular revenue sale" held without jurisdiction. In paragraph 11 he prays in the alternative for the balance of the revenue sale amount). Taking it then, that the sale was held with jurisdiction, the irregularities committed by the Revenue Officer in having the notices served on Narayanachariar (the man in possession), treating him as the defaulter instead of on the real defaulter (the *Matam*), cannot be now made a basis for attacking the sale, as the time fixed by law for the setting aside of the sale on the ground of irregularities [see *Malkarjun* v. *Narhari* (12)] had expired long before the present suit was brought.

In the result, this appeal must be allowed with appellant's costs payable by the plaintiff and the order of the lower Court directing the plaintiff and the 3rd defendant to pay sums of money to the appellant will be set aside. A money-decree will be given in favour of the plaintiff against the third defendant for the sum of Rs. 382-8 balance of the revenue sale-proceeds with interest thereon at 6 per cent. per annum from the date of suit and proportionate costs on that amount from the 3rd defendant in the lower Court. To this extent, the lower Court's decree will be modified.

Decree modified.

(12) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).

MADRAS HIGH COURT.

REFERRED CASE No. 2 OF 1912.

April 3, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

P. K. MOHIDEEN KUTTI—PLAINTIFF

versus

C. PARKER AND OTHERS—DEFENDANTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (g)—Contract of betrothal—Promise of marriage—Breach—Jurisdiction.

Plaintiff, the father of a Muhammadan girl, entered into an agreement with the defendant by which the minor son of the latter was to marry plaintiff's daughter. The defendant broke the contract and the plaintiff sued for compensation for loss of provisions, etc:

Held, that the suit was not cognizable by a Small Cause Court as it falls within the exemption of Article 35 (*g*) of the Provincial Small Cause Courts Act.

Kali Sunkar Dass v. *Koylash Chandra Dass*, 15 C. 833; *Nga La* v. *Nga Than*, 14 Ind. Cas. 837; 5 Bur. L. T. 57, followed.

Case stated, under Act V of 1908, by the District Judge of South Malabar, in O. S. No. 112 of 1911, on the file of the District Munsif of Ottampalam.

Mr. *K. Ramachandra Iyer*, *Amicus Curiæ*.

JUDGMENT.—The question for decision is whether a suit by the father of a Muhammadan girl against the father of a minor boy for breach of a contract agreeing to marry the boy to the plaintiff's daughter falls within Article 35, clause (*g*) of the Provincial Small Cause Courts Act "which relates to a suit for breach of contract of betrothal or promise of marriage." We hold, agreeing with the decision of the Calcutta High Court in *Kali Sunkar Dass* v. *Koylash Chander Dass* (1), that the suit falls under Article 35 (*g*). See also *Nga La* v. *Nga Than* (2). The fact that the Article exempts from the jurisdiction of a Small Cause Court a suit for a breach of a contract of betrothal which must be against a person other than the husband or wife supports that view. We have no doubt that the claim for compensation for the loss sustained by the plaintiff in consequence of the articles and provisions got ready by him for the marriage became wasted must be treated as a claim for compensation for the breach of the contract. Our answer to the reference is that the suit is not cognizable by a Small Cause Court.

(1) 15 C. 833.

(2) 14 Ind. Cas. 837; 5 Bur. L. T. 57.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 59 OF 1903.
March 10, 1913.
Present:—Mr. Justice Chitty and
Mr. Justice Teunon.
Kumar KALANAND SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
EASTERN MORTGAGE AND AGENCY COMPANY, LIMITED—DEFENDANT—
RESPONDENT.

Abwab—*Illegal cess—Permanent tenure—Tenant to pay fixed sum of Rs.* 4,310 *of which Rs.* 4,300 *is* jama, *Rs.* 5 *as* salami towji *and Rs.* 5 *as* tehwari dasahra—*Part of consideration for which tenancy was created—Sums legally recoverable.*

A permanent tenure was created in 1874 by a lease which specifically provided that the lessee shall pay to the lessor year by year the fixed sum of Rs. 4,310 of which the sum of Rs. 4,300 was described as *jama*, Rs. 5 as "*salami towji*" and Rs. 5 as "*tehwari dasahra*":

Held, that the two sums of Rs. 5 though not described in the lease as rent, are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid, and not illegal cesses, and are legally recoverable.

Tilukhdari Singh v. *Chulhan Mahton*, 17 C. 131; 16 I. A. 152 and *Radha Prosad Singh* v. *Bal Kowar Koeri*, 17 C. 726, distinguished.

Jotindra Mohan Tagore v. *Chandra Nath Sagri*, 6 C. W. N. 360 and *Apurna Churn Ghose* v. *Kasam Ali*, 10 C. W. N. 527; 4 C. L. J. 527, relied upon.

Appeal from the decree of the first Sub-Judge of Bhagalpore dated August 29th, 1907.

Babus *Umakali Mukerjee* and *Sallendra Nath Palit*, for the Appellants.

Babus *Hemendra Nath Sen*, *Upendra Gopal Mitter* (did not appear) and *Shib Chandra Palit*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs and arises out of a suit brought by them to recover from the defendants 1st and 2nd parties Rs. 4,976-8-6 as the *mokarari* rent of a 7-annas 3-pies share for the year 1312 and part of 1313 with cesses, interest, *salami* and *tehwari* under the terms of the *pattah* and *kabuliyat* and a further sum of Rs. 292-8 as mutation fee at the rate of 15 per cent. on annual *mokarari* rent.

The only questions arising on this appeal are (1) whether the claim for the mutation fee is barred by limitation and (2) whether the claim for *salami* and *tehwari* is legal, and (3) whether interest on the claim decreed should have been allowed *pendente lite*. (1) So far as the claim for the mutation fee is concerned there is no question that it is barred. It should be stated that before us the claim has been restricted to so much of the fee as would be due on the 6-annas share in the *mokarari*, the plaintiffs conceding that as regards the 1-anna 3-pie share it is not recoverable.

As to the 6-annas share the mutation fee was admittedly recoverable in 1898 when this share was transferred. At that time the present plaintiffs were entitled to only 9-annas out of the 6-annas. The other 7-annas was then vested in their co-sharer, and has only come to them by lease at a subsequent date, *viz.*, 25th March 1904. It is obvious, therefore, that as regards the 7-annas share of the 6-annas estate time had commenced to run against the plaintiff's predecessor-in-title in 1898 and the fact of one of the plaintiffs being a minor at the date of the lease would not avail to stop it.

As regards the 9-annas share of the 6-annas estate the plaintiffs attained majority in September 1901 and September 1904 respectively. The present suit was filed on 11th June 1906. It is conceded that on attaining his majority plaintiff No. 1 became the *karta* of the family. He could, therefore, have given a valid discharge for the amount of the mutation fee if paid. The provisions of sections 7 and 8 of the Limitation Act, 1877 cannot, therefore, avail the plaintiffs in the present case. Assuming the period of limitation to be six years under Article 120 of Schedule II it follows that the suit was not filed within six years from the date when the right to sue accrued nor within three years from the date when plaintiff No. 1 attained his majority. The suit, therefore, as regards this item of the claim is clearly barred and the plaintiff's appeal must fail.

With regard to the claim for the items designated "*selami towji*" and "*tehwari dasahra*" the plaintiffs-appellants rely upon the provision of section 3 of Regulation V of 1872, and the decision of this Court in the case of *Pudmanund Singh*, v. *Baij Nath Singh* (1) while the defendants respondents contend that the case just cited has been overruled by the decisions of the Judicial Committee of the Privy Council in *Tilukhdari Singh* v. *Chulhan Mahton* (2) and of a Full Bench of

(1) 15 C. 828.
(2) 17 C. 131; 16 I. A. 152.

this Court in *Radha Prosad Singh* v. *Bal Kowar Koeri* (3).

But in the cases of *Tilukhdhari* v. *Chulhan Mahton* (2) and *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) the facts were wholly different from the facts in the present case. In these cases there were no written engagements and the sums claimed represented imposts or demands made upon the *raiyati* defendants at various times subsequently to the creation of their tenancies and the settlement of their rents. It was, therefore, held and, no doubt, properly held, that though in accordance with practice or custom the tenants had paid these impositions for a long period, yet by virtue of the provisions of sections 54, 55 and 61 of Regulation VIII of 1793 they were not legally recoverable.

In the present case the permanent tenure now in question was created by a lease dated 31st January 1874 and in this lease it is specifically provided and agreed that the lessee shall pay to the lessor year by year a fixed sum of Rs. 4,310 of which the sum of Rs. 4,300 is described as *jama*, Rs. 5 as "*salami towji*" and Rs. 5 as "*tehwari dasahra*". Now no doubt if the lease had provided for an annual payment of only Rs. 4,300 and the landlord had at some subsequent date demanded from his tenant a further sum or sums by way of "*salami*" and "*tehwari*," such additional demands even if for some time acquiesced in would still be properly regarded as "*abwabs*" or "illegal cesses" not recoverable in law. But where (as in the present case) the payment of these specific sums is provided for and agreed upon in the lease creating the tenancy the stipulation for such payment is not, in our opinion, a stipulation or reservation for the payment of arbitrary or indefinite cesses but in the language of section 3 of Regulation V of 1872 is "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to." In fact the two sums now in question, though not described in the lease as rent are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid.

No doubt, in the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) some of the Judges expressed the opinion that the case of *Pudmanund Singh* v. *Baij Nath* (1) had been wrongly decided but that was not the question referred to the Full Bench, and as we have already shown the case then before the Full Bench and the Privy Council case of *Tilukdhari Singh* v. *Chulhan Mahton* (2) upon which the learned Judges relied were decided upon facts wholly different from those in the case now before us. The decisions, therefore, in those cases do not govern the present case. All the cases cited appear to agree in this that a charge which is shown not to be an *abwob* but in reality part of the rent is recoverable. See *Jotindra Mohan Tagore* v. *Chandra Nath Sagri* (4) and *Apurna Churn Ghose* v. *Kasam Ali* (5) where the learned Judges remark: "If a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such, the landlord would be entitled to recover the same and the whole question in this case is whether the items claimed are really part of the rent, which was the consideration for the letting out of the lands to the defendant." That is precisely the case here and we are of opinion that these charges are recoverable for that reason that they were really part of the consideration for the letting.

With regard to the 3rd point we are of opinion that in refusing interest *pendente lite* the Sub-Judge did not exercise a sound judicial discretion. On the portion of the claim decreed we allow interest *pendente lite* at the rate of 6 per cent. per annum. The appeal is, therefore, decreed in part. We make no order as to costs.

Appeal decreed in part.

(3) 17 C. 726.

(4) 6 C. W. N. 360.

(5) 10 C. W. N. 527; 4 C. L. J. 527.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1341 OF 1911.

March 10, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

PARSHOTAM—PLAINTIFF—APPELLANT

versus

Musammat RAJ DEVI—DEFENDANT—RESPONDENT.

Custom—Widow—Claiming partition—Burden of

proof—Widow to prove her right to partition—Completion of partition proceedings no bar to Civil suit for determination of title.

The mere fact of a partition having been completed is no bar to a subsequent civil suit instituted to decide the question of title which has not been disposed of during the partition proceedings.

Ata Muhammad Khan v. *Arjan Singh*, 72 P. R. 1896 (F. B.) and *Bachan Singh* v. *Madhan Singh*, 61 P. R. 1897 (F. B.), referred to.

Where in a suit in which a widow claims partition the parties are governed by custom, the onus lies on the widow of proving that she can claim partition.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated 30th October 1911.

Mr. *Gokal Chand Naurang*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondent.

JUDGMENT.—The genealogical tree of the parties is given at page 3 of the paper-book.

Parshotam, plaintiff, sues for a declaration that the whole *khata* is still joint, and that the partition proceedings effected at the request of *Musammat* Rajji in 1909 are null and void. The reply of *Musammat* Rajji is that the partition having been completed a Civil Court has no jurisdiction to try the present suit and also that she is entitled to obtain partition of the joint holding. The first Court gave the plaintiff a decree; the learned Divisional Judge, on appeal, agreed with the findings of the first Court but held that, though the widow was not entitled to claim partition, she should be maintained in separate possession of $\frac{1}{3}$rd share of the land. His decision practically amounts to a dismissal of the plaintiff's suit, so the plaintiff has preferred a further appeal to this Court. It is again urged before us on behalf of the widow that a Civil Court has no jurisdiction now that the partition has been completed. But a question of title is involved and the mere fact that the partition has taken place is no sufficient reason for holding that the jurisdiction of the Civil Courts is ousted. It appears that the partition was effected during the plaintiff's absence and that he had no opportunity of raising the question of title in those proceedings. Had he been present and had the question been raised by him before the Revenue Officer, it would have been open to the Revenue Officer to stay the proceedings until the question had been determined by a Civil Court, or to proceed to determine the question himself as if he were a Civil Court. The rulings [*Ata Muhammad Khan* v. *Arjan Singh* (1) and *Bachan Singh Madhan Singh* (2)] are clear authority for the proposition that the mere fact of the partition having been completed is no bar to a subsequent civil suit instituted to decide the question of title which has not been disposed of during the partition proceedings.

The next question is whether the widow is entitled to claim partition. According to the learned Counsel for the plaintiff-appellant, the parties are governed by Hindu Law, while for the respondent it is urged that Customary Law applies; granting that the parties are governed by custom, still the onus lies on the widow of proving that she can claim partition, see Rattigan's Digest of Customary Law, Article 15. In the present case the widow has absolutely failed to discharge the onus. The solitary instance mentioned by her witnesses of a widow having obtained partition is one in which the land given to the widow was a plot of only 4 *kanals*, a piece of land so small in area that it would be barely sufficient for the maintenance of a widow. It is true that the last witness, Raja, names another instance of partition in which a widow was concerned, but as he also states that it was himself who asked for partition, this was not a case of partition effected at the instance of the widow. From the evidence of defendant's first witness, Mehtab Jang, it appears that *Musammat* Rajji's daughter and her son-in-law have recently come to live with him, and the probability is that the widow has claimed partition at their instigation. There is no evidence to the effect that prior to their advent *Musammat* Rajji ever had any difficulty in obtaining her share of the produce. We hold it proved that the widow has no right to claim partition.

Whether the defendant or the plaintiff was actually in possession of the land at the date of institution of this suit, and whether the plaintiff's proper remedy was a suit for possession is a matter which has not been raised by either party, and we see no suffi-

(1) 72 P. R. 1896 (F. B.).
(2) 61 P. R. 1897 (F. B.).

cient reason to raise it of our own motion. We accept the appeal and setting aside the decree of the learned Divisional Judge we restore that of the first Court. We leave the parties to bear their own costs throughout, as it appears that plaintiff's absence at the time of partition proceedings was due to his having taken up his residence in another village with his maternal relations. Had he continued to reside in his own village he would doubtless have had full opportunity of raising the question of title in the course of the partition proceedings.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 66 OF 1911.

April 25, 1912.

Present:—Mr. Lindsay, J. C.

JANKI PRASAD—APPELLANT

versus

GIRDHARI LAL AND OTHERS—CREDITORS—RESPONDENTS.

Insolvency petition—Minor, position of.

A minor cannot be declared a bankrupt or made party to a petition for insolvency.

Appeal against the order of the District Judge, Lucknow, dated 29th November 1911.

Mr. P. *C. Gupta*, for the Appellant.

Babu *Har Gobind Das*, for the Respondent.

JUDGMENT.—This is an appeal in insolvency proceedings brought by one Janki Prasad against an order of the District Judge of Lucknow refusing to pass an order of adjudication on a petition which was lodged before him on the 4th August 1911. The applicant-appellant was examined at great length before the learned District Judge as to the statements contained in the petition and various other matters. The learned Judge appears to have come to the conclusion that Janki Prasad was either carrying on business in partnership with or as manager for two minor nephews of his; he, therefore, held that the petition for insolvency could not be presented by Janki Prasad without joining his minor nephews. He refused passing an order of adjudication. I do not think the order of the learned Judge can be supported. In the first place I know of no authority according to which any minor can be declared a bankrupt or be made a party to a petition in insolvency. The rule is certainly clear as laid down under the English Law and I see no reason for supposing that a different rule is to be applied in this country when it is borne in mind that the present Provincial Insolvency Act is framed on practically the same lines as the Bankruptcy Acts which obtain in England. The rule is laid down in Ringwood on Principles of Bankruptcy, page 15, thus:—"An infant, as a rule, is not liable to be made bankrupt in respect of a debt, even though he carries on a trade, and for it obtains goods on credit, unless, indeed, he fraudulently makes a presentation that he is of full age; but it is very doubtful whether, even then, he can be made bankrupt, for the effect of the fraudulent representation is not so much to create a 'debt', on which a petition can be grounded, but rather an equitable liability, which, though not a proper petitioning creditor's debt, might be proved for, if the infant became bankrupt when of full age." As autho ity for this statement of the law the learned Editor refers to the case of *In re Jones, Ex parte Jones* (1). It follows, therefore, that the District Judge was in error in rejecting the petition and insisting on two minors being joined with the appellant. As for the other matters it does not seem possible to get over the fact that Janki Prasad has debts to the amount of over Rs. 500. If that fact is established there is no question as to the right of Janki Prasad to present a petition under section 6 of the Act. Mr. Har Govind Das, who appears on behalf of one of the creditors, admits that in his own case the debt for which his client is a creditor is a debt due under a decree obtained against Janki Prasad and no one else. There is no reason to suppose that the debts given in the list attached to the petition are not due by the petitioner and *prima facie*, therefore, his right to present this application seems to me to be uncontestable. I, therefore, set aside the order of the learned District Judge and direct that the petition of Janki Prasad be taken up again by him and disposed of according to law.

No order as to costs of this appeal.

Order set aside.

(1) (1881) 18 Ch. D. 109; 50 L. J. Ch. 673; 45 L. T. 193; 29 W. R. 747.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 140 OF 1913.
April 24, 1913.
Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Beadon.
MILKHI—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Evidence Act (*I of* 1872), *s.* 122—*Communication between husband and wife not to be disclosed without consent of the other party.*

Statements alleged by the wife of an accused person to have been made to her in respect of the offence with which he is charged, without the accused or his representative-in-interest consenting to these statements being disclosed, are inadmissible under section 122 of the Indian Evidence Act.

Appeal from the order of the Sessions Judge, Jullundur Division, dated the 30th January 1913, convicting the appellant and sentencing him to death.

Mr. *Kanwar Narain*, for the Appellant.

Bawa *Sewa Ram Singh* (for the Government Advocate), for the Respondent.

JUDGMENT.—This case has come before us on appeal and, under section 374 of the Code of Criminal Procedure, for confirmation of the capital sentence passed on the appellant for the murder on the 8th of December 1912 of his daughter Ati, aged three or four years.

The Chemical Examiner found traces of opium in the child's stomach and its contents and in portions of her large and small intestine. He detected no poison in any portion of liver or kidney sent to him for examination. The Assistant Surgeon, who examined the child's body on the 10th of December, found it well nourished, and arrived at the conclusion, based to a great extent on the Chemical Examiner's report, that the cause of death was probably the administration of opium. On the 11th December the appellant stated to a Magistrate of the first class that he had given the child opium at sunset because she had a cold, that when the child was sick after taking the opium he told his wife what he had done, that he rubbed the child's body with butter and gave her aniseed which she could not swallow and that she died at about mid-day.

On the 8th of January in the Court of the Committing Magistrate, and in the Court of Session on the 29th January, the appellant retracted this statement, denied having given the child opium and alleged that his wife had illicit intimacy with one Bhuja, *Mochi*. Two *lambardars* deposed that appellant told them that after the child's death the appellant admitted having given her opium and asked to be forgiven, and two other witnesses deposed that in their presence the appellant gave the child something which, he said, was opium, because she had a cold.

The conviction is based to a very large extent on statements alleged by the appellant's wife to have been made to her by him, and in the first report the wife repeated these statements. It has not been suggested that the appellant or his representative-in-interest consented to these statements being disclosed, and they are inadmissible under section 122 of the Evidence Act. The learned Sessions Judge appears to have overlooked section 122 and the assessors, who found the appellant guilty, were probably influenced by these inadmissible statements. It is true that the child was blind and that the appellant might have wished to get rid of her, but the admissible material before us falls far short of justifying the conviction. It is notorious that opium is used freely as a medicine, and on the record the appellant is entitled to the benefit of the doubt which exists in consequence of the absence of any direct evidence of motive or intention to cause death or injury.

The appellant is a *Mirasi* and by no means unlikely to be ignorant of the size of dose necessary. From the first he had pleaded that his intention was to relieve the child of her cold; the child having died he would naturally be alarmed and ask to be forgiven for the result of his ignorance and carelessness, and his subsequent denial of having administered the opium is by no means unnatural, having regard to his position in life and the steps which were taken against him.

For these reasons we allow the appeal and set aside the conviction and sentence.

Appeal allowed.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 315 OF 1913.
April 10, 1913.
Present:—Justice Sir Richard Harington, Bart., and Mr. Justice Coxe.
SABED ALI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Warrant—Date fixed by Court for execution—Warrant endorsed to peon by Nazir *fixing earlier date—Execution by peon between date fixed by* Nazir *and that fixed by Court, whether legal.*

A warrant for the attachment of the moveable properties of a judgment-debtor was issued by the Court and addressed to the bailiff to be executed within August 30th. The *Nazir* endorsed the warrant to a peon with a direction to execute it on or before August 25th. The peon executed the warrant between August 25th and August 30th:

Held, that the execution was lawful and in rescuing the property attached by the peon from him the accused were guilty of an offence.

Rule against the order of the Sessions Judge of Dacca, dated January 13th, 1913, dismissing an appeal from the order of the Sub-Divisional Magistrate of Naraingunge, dated December 23rd, 1912, convicting the petitioner under section 147, Indian Penal Code, and sentencing him to three months' rigorous imprisonment.

Babus *Harendra Narain Mitra* and *Bhudev Chandra Roy*, for the Petitioner.

Babu *Srish Chandra Chowdhury*, Junior Government Pleader, for the Crown.

JUDGMENT.

HARINGTON, J.—This is a Rule calling on the District Magistrate to show cause why the conviction should not be set aside on the first ground mentioned in the petition. That ground runs in these terms that the conviction is bad in law in that the attachment of the cattle by the peon whose power to act under the warrant having expired, was illegal.

The whole question raised by this Rule was —was the peon's act in attaching the cattle illegal under these circumstances?

The warrant was a warrant addressed to the bailiff, the English word "bailiff" appearing on the face of it in Bengali characters. The *Nazir* of the Court who appears to have superintendence over the persons who execute the warrants endorsed it with a direction to the particular bailiff in question to execute it within a particular day: but the warrant itself was good warrant for some days beyond that date. The bailiff should have executed it, according to the direction of the *Nazir*, on or before the 25th August, but the warrant issued by the Court could be legally executed up to the 30th August. The question is whether the execution by the peon between 25th and 30th is a lawful execution. In my opinion it is.

The point that strikes me is that the warrant was addressed to the bailiff. Now "bailiff" is a very well known English word and used to describe the officer who actually conducts executions. When an execution is put into a house, it is the bailiff who goes and seizes the furniture, it is the bailiff who takes actual physical possession of the furniture and becomes the man in possession who prevents it from being carried away. In my view, the fact that the warrant is addressed to the bailiff shows that it is the person who actually makes the seizure, who is authorized by it, namely the peon. If the warrant had been intended to go to the *Nazir* it would have been so addressed but as it was addressed to the bailiff, it must have been addressed to a person who in this country follows the description of a bailiff, that is, a peon.

For that reason, the peon who made the seizure derived his authority from the Court that issued the warrant, and not from the *Nazir* who endorsed it. That authority was not lessened by the circumstance that the officer who has general charge of the 'bailiff' or peon, namely, the *Nazir* directed him to do his duty within a particular time. He did not do it within the time: he still had authority from the Court to make the seizure, though as far as his duty to the *Nazir* was concerned, he ought to have made it at an earlier date.

For these reasons, I think that the Rule should be discharged.

A case reported in 22 Calcutta* was cited by the learned Vakil who argued in support of the Rule. But that case was entirely different because in that case the warrant was directed to the *Nazir* and not only was it directed to the *Nazir* but to a particular *Nazir* by name and the question which the learned Judges discussed in that case was how far the *Nazir* who by name was authorised to execute the warrant could delegate his authority to another officer. That case has nothing to do with the present in which the warrant was

* See *Dharam Chand Lal* v. *Queen-Empress*, 22 C. 596.—*Ed.*

directed to the bailiff and not to any particular person by name.

The Rule must be discharged.

COXE, J.—I agree that the Rule should be discharged.

It does not appear that any question of delegation arises in this case at all. The argument of the learned Vakil for the petitioner that this warrant was delegated by the *Nazir* to the peon was founded on the assumption that the word "bailiff" used in the form means and only means the *Nazir*. There is no reason, so far as I can see, why the term "bailiff" should be confined to the *Nazir*. There are several reasons why it should not.

On a reference to Order XXI, rule 25, it will be seen that the warrant is referred to the officer entrusted with the execution of the process and it is clear from the terms of that section that that officer is not the *Nazir* but is the peon. That officer has to endorse on it the day on, and the manner in, which it is executed. This is done by the peon. If the process is not executed, the Court has to examine the officer trusting his alleged inability to execute it. It is only the peon who can give evidence on this point. The *Nazir's* evidence would be purely hearsay. It seems to me that the officer to whom Order XXI, rule 25, refers can only be the peon.

On referring to the form itself, the process is addressed to the bailiff by the Court and on the back we find space allowed for the date on which the order is made over to the *Nazir*, the date on which it is returned by the serving officer and so on. If the *Nazir* and bailiff are the same person, it is difficult to understand why the same word should not be used throughout.

No doubt, the process does pass through the hands of the *Nazir* on its way for the Court to the executing officer who, in my opinion, is the bailiff. The Court has perhaps fifty peons attached to it and it is impossible for the Court to entrust the execution to individual peons and consequently it is the *Nazir's* duty not to delegate his authority but to distribute the processes which are received by his department among the various officers entrusted with their execution. That, in my opinion, does not amount in any way to delegation.

I think, therefore, that the officer who was entrusted with the execution of the process was the peon or the bailiff as he is described in it. He was the attaching peon and consequently his custody of the property was lawful and the accused were guilty of an offence in rescuing that property from him.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 41 OF 1913.

February 12, 1913.

Present:—Justice Sir Frederick Robertson, KT., and Mr. Justice Shah Din.

AHMAD—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, 411—Murder—Stolen property belonging to the murdered man—in possession of accused not sufficient for conviction of murder—Evidence.

Where the only evidence against an accused person is a bundle of cloth, which he produced and which is identified as having been stolen from a person proved to have been murdered, and there is no admissible evidence against him upon the record to connect him more directly with the murder, it is impossible to do more than convict him under section 411 of the Indian Penal Code.

Appeal from the order of the Additional Sessions Judge, Jhelum Division, at Rawalpindi, dated the 27th November 1912, convicting the appellant and sentencing him to death.

Mr. *Nand Lal*, for the Appellant.

The *Government Advocate*, for the Respondent.

JUDGMENT.—This case is before us on appeal, and also under section 374, Criminal Procedure Code, for confirmation of the sentence of death passed upon the two appellants. The facts are very fully given in the judgment of the lower Appellate Court.

It is proved that the two deceased persons, who were found murdered not very far from the village of Mangwal in the Chakwal Tahsil of the Jhelum District, were seen to start from the village of Dhab *Kalan* situated from five to six *kos* from Mangwal on the evening of 21st June 1912. Next morning the dead bodies of Gauhar Singh and Santokh Singh, who were dealers in cloth

and who had a bundle of goods carried with them on a mule, were found at a place where the road goes through a depression. It is clear from the conditions of the bodies and the medical evidence that they had been murdered with some sharp cutting instrument such as an axe. We think it is proved that Ahmad accused at any rate was aware of their presence and of their purpose of journeying to Mangwal.

To take the case of Ahmad first. The direct evidence against him is that he was seen with an axe across his shoulder following the deceased near Dhab *Kalan* at about 5 P. M. on the day before the bodies were discovered. We confess that we do not think this evidence of very great importance. The spot at which Ahmad and Amir are said to have been seen following the deceased is four to five *kos* from the place where the murder took place. One of the witnesses Ishwar Singh, P. W. No. 11, indeed says that Ahmad was actually with the two deceased at that time. This evidence has been believed by the learned Sessions Judge. Next day the accused Ahmad was taken to the house of a connection, Ahmad son of Ghulam Haider, P. W. No. 12, where he told this Ahmad II to produce the property which he had given to him. Ahmad II himself produced a bag which was identified as the property of the deceased which he had buried in a field and he also stated that two pairs of *chadars* which had been given to him (Ahmad II), P. W. No. 12, had been given by him to Fateh Khan, P. W. No. 19, from whom they had passed to Gheba, P. W. No. 20, from him to *Musammat* Shahbazan, P. W. No. 21, from her to *Musammat* Jawai, P. W. No. 22, and from her to *Musammat* Bakht Bano, P. W. No. 23, who produced them. That this property was produced in consequence of Ahmad convict, appellant's statement is clearly proved and whatever the part which Ahmad II had taken in the transaction may be it clearly proves that Ahamad convict appellant knew where certain part of the property taken from the deceased had been disposed of. It is also proved that the whole of Ahmad appellant's clothes and shoes were stained with blood of which, of course, he gives an explanation, *i.e.*, that his nose had bled an explanation quite insufficient to account for the blood stains distributed over his clothes and shoes. It is also proved by unimpeachable evidence that Ahmad produced an axe, which was also found to be blood-stained, hidden in a *kotha* adjoining his own house but belonging to one Nur Khan. This *kotha* was locked, but it is proved that Ahmad showed the witnesses how he had got into it by lifting a shutter and concealed the axe inside. As regards Ahmad we think the evidence conclusively proves that he was concerned in the murder. He was seen at Dhab Loharan on the day on which Gauhar Singh and Santokh Singh were selling their goods at that village, namely, on the 20th June, but he was at Dhab *Kalan* on the 21st when they were there and there is evidence that he started towards Mangwal, we think, in their company or shortly behind them. There is also evidence that he was in possession of an axe at that time similar to the axe which was subsequently produced from the *kotha* of Nur Khan, that on the morning of the 22nd he gave certain property which had been robbed from the deceased to Ahmad II; that his clothes and shoes were stained with blood and that he produced the blood stained axe hidden by him in the *kotha* of Nur Khan. We think his guilt is proved. His appeal is rejected and the sentence of death passed upon him is confirmed.

As regards Amir the case is quite different. All that is proved against Amir, and we consider that this is satisfactorily proved, is that he produced a bundle of cloth which is identified as having been stolen fom the deceased. We do not think upon this evidence that it is possible to do more than to convict him under section 411, Indian Penal Code, as there is nothing which is admissible as evidence against him upon the record to connect him more directly with the murder. We accordingly accept his appeal and alter his conviction to one under section 411, Indian Penal Code, under which section we sentence him to three years' rigorous imprisonment, including three months' solitary confinement. The sentence of death passed on Amir is not confirmed.

Conviction altered.

JHENGAR *v.* BAIJ NATH.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 281 OF 1913.
April 19, 1913.
Present:—Mr. Justice Rafique.
JHENGAR AND OTHERS—APPLICANTS
versus
BAIJ NATH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 145—*Order of Magistrate without compliance with the provisions of the section—Revision.*

Where a Magistrate closes a proceeding under section 145 of the Criminal Procedure Code without complying with all the provisions of the section and to the prejudice of one of the parties, a revision lies to the High Court.

Debi Prasad v. *Sheodat Rai*, 30 A. 41; (1907) A. W. 265; 4 A. L J. 705; 6 Cr. L. J. 352, referred to.

Application for revision against an order of the Joint Magistrate of Jaunpur.

Mr. *P. L. Banerji*, for the Applicant.

Mr. *G. P. Boys*, for the Opposite Party.

ORDER.—This is an application for revision challenging an order of the Joint Magistrate of Jaunpur, which purports to have been passed under section 145 of the Code of Criminal Procedure. It appears that as early as February 1912 a dispute arose between the Muhammadans of Karakat and Baijnath and others regarding the burial of Muhammadan corpses in certain ground, to which Baijnath and others laid a claim as owners under recent purchase. Several complaints under section 297, Indian Penal Code, were filed on behalf of the Muhammadans and they were disposed of by Pandit Janardan Joshi, Deputy Magistrate, with the order that the complainants should go and establish their right of burying their dead in the ground in dispute in the Civil Court. Some time in June 1912 an attempt was made by the Muhammadans of the village to bury a corpse on the land in question, but they were opposed by Baijnath and others. The dispute threatened to end in a breach of the peace and the Police asked for orders from the District Magistrate. The latter directed the Police to disperse the unlawful assembly and ordered one of his subordinate Magistrates to institute proceedings under section 145 of the Code of Criminal Procedure. The proceedings were accordingly started and Baijnath and his friends were described as party No. 1 and the Musalmans as party No. 2. Both parties filed written statements claiming the ownership and possession of the land in dispute party No. 2 stating that the said land was *wakf* and was used as burial ground. During the pendency of the proceedings the second party filed an application on 2nd of November 1912 stating that the real dispute between them and the first party related to the burial of dead bodies and not to the ownership and possession of the land in dispute. The second party, therefore, prayed the Magistrate to consider the proceedings as proceedings under section 147 of the Code of Criminal Procedure. The Magistrate rejected their application. The second party came up in revision to this Court and the order of the Magistrate was upheld. By the time the record of the case had been returned to Jaunpur a new Magistrate had come into office. Mr. Mehta, the Joint Magistrate, took up the case and without receiving any further evidence closed the proceeding and made an order that the second party should not interfere with the possession of the first party and that the latter should rail off certain mounds which were alleged to be graves. Both parties, were left to seek their remedies in the Civil Court. The second party has come up in revision to this Court. It is contended on their behalf that the learned Joint Magistrate was not justified in closing the proceedings under section 145 arbitrarily and issue an order under that section to the prejudice of the applicants. A preliminary objection is taken on behalf of the first party to the effect that no revision lies from the order of the Joint Magistrate. The learned Counsel for the first party relies on the case of *Debi Prasad* v. *Sheodat Rai* (1) in support of his contention. In that case the learned Chief Justice remarked as follows:- "It certainly would be well that all Magistrates' proceedings under section 145 should in all cases strictly comply with the various provisions of the section, and if I could find that the applicants here had been in the smallest way prejudiced by any omission to comply with the provisions of the section, I should feel bound to set aside the order complained of." In the present case the contention for the applicants is that a revision does lie from an order under section

(1) 30 A. 41; (1907) A. W. N. 265; 4 A. L. J. 705; 6 Cr. L. J. 352.

MOHAMMAD SHAH *v.* EMPEROR.

145 where the order is made without jurisdiction and to the prejudice of the applicants. It is said that the learned Joint Magistrate excluded the evidence of the applicants and passed an order which prevents them from burying their dead on the ground in dispute. I think that the present application is entertainable even on the authority of *Debi Prasad* v. *Sheodat Rai* (1) The learned Joint Magistrate seems to have disposed of the proceedings pending before him on certain facts, which came to his knowledge privately. The order that he made purports to have been made under section 145 and he could not make such an order without complying with all the provisions of the section. Under clause (4) of section 145 the learned Joint Magistrate was bound to receive and record all the evidence that the parties wanted to produce. He gave no opportunity to the applicants to produce their evidence. They were obviously prejudiced by the action of the learned Joint Magistrate. It is, however, suggested on behalf of the other side that considering the length of time during which the dispute has been pending the order of the Joint Magistrate should be allowed to stand and the parties can go to the Civil Court to have their rights determined. It is said that after all the interference by this Court on the revisional side is a matter of discretion and this is not a case in which the discretion should be exercised in favour of the applicants. I think that under the peculiar circumstances of this case and considering that feelings are running high between the parties and that the applicants have already been prevented from burying their dead for the last two years the order of the Magistrate should be maintained. The applicants can seek their remedy by a civil suit and would have got it by this time, had they carried out the direction given in the early part of the last year. The application is, therefore, rejected.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 626 OF 1912.

November 23, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Chevis.

MOHAMMAD SHAH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 376—Penal Code (Act XLV of 1860), ss. 201, 302—Accused charged with murder and concealment of murder—Sessions Court convicting of murder—No finding on the minor charge—Chief Court acquitting of murder—Competent to convict of concealment of murder.

The appellant was tried for murder and concealment of murder, but the Sessions Judge convicted him on the main charge of murder, expressing no opinion whether the minor charge under section 201, Indian Penal Code, had been established or not. The appellant was acquitted by the Chief Court on the murder charge:

Held, that the Chief Court was competent to convict the appellant on the minor charge, provided there was sufficient evidence on the record to support it.

Bucha v. *King-Emperor*, 1 P. R. 1904, Cr.; 30 P. L. R. 1904; 1 Cr. L. J. 113, referred to.

Appeal from the order of the Sessions Judge, Rawalpindi, dated the 28th August 1912, sentencing the appellant to death.

Mr. *Fazal Elahi*, for the Appellant.

Mr. *Bevan Petman*, Government Advocate, for the Respondent.

JUDGMENT.—The appellant, Muhammad Shah, a Syed, aged 35 has been convicted of the murder of a distant cousin named Karm Shah and sentenced to death. He was jointly tried in the Sessions Court with two other persons, one of them his first cousin, on charges of murder against all three, to which additional charges under section 201, Indian Penal Code, were added on the second day of the trial (page 111 of the record). The trial was conducted at great length and the learned Sessions Judge has written a very long judgment dealing in great detail with the facts and the rather confused record of evidence. In the end, agreeing with the assessors he acquitted the remaining two co-accused of any offence. Differing from the assessors who thought that the appellant was also innocent both of the murder and of concealment of murder, he has convicted the appellant on the main charge of murder expressing no opinion whether the minor charge under section 201, Indian Penal Code, had been established against the appellant or not. We

have found it extremely difficult to follow the reasons for which the learned Sessions Judge has differentiated between the cases of the appellant and the remaining two co-accused on the main charge of murder. Some sort of motive for murder by the appellant has perhaps been established if we are to believe the evidence showing that there was a bitter family dispute between the deceased and the appellant some three or four years before, leading to exclusion of the appellant from the brotherhood and to charges and countercharges in the Criminal Courts. The Sessions Judge has referred to this evidence at page 365 of the record and he considered that there was no doubt about its truth. At the same time all this trouble was of some years ago and we are left quite in the dark as to what the immediate cause of the present murder may have been. Much of the evidence in the case is contradictory and it is doubtful how far the stories told by the various members of the family can be trusted. These include witnesses Nos. 10 and 13, uncles of the deceased, and the witnesses Nos. 5, 20 and 21, who according to a pedigree table made out for us by Counsel are distant collaterals. Even if we are to take all the essential prosecution evidence at its face value it appears to us to indicate that the appellant took no active part in the murder even if he was present at the time when the fatal quarrel ensued. We do not find anything definite against the appellant to show that he joined in the murder beyond the fact that it was through him that the dead body and certain incriminating articles were recovered from their places of concealment. All that portion of the evidence was really directed to establishing an offence against the appellant under section 201, Indian Penal Code, and as regards the murder if the Sessions Judge was correct in accepting the opinion of the assessors in favour of the two co-accused his conviction of the appellant, against the opinion of the assessors and in spite of a considerable body of evidence to show that he took no actual part in the murder, appears to us illogical and indefensible. We think it unnecessary to discuss this part of the case any further, as the learned Government Advocate at the outset of the hearing represented that he was himself entirely unable to support the conviction for murder. There is no evidence of murder against the appellant. The witnesses, even if believed, do not implicate him, except that Fazl, a boy of 10, witness No. 3, says that the appellant was present, and this witness has been disbelieved in the Sessions Court, see page 341 of the record.

We agree with the Government Advocate and have no hesitation in acquitting the appellant on the murder charge.

There remains the question whether the appellant should be convicted under section 201, Indian Penal Code, in spite of the strange omission of the learned Sessions Judge to give any finding at all about him in respect of this minor charge.

The Government Advocate here has pressed for a conviction relying upon the ruling of *Bucha* v. *King-Emperor* (1) and upon two unpublished judgments of this Court in Criminal Appeals No. 575 of 1910 decided on the 31st October 1910 and No. 254 of 1912 decided on the 24th May 1912. We may say at once that we are quite satisfied of our capacity to convict upon the minor charge as was done in the cases referred to, assuming that there is sufficient evidence on the record to support the charge under section 201, Indian Penal Code. We have heard Counsel for the appellant on this point at some length, but his arguments based on the evidence appear to us to carry no weight. We find no sufficient reason for holding that the very precise evidence to show that the appellant himself pointed out not only where the body was discovered buried in the field which he himself cultivates but also where various articles of clothing belonging to the deceased were concealed, should be disregarded. The evidence on this point, which was accepted by the Sessions Judge, has been sufficiently summarised on pages 354 to 357 of the record. The discovery of the body was effected the very day after the murder and of the remaining articles on the following morning. It appears to us quite impossible to say that the appellant did not take an active share in disposing of the body and other articles, whatever his motive for doing so may have been. It may be that he was in some way concerned with the death of the deceased or it may be that he merely desired to save the real murderers whoever they were, including

(1) 1 P. R. 1904 Cr.; 30 P. L. R. 1904; 1 Cr. L. J. 113.

his first cousin, Fazl Hussain Shah, against whom strong suspicion had been set up.

The Sessions Judge has expressed his opinion on this part of the case so clearly that we think it must have been through inadvertence only that he failed to record a finding. We ourselves have no doubt that the appellant took the leading part in making away with the evidence of the commission of the crime, and the fact of his doing so leads to the conclusion that the deceased really was murdered and was not merely killed in the course of an ordinary quarrel. Under the very peculiar circumstances of the case, we do not think it right to say more on this point, except that, as we read the evidence it all tends to show that the case really was one of murder, though it fails to establish the charge against any of the men accused.

If we were to follow the precedents referred to above in cases of the kind, we should be justified in awarding the maximum penalty of seven years' imprisonment under section 201. In the present case, however, we think that there is no strong reason for suspecting the appellant of having taken part in the actual murder and he to some extent atoned for his endeavour to hush up the crime by giving information leading to the recovery of the body at a very early stage in the investigation.

We, therefore, think that something less than the maximum penalty may be fairly awarded. It is, no doubt, the case that the assessors expressed an opinion that the offence under section 201, Indian Penal Code, also was not proved against the appellant but we think that this opinion was clearly against the evidence and that it was given under some misapprehension owing to the way in which their opinion was taken on both charges combined after a protracted trial and the hearing of much very confusing evidence. It is to be regretted that the Sessions Judge did not put each point more clearly before the assessors and take their opinion thereon separately with some attempt to elucidate the grounds upon which that opinion was given.

The result is that we accept the appeal to the extent of acquitting the appellant on the charge of murder and of setting aside the sentence of death passed on him. We convict him of a less serious offence under section 201, Indian Penal Code, and sentence him to rigorous imprisonment for five years.

Appeal accepted;
Sentence altered.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 187 OF 1912.
January 29, 1913.

Present:—Mr. Kanhaiya Lal, A. J. C.

LACHHMI NARAIN—ACCUSED
versus
EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 193—Contradictory statements in the same deposition, whether an offence—Right of witness to correct before finishing his statement—Perjury.

It is desirable to give witnesses a *locus penitentiæ* and an opportunity to correct themselves, and if they do correct themselves immediately afterwards or on a second thought in the same deposition, a prosecution for perjury would hardly be desirable. No statement made by a witness in a deposition can, moreover, be regarded as a completed statement until the deposition is finished and corrected, if necessary, for till then, every statement is liable to be retracted, corrected, varied or qualified. The whole deposition must be read as one and if a later statement in it is contradictory to or at variance with a previous statement in the same deposition the statement first made will be deemed to be modified by the subsequent statement.

In the matter of Palani Palagan, 26 M. 55 and *Dasondha Singh* v. *Emperor*, 11 Ind. Cas. 589; 34 P. W. R. 1911 Cr.; 230 P. L. R. 1911, 12 Cr. L. J. 405, referred to.

Intention to give false evidence is a necessary element to constitute an offence under section 193, Indian Penal Code. That intention can only be gathered from the surrounding circumstances and the subsequent correction or retraction by a witness of his statement in the same deposition might negative the existence of such an intention.

Application against an order of the Munsif of South Unao, dated 7th November 1912.

Messrs. *H. C. Dutt* and *I. Masaldan*, for the Applicant.

The *Government Pleader*, for the Crown.

JUDGMENT.—Rajaram sued for the recovery of an ornament. He cited Lachhmi Narain as a witness in support of his case.

Lachhmi Narain stated in cross-examination that he did not know whether Rajaram had his *susral* in Chitauli or not, but subsequently corrected himself by saying that his brother Gokul Prasad and Rajaram were married in the same family at Chitauli.

It is desirable to give witnesses a *locus*

penitentiæ and an opportunity to correct themselves, and if they do so correct themselves immediately afterwards, or on second thought in the same deposition, a prosecution for perjury would hardly be desirable.

It is evidently inadvisable to prosecute a man for coming to his right mind by at once admitting what was the real truth, *Dasondha Singh* v. *Emperor*(1). As observed by Sir Bhashyam Iyengar in *In the matter of Palani Palagan* (2) no statement by a witness in a deposition can, moreover, be regarded as a completed statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a previous statement in the same deposition the statement first made will be deemed to be modified by the subsequent statement which can be regarded as a retraction or correction of it. Intention to give false evidence is a necessary element to constitute an offence under section 193 of the Indian Penal Code. That intention can only be gathered from the surrounding circumstances, and the subsequent correction or retraction by a witness of his statement in the same deposition might negative the existence of such an intention. Lachmi Narayan is a boy twenty years old and no object can be gained by his prosecution under the above circumstances.

The application is, therefore, allowed and the order directing the prosecution of the applicant is set aside.

Application allowed.

(1) 11 Ind. Cas. 589; 34 P. W. R. 1911 Cr.; 230 P. L. R. 1911; 12 Cr. L. J. 405.

(2) 26 M. 55.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1014 OF 1912.

April 23, 1913.

Present:—Mr. Justice Kensington and Mr. Justice Shah Din.

BASAN AND ANOTHER—PETITIONERS

versus

EMPEROR THROUGH MANNA—COMPLAINANT—RESPONDENT.

Canals Act (VIII of 1873), *s.* 70 (4)—*Authorised distribution means distribution expressly made by canal authorities—Private arrangement of water, disturbance of—Offence—Civil remedy.*

The 'authorized distribution' spoken of in section 70 (4), Canals Act, 1873, refers only to such distribution as has been expressly made by the Canal authorities, and any further distribution between a landlord and his tenant is a matter of private contract which merely entitles the tenant to bring a Civil claim.

Petition for revision, under section 439 of Act V of 1898, of the order of the District Magistrate, Ferozepore, dated the 25th day of April 1912, confirming that of the Deputy Collector and Magistrate 2nd class, Ferozepore, dated 27th March 1912, convicting the petitioner.

Lala *Balwant Rai*, for the Petitioner.

Mr. *Broadway*, Assistant Legal Remembrancer, for the Respondent.

ORDER OF REFERNCE.

CHEVIS J.—(25*th October* 1912).—Basan and Premu have been convicted of an offence under section 70, Canals Act of 1873, and sentenced each to pay a fine of Rs. 15. The facts found are that Basan left a portion of his land to Mana as tenant, and that he and his son Premu then prevented Mana from getting his share of water from the water-course.

The question is whether such an act constitutes interference with the authorized distribution of water from the water-course, see section 70 (4) of the Act.

The learned Government Advocate refers to section 32 (3) (*e*) and argues that though the Canal authorities had not fixed any terms for irrigation as between Basan and his tenant, the contract between Government and Basan as to the supply of canal water to Basan's land was transferable and should be presumed to have been transferred when Basan made over a part of his land to the tenant for cultivation. On the other hand, it is argued for the petitioners, Basan and Premu, that the "authorized distribution" spoken of in section 70 (4) refers only to such distribution as has been expressly made by the Canal authorities, and that any further distribution between Basan and his tenant was a matter of private contract, breach of which merely entitles the tenant to bring a civil claim.

No rulings are forthcoming on either side and as the matter is not free from difficulty and not unimportant I refer it to a Division Bench.

JUDGMENT OF THE DIVISION BENCH.

The general facts of this case have

been sufficiently stated in the order of reference to a Division Bench. They might well have been given more precisely by the Magistrate, and the District Magistrate's order on appeal is exceedingly curt. We understand that the complainant, Mana, is a non-proprietor who has been cultivating the land of the petitioners for some years as a tenant paying *batai*. He quarrelled with the petitioners during 1911 and the matter was eventually settled by an arrangement that he should continue to cultivate a reduced area of some 14 *bigahs* for another year. There is no lease or certainty about the conditions as to canal water between him and the petitioners, but it seems certain that he was not authorised by the canal department to receive water as a matter of right.

It may be taken for the purposes of this case that the petitioners prevented Mana from sharing in their water supply. We cannot hold that any offence was constituted thereby under section 70 (4), Act VIII of 1873, even when read with section 32 (*e*). The water question was a matter of private contract between complainant and petitioners, and the former's remedy, if any, for breach of contract was by civil suit. There is no proof of disturbance by petitioners of the distribution authorised between them and the canal department.

Looking at the matter in this light we must accept the revision. The convictions of the two petitioners (father and son) are set aside. They are acquitted of any offence under the Canal Act and their fines of Rs. 15 each will be refunded, if paid.

Revision accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 82 OF 1912.

August 23, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

EMPEROR—PROSECUTOR

versus

VERSIMAL BAHAGIOMAL AND ANOTHER —APPLICANTS.

Bombay District Police Act (*IV of* 1890), *s.* 41—*Ingredients—Brothel—Interpretation.*

There are two ingredients in section 41 of the Bombay District Police Act:

(1) *The character of the house, i.e.*, the use of the house as a common brothel or lodging house or place of resort for prostitutes or disorderly persons of any description.

(2) *The nuisance, i.e.*, the annoyance of the respectable inhabitants of the vicinity.

Nuisance or no nuisance is not an element in the definition of brothel.

A brothel is a place resorted to by persons of both sexes for the purpose of prostitution, who are strangers to the occupancy.

Singleton v. *Ellison*, (1895)1 Q. B. D. 607; 64 L. J. M. C. 123; 15 R. 201; 72 L. T. 236; 43 W. R. 426; 18 Cox. C. C. 79; 59 J. P. 119, referred to.

If a woman plies the trade of a prostitute in her own house, that does not make the house a brothel.

Mr. *Wadhumal Oodharam*, for the Applicants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the Sub-Divisional Magistrate, Tatta, under section 41 of the Bombay District Police Act requiring the applicants Versimal and his wife Dhanna to discontinue the use of a house in Tatta as a brothel. There are two ingredients in the section:—

(1) *The character of the house, i.e.*, the use of the house as "a common brothel or lodging house or place of resort for prostitutes or disorderly persons of any description,"

(2) *The nuisance, i.e.*, "the annoyance of the respectable inhabitants of the vicinity."

Nuisance or no nuisance is not an element in the definition of brothel (*Regina* v. *Holland* (1), quoted in Stroud's Judicial Dictionary, Vol. I, p. 222). We accept the Magistrate's finding of fact that the house is a nuisance, but that is not sufficient unless the character of the house is also proved to fall within the terms of the section. The Magistrate finds that Versimal is the owner of the house that his wife Dhanna plies the trade of a prostitute in that house. This would not make the house a brothel. A brothel is "a place resorted to by persons of both sexes for the purpose of prostitution." *Singleton* v. *Ellison* (1). In that case Willis, J., said: "It is certainly not applicable to the state of things described by the Magistrates in this case where one woman receives a number of men." The *ratio decidendi* being that the prostitute

(1) (1895) L. R. 1 Q. B. 607; 64 L. J. M. C. 123; 15 R. 201; 72 L. T. 236; 43 W. R. 426; 18 Cox. C. C. 79; 59 J. P. 119.

or prostitutes must be strangers to the occupancy. The Magistrate's finding that the house which belongs to Dhanna's husband is a brothel, cannot, therefore, be supported. It is sufficient, however, for the purposes of the section if the house is a place of resort for disorderly persons, *i.e.*, a place to which bad characters resort for an improper purpose. The Magistrate has not dealt with this issue. We, therefore, reverse the order passed by the Sub-Divisional Magistrate and direct the Magistrate to hold fresh proceedings under section 41 after due notice to the applicants in order to decide whether the house is a place of resort for disorderly persons within the meaning of section 41 and to make order accordingly.

Order reversed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 734 OF 1911.

March 4, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

RAHIM DAD AND ANOTHER—CONVICTS APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 300, 304—*Culpable homicide not amounting to murder—Circumstantial evidence—Wife receiving injury on her head—Presumption that it was inflicted by husband.*

Where the sole inmates of a house were a man and his two wives and it was found that the elder wife was habitually ill-treated and half-starved by her husband, she was admitted to hospital suffering from a serious injury to the head from the effects of which she died three days after but she was too ill to make any statement and there was no indication that the injury was accidental or self-inflicted, the explanation given by the husband as to the injury being unsatisfactory and highly improbable:

Held, that the presumption was that the injury was caused by her husband:

Held, also, that to inflict such an injury on the head of a woman already reduced by ill-treatment to such a poor condition was an act which warrants the finding that the culprit must have known that it was likely that death would be the result and was sufficient to bring him under section 304 part 2 of the Indian Penal Code.

In this case a sentence of ten years' rigorous imprisonment was not considered severe.

The co-wife was given the benefit of doubt and was acquitted.

Appeal from the order of the Sessions Judge, Hissar Division, dated the 31st October 1911, convicting the appellant.

JUDGMENT.—Both the appellants, Rahim Dad and *Musammat* Fatima have been convicted of causing the death of *Musammat* Hubri, and sentenced under section 304 part 2 to ten years' rigorous imprisonment.

The deceased was the elder wife of Rahim Dad, and *Musammat* Fatima was the younger wife.

There is ample evidence on the record to show that both the appellants habitually ill-treated the deceased and half starved her This evidence is given by Rahim Dad's fellow constables and the neighbour *Musammat* Sheran. It is corroborated by the medical evidence which shows that, in addition to the injury to the head which caused her death, she had scabs and marks of burns and was in an emaciated condition. There is also evidence that in consequence of the ill-treatment a letter was sent to her brother who came to fetch her away but was not allowed by Rahim Dad to see her; this was a short time before her death. On the 26th June 1911, *Musammat* Hubri was admitted into hospital, suffering from an injury to the head from the effects of which she died on the 29th June. While in hospital she was too ill to make any statement. The medical evidence is that this injury might have been caused by a fall from a height of 6 or 7 feet, or by striking the head against some hard substance or by a blow from a blunt heavy weapon, but that it is not likely that an ordinay fall out of bed on to a hard floor would cause such an injury.

There is no direct evidence to show how the injury was caused, and the appellants have not attempted to explain how it was caused beyond the statement that the deceased was ill with fever and began to have fits and so *might* have hurt herself. There is absolutely no indication that the deceased suffered from fits. The appellants are the only persons who could, if they would, explain what happened. The appellants and deceased were living on an upper story, but there is no suggestion that the woman fell downstairs. Had the appellants taken the woman voluntarily to hospital, stating that they had found her fallen at the foot of the stairs their story might have been believed. But the real facts seem to be that it was not until

reports were made to the Police that the woman was lying in the house in a state of serious illness that she was taken off to hospital. Apparently she would have been left to die where she was had nobody interfered; the appellants did not care what became of her, and would have been only too glad to get rid of her though Rahim Dad would not allow her to escape from his control by going off to her brother's protection. The circumstances are such that it is impossible to come to any conclusion other than that the systematic ill-treatment of the deceased at last culminated in an act of violence which caused her death. The evidence for the defence is simply an attempt to show that Rahim Dad and the deceased lived together on good terms which is clearly not the case. Rahim Dad, the man, if he had not approved of the ill-treatment, could easily have put a stop to it. The same cannot be said with the same safety of the female appellant, and it is not impossible that she had no hand in the act of violence which caused the death of the deceased. We think, therefore, she must be given the benefit of the doubt, although it may well be that the one is just as guilty as the other. But as to the guilt of Rahim Dad, whether as principal or or as abettor, we have no doubt whatever. The mere fact that he made enquiries after her admission into hospital proves nothing; no doubt, he was then alarmed as to what might happen to him, and his solicitude was probably not unfeigned. To inflict such an injury on the head of a woman already reduced by ill-treatment to such a poor condition was an act which warrants the finding that the culprit must have known that it was likely that death would be the result, and as to the sentence we do not consider it too severe.

We accept the appeal in the case of *Musammat* Fatima and reversing the conviction and sentence passed in her case we acquit her and order her to be released. We uphold both conviction and sentence and dismiss the appeal so far as Rahim Dad is concerned.

Appeal of Rahim Dad rejected.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 171 OF 1912.

October 17, 1912.

Present:—Mr. Eales, J. C.

NGA PO THAW—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 199—*Rape—Accused convicted of rape—Acquitted—Cannot be convicted of adultery without complaint by the husband.*

Where a conviction for rape is set aside on the ground that it was only a case of adultery, the accused cannot be convicted of adultery, if no complaint has been made by the husband to give jurisdiction to the Court under section 199 of the Code of Criminal Procedure.

Empress v. *Kallu*, 5 A. 233; A. W. N. (1883) 1, referred to.

Appeal from the order of the District Magistrate, Yamethin.

Mr. *W. Calogreedy*, for the Appellant.

JUDGMENT.—Appellant, Po Thaw, Headman of Lezabin village, has been tried and convicted by the District Magistrate, Yamethin, under section 376, Indian Penal Code, for having ravished one Mi Pyu, and was sentenced to undergo five years' rigorous imprisonment.

I have read the grounds of appeal. I have heard the learned Advocate for the appellant and read the whole of the proceedings.

The learned District Magistrate has written a very carefully considered and on the whole well balanced judgment. The case, as he points out, is an exceedingly difficult one, and he has, I think, tried to consider every point in favour of the appellant as well as those against him; but it appears to me that he has omitted to consider a few very important and significant facts which apparently escaped notice when the case was argued before him. He has quoted in his judgment as follows:—"The important point for consideration, and which I have not lost sight of all through, is the possibility or probability that the complainant and her witnesses, knowing in their own hearts of the adultery, determined to make up the story of rape and tell it to the husband on his return and so save complainant's face and leave him to report the rape." Now it has occurred to me that this leaving of the husband to report the rape perhaps is a crucial point of the whole case. It was not raised by the learned Advocate for the appellant, but it occurred to me on reading the

judgment of the learned District Magistrate and the evidence of Ma Sabe. It must be remembered that rape is an offence not so much against the husband as against the person of the woman ravished. Knowing the independent character of Burmese women, there is no necessity whatsoever, if the case is a true one, to wait till the husband's return. If the case were a true one, she would have gone off and complained at once, and this alone to my mind in the peculiar circumstances of the case throws great suspicion on the case for the prosecution as regards the genuineness of the woman's complaint.

Secondly, we have the fact that the husband asked his mother, Ma Sabe, to watch the house while he was away. The reason she gives is, that she was to look out for robbers and thieves * * * *, but this does not appear to me to be probably the real reason. If there were any real valuables left behind, the husband after the Burmese fashion would secrete them in a hole in the ground, and on the face of it, it seems ridiculous to ask an old woman of 51 to keep watch in the house for the sake of preserving the valuables in it. If he really wanted any one to look after his valuables and to keep off thieves and robbers, he would ask some man of his acquaintance and not his mother.

Moreover, Ma Sabe's action to my mind shows that she suspected her daughter-in-law, and clearly proves that it was not a thief that she was looking for. Had it been a thief, she obviously would have given the alarm at once and called out * *. I do not think that the full significance of Ma Sabe's conduct has been fully understood.

Lastly, we have the fact that the Police inquiry showed that Ma Pyu did not back up her husband's statements. The learned District Magistrate has carefully considered this. He points out very clearly that Ma Pyu's conduct is illogical, and he thinks it is inconceivable for a woman to complain of rape to her husband and then go back and tell a different story to the Police. It seems to me that the learned Magistrate has perhaps been misled in this matter, because, what would appear illogical and inconceivable to him may not appear so to a Burmese woman. It is a common place that women are illogical. This may or may not be true, but I do not think that it is really at all unlikely in the circumstances of this case that the woman did go back on her statement which she made to the Police, especially as it is clear that she never went to the Police herself till her husband came back. I think the learned Magistrate has indicated the explanation of the whole case; Ma Pyu's hands were forced by her being caught in the act of adultery. Her unaccountable neglect to make any report to the Police shows she was reluctant to complain till her husband came. She was bound in the circumstances to tell her husband that she was ravished: otherwise he probably would have beaten her and might have killed her. That she complained to her husband that she had been raped is, therefore, only natural, but it is a different matter to go to the Police-station and have her statement taken down in writing, and to know that she will have to go into Court and repeat her statements on oath, and it is, therefore, quite conceivable that a woman might very easily have hesitated to have told the Police what she told her husband, especially if her story were untrue.

The learned Magistrate has stated that he thinks it is unlikely that the woman, six months gone in pregnancy, would allow another man to have connection with her especially when that man is not her husband, but it is not a physical impossibility by any means, and I do not think that this matter would weigh very much in the mind of a woman who is willing otherwise to commit adultery. She says that she never woke up till she found the man was actually upon her, and yet she did not think that the man was her husband but merely a bad man trying to have connection with her. This itself is not very credible. She never screamed out at once which a woman would naturally do, and she does not say that she was actually threatened till after she questioned the man. The first thing a woman would do is to scream out and not to ask questions.

I think the learned Magistrate has, no doubt, been influenced by the view which he took of contradictions in the Police report, a view which, I think, is an incorrect one. The case is one by no means free from doubt.

On the whole, I am inclined to believe that the charge of rape is untrue. I do not, there-

fore, think that the conviction is sound, and, I think, it must be set aside.

With regard to the question whether the accused can be tried and convicted on this evidence of having committed adultery, it must be recollected that a charge of adultery can only be brought under section 199, Criminal Procedure Code, on the complaint of the husband. The definition of complaint is found in section 4 (*h*), Criminal Procedure Code. It is an allegation made orally or in writing to a Magistrate, with a view to his taking action. No such complaint of adultery has been made to a Magistrate and, strictly speaking, therefore, under section 199, the Court cannot take cognizance of the offence of adultery, nor is this a mere quibble of law because Straight, J., pointed out in the case of *Empress* v. *Kallu* (1) "that it does not follow that because a husband may wish to punish a person who has committed rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out that she has been a willing and consenting party to the act."

There are other rulings besides the one I have quoted, and I think that in the circumstances of the case, even without these rulings, I should not be inclined to forestall the act of the husband in this matter.

The conviction and sentence are set aside, and it is directed that the appellant, Po Thaw, be acquitted of the charge brought against him, and so far as this case is concerned, be released.

Conviction and Sentence set aside.

(1) 5 A. 233; A. W. N. (1883) 1.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 111 OF 1912.

November 29, 1912.

Present:—Mr. Justice Beadon.

JIT SINGH—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 526—*Accused under* bona fide *impression of not having fair trial—Ground of transfer.*

Where an accused person is under the *bona fide* impression that he may not have an impartial trial before a Magistrate it is desirable that the case should be transferred from his Court to another Court.

Petition, under section 526, Criminal Procedure Code, for transfer of the two cases.

Mr. *Nand Lal*, for the Petitioner.

The *Government Advocate*, for the Respondent.

JUDGMENT.—Petitioner is a Sub-Assistant Surgeon in the Montgomery District and a criminal case under sections 201 and 414, Indian Penal Code, is now pending against him in the Court of the District Magistrate of that District. He applies for transfer of the case to some other District on the alleged ground of personal animosity towards him on the part of the District Magistrate.

It appears that the District Magistrate, in his official position as Deputy Commissioner, has had occasion to find fault with the petitioner's conduct as an official and has expressed the opinion that petitioner's presence in the District is undesirable. This, however, is no reason for thinking that the District Magistrate in the judicial proceeding before him would act unfairly towards the petitioner. In fact the petitioner's official position and the existence of friction between Sikhs and Hindus were the District Magistrate's apparent reasons for keeping the case in his own Court. The insinuations that the District Magistrate has instigated the present prosecution of the petitioner and that, if the case were tried by another Court in the District, the District Magistrate would use his influence to obtain a conviction, are, in my opinion, groundless and without justification.

There does not appear to me to be any good ground for the transfer of the case to another District, but at the same time the petitioner is, no doubt, under the *bona fide* impression that he may not have an impartial trial before the District Magistrate, and on this ground I think that the transfer of the case to another Court is desirable.

I accordingly order that the case be transferred to the Court of Khan Saadullah Khan, Magistrate, 1st class, in the Montgomery District.

Petition allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 550 OF 1912.

October 22, 1912.

Present:—Mr. Eales, J. C.

NGA PO SHEIN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 353, 537—Recording defence evidence in the absence of absconding accused—Irregularity, whether curable.

Where an accused person, who was being tried, under section 323 of the Indian Penal Code together with three others, absconded after the evidence for the prosecution had been recorded, but before the witness for the defence named by him had been examined:

Held, that recording the defence evidence in the absence of the accused was an irregularity which could not be cured under section 537 of the Criminal Procedure Code, and, therefore, the conviction of the accused must be set aside.

The wording of section 353 of the Criminal Procedure Code, laying down that all evidence shall be taken in the presence of the accused, includes the evidence for the defence as well as for the prosecution.

Petition for revision of the order of the District Magistrate, Shwebo, confirming the conviction and sentence passed by the second class Magistrate, Wetlet.

Mr. *J. N. Basu* for the Applicants.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—The three applicants, Po Shein, Po Han and Po San applied for revision to this Court under section 439, Criminal Procedure Code, against the appellate order of the District Magistrate, Shwebo, confirming the conviction and sentence passed by the second class Magistrate, Wetlet, under section 323, as against Po Shein and under sections 323/109 as against Po Han and Po San.

The grounds for the application are first that the Court below should have applied the provisions of section 562, Criminal Procedure Code, and that in any case the sentences passed are unduly severe and that a smaller fine would have met the requirements of justice.

I heard the learned Advocate on behalf of applicants and sent for and perused the proceedings. I found that there was another accused, Maung Po Zon, and it would appear that he was not present during the whole of the trial. Nevertheless he has been convicted with the three others who now apply for revision. As there appears to be grave doubt with regard to the validity of the Magistrate's proceedings I have admitted the application. I let the applicants out on bail and directed that the Government Prosecutor should appear to argue the case on behalf of the Crown. On the date fixed Mr. Basu appeared for the applicants and Mr. Lutter for the Crown.

The facts of the case are as follows:—

The complainant, Maung Po Ni, prosecuted the four accused before the 2nd class Magistrate, Wetlet, on May 3rd. The case fixed for hearing was taken up and part heard and adjourned to June 7th on which day the accused were charged and the case fixed for hearing on July 3rd. On that day the first accused Po Zon, although he had named one witness for the defence, never appeared. The Magistrate nevertheless proceeded to hear his witness and other witnesses for the defence. The first accused's witness knew nothing about the case. The Magistrate found all four accused guilty—1st and 2nd accused, Po Zon and Po Shein under section 323 and the two others under sections 323/109 and he sentenced Po Shein to four months' rigorous imprisonment and Po Han and Po San to three months' rigorous imprisonment each. He held that the 1st accused admitted having kicked the complainant, and he held that 2nd accused had also committed a brutal assault, while he considered that 3rd and 4th accused as they held complainant while the others kicked and struck him were equally guilty. He found that the assault was made simply because the complainant refused to gamble with them, and he sentenced them, Po Shein to four months' and Po Han and Po San to three months' rigorous imprisonment apiece.

The 2nd, 3rd and 4th accused appealed to the District Magistrate who dismissed the appeal and refused to interfere with the sentence. Against this order 2nd, 3rd and 4th accused have applied for revision to this Court. The first accused having absconded during the trial and not having been arrested on the warrant issued for arrest has not, of course, made any appearance either in appeal or revision. It appears, however, necessary to take notice of the action of the Court in the case of the 1st accused, and I will deal with this case after disposing of the present application.

NGA PO SHEIN *v.* EMPEROR.

The learned Advocate for the accused does not attempt to aver that the irregularity as regards the 1st accused, Po Zon, in any way effects the legality of the proceedings as regards the three other applicants. He urges that the three men should have been dealt with under section 562, Criminal Procedure Code, and treated as first offenders, and if their offence is considered too serious for this the punishment awarded is in any case far too severe. I have carefully considered all that the learned Advocate has to say on their behalf. I find that Po Shein is 20, Po San 43 and Po Han 31 years of age. Po Shein took a prominent part in the assault on complainant and struck the blow which cut the complainant's cheek inside his mouth. The other two accused held the unfortunate man while the others beat and kicked him and struck him with their knees. The assault altogether was cowardly and brutal, and the motive for the assault, namely, that complainant would not gamble with them, shows that the offence had no justification on the score of any sudden heat of passion or provocation. Crimes of violence are very common in Burma, and I am not prepared to say that the offence, if committed, has been too severely punished. I see no good reason for interference, therefore, either with the convictions or sentences, and I, therefore, dismiss the application so far as the three men Po Han, Po Shein and Po San are concerned.

The learned Advocate for the defence very kindly consented to argue the case of the remaining accused, and he drew my attention to the case of *Queen-Empress* v. *Gotiram* (1). But this case is not on all fours with the present one, as in that case no witnesses were examined, and the High Court directed that the Magistrate was not to pronounce judgment but to give accused opportunity of hearing the witnesses for the prosecution and examining them. It will be seen that in the present case accused was present when all the witnesses for the prosecution were examined and only disappeared when his own witness was called.

Mr. Lutter, who appeared for the Crown, at first was of opinion that section 205 might apply, and if not section 366, sub-section 2. He urged that if these two sections did not apply that as the case was a very simple one and it was the action of the accused himself which was the cause of his not being present when the case was called, and as he has not appeared or objected, the irregularity or illegality has led to no failure of justice and might be held to be curable under section 537, Criminal Procedure Code. I have carefully considered the matter and am of opinion that neither of the two sections 205 or 366 (2) can be held to apply to the case. It appears to me that section 353 is the section which applies, and the wording of this section is clear and peremptory. The trial in question was one held in Chapter XXII of the Criminal Procedure Code, and it is there laid down that all evidence shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his Pleader. It is clear that his presence was not dispensed with by the Court, and as it is clearly laid down that all evidence shall be taken, this can only mean that the evidence for the defence as well as for the prosecution is included in those words.

I do not think, therefore, that this is an irregularity or illegality which can be cured under section 537 while it is clear that in the present case no miscarriage of justice has taken place, yet to allow such a proceeding to stand merely because there has been no failure of justice occasioned thereby might, I think, lead to calamitous results in other cases. There are certain irregularities which may be curable and some which are incurable, and I think that this irregularity is one which cannot be cured under section 537, even though in the present case it has led to no miscarriage of justice.

I direct that the conviction so far as accused Po Zon is concerned be set aside, and that in the case of Po Zon's arrest the case will proceed against him as if it had been stayed when it should have been stayed on his failure to appear before the Court.

If the other accused, the present applicants, have not served the full term of their sentences, they will be re-arrested and committed to Jail by the warrant of the Township Magistrate, Wetlet, to serve the unexpired portion of their sentences.

(1) Ratanlal's Unreported Cases of High Court Bombay p. 325.

SEVATHAMUTHU ASARI *v.* REVD. J. N. K. MASQUITE.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1035 AND 1036 OF 1910.

August 15, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

SEVATHAMUTHU ASARI *alias* SAVARIMUTHU ASARI—DEFENDANT—APPELLANT

versus

REVEREND J. N. K. MASQUITE—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ejectment—Forfeiture clause—Disobedience of order of lessor—Effect of such clause considered.

The plaintiff, a Vicar of the Roman Catholic Church in Trichinopoly, sued to eject the defendant from a house site belonging to the Church and held by the defendant and his predecessors under the Church. Exhibit B, the document executed by the predecessors of the defendant, contained the terms on which the house site was held. After reciting a number of covenants the document contained a clause (*h*), that if without acting as aforesaid, they act contrary to the other orders also of the Swamimars, they shall pay off the Manai-tax of the said temple found due by them, remove the said terraced house without asking the price thereof, leave the said kovil land and walk out.

The plaintiff's ground for ejectment was that the defendant disobeyed an order of the plaintiff four years back asking the defendant not to proceed with the construction of a new building before first executing a fresh document in favour of plaintiff containing some more stipulations in addition to those in Exhibit B:

Held, that the Vicar was entitled to bring the suit since there was no evidence for the defendant that the property was vested in any one other than the Vicar and since he and his predecessors-in-office have for over 80 years been in possession of the lands of the Church.

Wardens of Nossa Senora v. *Bishop Hartman*, Perry's Oriental Cases 333, *Jivanji Jamshedji* v. *Burjorji Naserwanji*, 3 Ind. Cas. 770; 33 B. 499; 11 Bom. L. R. 726, *Navroji Manekji Wadia* v. *Dastur Kharsedji Manherji*, 28 B. 20; 5 Bom. L. R. 745, referred to.

Held, also, (*Sundara Aiyar, J., dissenting*)—that the tenancy is a tenancy-at-will or at sufferance and that the plaintiff is entitled to eject.

Per *Sundara Aiyar, J.*—The rent provided being a yearly one, the presumption is that the tenancy is at least one from year to year and there is no allegation that it was terminated by a proper notice. In the absence of any specific allegation in the plaint the tenancy cannot be held to be one at will or at sufferance.

Dixon v. *Bradford and District Railway Servants Coal Supply Company Ltd.*, (1904) 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159, referred to.

Clause (*h*) of Exhibit B cannot work a forfeiture since the clause is only a condition for defeating the lease and it cannot be enforced because it is vague and uncertain.

Quære.—Whether the clause is not a mere threat such as in equity in the absence of specific mention of the nature of the disobedience which was to bring down the penalty of forfeiture ought not to be enforced?

Chidambara Pillai v. *Manikka Chetti*, 1 M. H. C. R. 63 at p. 64; *Vizianagaram Maharajah* v. *Suryanarayana*, 9 M. 307 at p. 311; 13 I. A. 32; *Navalram* v. *Javarilal*, 7 Bom. L. R. 401; *Promada Nath Roy* v. *Sri Gobind Chowdhry*, 32 C. 648; 9 C. W. N. 463, *Mohim Chandra Sirkar* v. *Anil Bhandu Adhikary*, 1 Ind. Cas. 66; 9 C. L. J. 362; 5 M. L. T. 247; 13 C. W. N. 513 at p. 517, referred to.

Second appeals preferred against the decrees passed by the District Court of Trichinopoly, in Appeals Suits Nos. 254 and 265 of 1909, presented against those of the District Munsif of Trichinopoly, in Original Suit No. 281 of 1908.

Mr. *J. L. Rozario*, for the Appellant.

Mr. *W. Burton*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.— The respondent who is a Vicar and Manager of the Church of our Lady of Dolours at a place near Trichinopoly and as such has been for a long time in possession of the land in dispute which belongs to the Church, has obtained a decree directing the appellant to deliver to him possession of the land and to remove certain superstructures erected by the appellant on the land.

It is first of all argued before us that the plaintiff has not made out that the title to the property is vested in him; but I think that, having regard to the fact that he and his predecessors in office have for over 80 years been in possession of the land letting out this and other lands to tenants, and it is not suggested by the defendant that there are other persons in whom the property of the church is vested as trustees, I think, the Courts are justified in inferring that the plaintiff holds the land as trustee on behalf of the church.

The next contention urged by Mr. Rozario, who appeared for the appellant, is that, even upon the terms of Exhibit B, the plaintiff is not entitled to eject his client. "He argues that, upon a proper construction of that document, the appellant has either a permanent right to hold the land subject to the payment of the stipulated rent or that he is at least a tenant from year to year. If we accept this view of the document, he

would next ask us to say that the appellant's undertaking in certain contingencies which have admittedly happened to vacate the land and remove the building without making any claim for compensation is unenforceable. Now Exhibit B, which is described as an agreement executed by the father and uncle of the appellant in favour of the then Vicar and Manager of the church is in these terms. It states that, as the executants had built a terraced house and been living there, they would (*a*) pay so much annually as the tax due; (*b*) at no time take in tenants in the house for rent or without rent or give an *otti* or sell the premises without the permission of the church; (*c*) never associate with those who violate the rules of the Bible and cause disturbance; (*d*) if the tax due be left outstanding that it will be a charge on the house; (*e*) if they keep a shop or carry on trade at the house, they will pay every month the amount which shop-keepers generally pay as a tax; (*f*) they would not misbehave and quarrel or fight with others; (*g*) they would pay Rs. 14 the amount of arrears of tax due from January 1826 to December 1831, Rs. ¾ths for the current July, and Rs. ¾ths for August; and (*h*) that, if without acting as aforesaid they act contrary to the other orders also of the Swamimars, they shall pay off the *manai* tax of the said temple found due by them, remove the said terraced house without asking the price thereof, leave the said *kovil* land and walk out. If they do not leave as aforesaid they shall make good the expenses of the suit which the Swamimars may institute in Court, give up their terraced house also to the said *kovil* and get out. Then what happened was the defendant demolished his old building and asked for permission to erect a new and more permanent building. The plaintiff would not grant him permission unless the defendant executed a fresh document containing not only the terms of Exhibit B, but also an additional condition that the defendant would remove the building if the plaintiff at any time required the site. The defendant would not agree to these terms and in spite of the plaintiff's protest went on erecting a substantial building which he now values at Rs. 4,500.

It is argued that Exhibit B shows that the defendant and his predecessors held the land under a building lease. In my opinion there is nothing in that document to support such a contention. Exhibit B, which is executed by the defendant does not purport, to grant any interests in, or right to the land; it only purports to be an agreement by which the defendant's father and uncle who had built a terraced house on the land undertook to do, and to abstain from doing the things mentioned therein. It does not appear what was the nature and value of that construction and how long before the date of Exhibit B it was erected. It is not possible to infer in favour of the appellant that his father and uncle had acquired any sort of interest in the land at the date of Exhibit B. On the other hand the terms of Exhibit B under which they were allowed to continue in occupation of the land clearly negatives, in my opinion, the existence of any tenancy either permanent or for any term when Exhibit B was executed. Then Exhibit B itself contains no words of demise and is not in terms a lease at all. But it is argued that because a certain yearly payment is to be made to the plaintiff as tax or rent we must presume at least a tenancy from year to year. Now it may be that, when a person in occupation of another's land pays rent, annually, a presumption would be raised in favour of a tenancy from year to year in the absence of any other circumstances showing a different arrangement. But in construing a document we must read all the provisions together and see what is the cumulative effect of them all. So reading Exhibit B which, no doubt, has been acted upon by the parties and may be regarded as having the effect of a contract binding on both the parties, the only conclusion that is possible to my mind is that it was not the intention of the plaintiff's predecessor-in-office to confer any sort of title or interest on the then occupiers of the land but that they were to continue to occupy it practically at his will and pleasure that is, as a mere tenant at sufferance or a tenant-at-will. It is, however, argued that the plaintiff does not say in the plaint that the defendant was a tenant at sufferance or a tenant-at-will. But he claims the right to eject the defendant because the latter refused to execute a fresh document as demanded of him, the effect of which would be to make him a tenant at sufferance,

And I can find no admission on the part of the plaintiff or the defendant having any interest in the land. No doubt, the plaintiff is bound by the terms of Exhibit B and he claims to eject him according to the strict terms of the contract. The plaintiff having proved his title, it is for the defendant to prove that he has a right to the possession of the land. He has failed to do so and Exhibit B, on the other hand, shows that the defendant has no right to the land. If my construction of Exhibit B. is correct no question as to whether the clause which I have marked as (*h*) is enforceable can properly arise. If there was no grant of a term and the defendant has no interest in the land being merely a tenant at sufferance or a tenant-at-will, there would be nothing to forfeit and it is not, therefore, necessary for me to consider whether the clause in question if it be read as one of forfeiture properly so-called was not intended to be merely a threat or is not repugnant to the grant. But I may observe that none of these questions were raised in the lower Courts.

I would dismiss the appeals with costs.

SUNDARA AIYER, J.—The plaintiff in the suit out of which these second appeals arise, is Vicar of a Roman Catholic Church, in the District of Trichinopoly and the object of the suit is to eject the defendant from a *manai* or house site which he and his predecessors have been holding under the church for a long time. The predecessors of the defendant had built a house on the plaint site. According to the plaint the defendant removed the then existing building about four years before the suit and subsequently erected a new one. The plaintiff alleges that, according to the terms of the holding, the defendant was bound to quit the site, removing the building if he disobeys any order of the priest; that, before the construction of the new building when the defendant asked the plaintiff's permission to put it up; the plaintiff had ordered him not to do so without executing a new document binding himself to remove the building and quit the premises whenever the plaintiff might require him to do so, that the defendant in violation of this order made the new building without executing such a document and that the plaintiff is, therefore, entitled to recover the property and to an injunction requiring the defendant to remove the building. The defendant's contention is that the plaintiff has no right to eject him, that he is bound only to pay rent to the plaintiff and is entitled to occupy the site permanently. He alleges that there was a tank in the plaint site originally and that it was given to the defendant's father for building purposes. He denies the existence of any agreement providing for his quitting the holding in case of any disobedience of the plaintiff's orders and claims a compensation of Rs. 4,500 in case a decree for possession is passed in the plaintiff's favour.

He also denies the plaintiff's rights as Vicar to maintain the suit as the property of the church is not vested in him.

Both the lower Courts have held that, as the plaintiff and the previous Vicar have long been in possession of the property, the plaintiff is entitled to maintain the suit for possession. They have also found that Exhibit B put forward by the plaintiff as supporting his right to eject the defendant, is genuine and that according to its terms the plaintiff is entitled to eject the defendant for disobedience of his orders. The District Munsif held that the defendant was entitled to Rs. 1, 000 as compensation for the building erected by him. But the District Judge reversed that finding as according to the terms of Exhibit B, compensation was not claimable and the defendant was bound to remove the building on delivering up the possession of the leased site.

Three questions have been argued in second appeal: *First* whether the plaintiff is entitled to sue for the recovery of the property, *secondly* what is the nature of the defendant's tenancy, *thirdly* whether the plaintiff is entitled to eject the defendant for disobedience of his order.

Mr. Rozario contends that the Church being admittedly the owner of the property and there being nothing to show that the property of the church is vested in the Vicar, the plaintiff has no right to sue and relies on the decision of the Bombay High Court in *Wardens of Nossa Sonora* v. *Bishop Hartman* (1). Attention is also drawn to the plaintiff's statement in his deposition that the site belongs to the Goanese Mission and it is urged that the trustee of the properties belonging to the Goanese Mission

(1) Perry's Oriental Cases 333.

is the proper person to sue. The plaintiff's statement is that he is the Parish priest and Manager of the church. Mr. Barton for the respondent contends that, in the absence of any evidence to the contrary, the plaintiff as the manager is entitled to maintain the suit. He also urges that the plaintiff's possession of the church and its property is sufficient to entitle him to sue and points out that the plaint site was purchased in 1826 in the name of the Vicar and Manager. He relies on the decisions in *Navroji Manekji Wadia* v. *Dastur Kharsedji Muncherji* (2) and *Jivanji Jamshedji* v. *Burjorji Naserwanji* (3). These cases really do not support the plaintiff, as the suit in the present case cannot be said to be for an infringement of the plaintiff's right of possession. There is, however, no evidence on the defendant's side that the property sued for is vested in any one else than the manager, and I am of opinion that the lower Courts were entitled to presume that the trusteeship of the property is vested in the plaintiff in the circumstances of the case. This contention must, in my opinion, fail.

The next question is what is the nature of the tenancy in this case. Exhibit B dated 1832 which, as already observed, has been found to be genuine by the lower Courts was executed by the defendant's father and another (no lease executed by the plaintiff's predecessor-in-office has been produced). It shows that the executants of Exhibit B were in possession prior to the date of Exhibit B and that they had already built a terraced house. It says "we shall pay annually to the said temple people according to the accounts of the *kovil* at the date of *Sakkaram Pou* one and *Fanams* $8\frac{3}{4}$ being the tax due for the $3\frac{1}{8}$ *manais* which we have built.....". Then follow covenants not to sub-let or alienate without the priest's permission and not to "associate with those who violate the rules of the Bible and cause disturbance" and for payment of increased rent in case the executants or others keep a shop or carry on trade at the premises. Then follow the provision which is material for the decision of this case, "if without acting as aforesaid we act contrary to the other orders also of the Swamimars we shall pay off the *manai* tax of the said temple found due by us, remove the said terraced house without asking the price thereof, leave the said *kovil* land and walk out" It will be observed that there is no provision in the document fixing the term of lease. But the rent provided is a yearly one, and the presumption in such cases is that the tenancy is at least one from year to year. See *Dixin* v. *Bradford and District Railway Servants Coal Supply Co., Ltd.* (4). Although the subject of the lease was a *manai* or vacant site and it is expressly stated in Exhibit B. that the building was put up by the tenant, there is no direct evidence that the lease was made for the purpose of building. Mr. Rozario asks us to presume in the circumstances of the case that the land was granted for the purpose of building and as the grant was not for any specific term, he contends that the tenant must be taken to have a right to occupy the land permanently. He relies on *Navalram* v. *Javerilal* (5) and *Promadah Nath Roy* v. *Sri Gobind Chowdhry* (6) in support of his contention. I should be inclined to accept this contention although a lease for the purpose of building need not necessarily convey a right to occupy the premises in perpetuity. See *Mohim Chandra Sarkar* v. *Anil Bhandhu Adhicary* (7). But I do not rest my judgment on this ground. The plaintiff does not allege in his plaint that the defendant is a tenant-at-will or a tenant from year to year nor does he say that the tenancy if it be one from year to year has been terminated by proper notice to quit. As I understand the plaint, the plaintiff rests his right to eject on the ground that the defendant having broken one of the conditions of the lease has forfeited the right to continue in possession. If, in his opinion, the tenancy was for a limited term the plaintiff ought to have alleged it definitely in the plaint. He does not say that Exhibit B was the origin of the defendant's tenancy. Such a position is in fact negatived by the terms of Exhibit B. This leads to the consideration of the question whether the plaintiff is

(2) 28 B. 20; 5 Bom. L. R. 745
(3) 3 Ind. Cas. 770; 33 B. 499; 11 Bom. L. R. 726.
(4) (1904) 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159.
(5) 7 Bom. L. R. 401.
(6) 32 C. 648; 9 C. W. N. 463.
(7) 1 Ind. Cas. 66; 13 C. W. N. 513 at p. 517; 9 C. L. J. 362; 5 M. L. T. 247.

entitled to eject on the ground of the defendant's violation of one of the terms of the lease, namely that the defendant should give up possession and 'walk out' if he disobeys the orders of the priest. I assume for the purpose of this judgment that the tenant was bound to obey the orders not only of the person to whom Exhibit B was addressed, that is, the plaintiff's predecessor in the office of priest, but of the plaintiff also as the successor of the lessor. What now is the effect of the clause relied on which has already been set out in full? Exhibit B, as already mentioned, contains several covenants to be performed by the lessee. Rendering obedience to all the orders of the lessor is not one of such covenants. There is a positive covenant in Exhibit B to pay an annual rent for the site and an additional rent if a shop be kept or trade carried on at the house. There were also covenants not to under-let or to alienate without the lessor's permission and not to associate with those who violates the rules of the Bible and cause disturbance. There is no covenant expressed as such to obey all the orders of the lessor, but in the clause setting out the result of a breach of the covenants already expressed, disobedience of orders is stated as a further contingency on the happening of which the lessee will lose his right of possession.

In my opinion the provision with regard to forfeiture on disobedience of orders is clearly a condition and not a limitation of the rights of the lessee. The language of the instrument is what has to be looked, in deciding whether it could be regarded as a limitation. I can find no words defining the term of the lease to be either in the first instance or in the alternative so long as the lessee should obey the lessor's orders.

Proceeding then, on the footing that it is a condition I confess I have serious doubts looking at the broad and vague terms of the provision whether it could be regarded as anything that would work a forfeiture and whether it should not be regarded in the language of Strange and Philips, JJ. in *Chidambara Pillai* v. *Manikka Chetti* (8) as having the appearance of a mere threat such as in equity in the absence of specific mention of the nature of the failure which was to bring down the penalty of forfeiture ought not to be enforced. This Court held in *Vizianagaram Maharajah* v. *Suryanarayana* (9) that a stipulation that a tenant shall be "bound to obey the order of the Circar could not be held to justify the inference of a tenancy-at-will, as these words are no more than common words in which a tenant professes his respect for his superior Lord". Mr. Rozario contends that according to the clause relied on in Exhibit B forfeiture would be incurred only if the tenant acted contrary to the covenants set out in the lease and also contrary to the other orders of the Swamimar and as there is no allegation that the covenants referred to were infringed, no forfeiture was incurred. It must be admitted that the language of the clause is vague to a degree. The respondent contends that it should be read as meaning that if any (not all) of the expressed covenants should be violated and also if any other orders of the Swamimar should be disobeyed, the right to possession would be lost. I do not say that the respondent's contention is unreasonable or that the parties to Exhibit B might not really have meant it At the same time it has to be remembered that the Courts will not stretch an extended hand to a lessor who wishes to enforce a clause of forfeiture. (See Woodfall's Landlord and Tenant, 18th Edition, page 210). I should hesitate to hold that the language of the document is clear enough to support Mr. Barton's contention.

But assuming that we may interpret the clause as meaning that disobedience of any orders of the lessor would work a forfeiture, is it still free from the vice of vagueness and uncertainty. I asked the learned Counsel for the respondent during the argument whether he would contend that the condition related to each and every kind of order, whatever its nature or quality might be. At one time he seemed inclined to restrict the clause to reasonable orders and apparently also to orders connected with the enjoyment of the premises leased. But ultimately he seemed to feel compelled to contend that it would relate to any order

(8) 1 M. H. C. R. 63 at p. 64.

(9) 9 M. 307 at p. 311; 13 I. A. 32.

whatsoever, and urged that the lessee having agreed to the clause with his eyes open he had no right to demur to it. I find it impossible to suppose that the parties could really have intended that disobedience of an order not connected with the holding of the premises should work a forfeiture as that would be defeating the very object of the lease. If they did it would be void as being repugnant to the nature of the estate to which it was annexed (See M. C. Adam on Landlord and Tenant, Vol. I, page 568).

Nor again can it be supposed that it was understood that the lessee was bound to obey even the unreasonable orders of the lessor. I am of opinion that it is not possible from the language of the instrument to ascertain what kind of order is referred to in the condition, if the clause was in reality anything more than an injunction to be a faithful tenant as held in *Vizianagaram Maharajah* v. *Suryanarayana* (9). I must hold that the clause in so far as it relates to disobedience of orders is too vague and uncertain to be enforceable in a Court of Law. The plaintiff's contention would really destroy altogether the rights secured to the tenant under the lease. As already stated the clause in question is not intended to fix the term of the lease but to add a condition of forfeiture. The appellant's view substantially is that he could by an order of his own directing the tenant to execute a writing agreeing to hold as a tenant-at-will convert him into such a tenant though he was not one before. The position would be exactly the same if in this case, the plaintiff had ordered the defendant to execute a document agreeing to give up the premises on demand, even though the defendant had not attempted to put up any new building. Apart from the uncertainty of the clause I feel perfectly sure that an order, the disobedience of which would work a forfeiture, could not be one directing the defendant to extinguish his own rights by agreeing to give up possession whenever demanded. I would allow the appeal and dismiss the suit with costs throughout.

Under section 98 of the Code of Civil Procedure, these second appeals are dismissed with costs.

Appeals dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 28 OF 1910.

September 20, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

JERAMDAS KHATONMAL AND OTHERS —RESPONDENTS.

Bombay Irrigation Act (VII of 1879), s. 23—Collector's order under the Act—Appeal from the order—Suit to set aside order incompetent till appeal preferred—Bombay Land Revenue Code (Act V of 1879), s. 203.

An order made by a Collector under section 23 of the Bombay Irrigation Act, falls within the purview of section 203 of the Bombay Land Revenue Code, and is none-the-less the order of the Collector by reason of the fact that it is a confirmation of an order made by a Canal Officer.

An appeal from such an order lies to the Commissioner, until that appeal has been presented, a suit to set aside the order is incompetent.

Appeal against the decision of the District Judge, Hyderabad.

The *Government Pleader*, for the Appellant.

Mr. *Tahilram Maniram*, for Respondent No. 1.

Mr. *Wadhumal Oodharam*, for Respondent No. 2.

JUDGMENT.

PRATT, J. C.—The plaintiff sues to set aside an order made by the Collector under section 23 of the Bombay Irrigation Act.

The lower Court has held that section 11 of Act X of 1876 is no bar to the suit.

Mr. Tahilram seeks to support the order on two grounds: *first* that the Collector is not a Revenue Officer within the meaning of that term in section 203 of the Bombay Land Revenue Code and (2) that the provisions of section 67 imply a provision excluding the operation of section 203, Land Revenue Code.

As to the first ground there is no doubt, that the word Collector as defined in section 3 (5) of the Irrigation Act has the significance defined in the section 3 (11) of the Bombay General Clauses Act, 1904. The word means "the head Revenue Officer of a District" and occurred in the Irrigation Act and was only omitted when the Bombay General Clauses Act, 1886, was passed. The Collector is, therefore, the Chief Officer

in charge of the Revenue Administration of the District. Under section 3 (5) of the Irrigation Act he may also be such Officer as Government may empower to exercise powers under the Act. No such other Officer has been empowered in the present case and the powers are exercised by the Collector *qua* Officer in charge of the Revenue Administration of the District. The order, therefore, falls within the purview of section 203 of the Land Revenue Code—and it is none-the-less the order of the Collector by reason of the fact that it is a confirmation of an order made by a Canal Officer.

An appeal, therefore, lies to the Revenue Superior of the Collector and until that appeal has been presented the present suit is incompetent.

It has also been argued that section 67 allowing the Commissioner to revise the order of the Collector under section 23 shows that the Irrigation Act does not contemplate a right of appeal. That may be so, but it is only by implication. It does not amount to an express provision to the contrary as said in section 203 of the Land Revenue Code.

I, therefore, would allow this appeal and reversing the order of the District Judge would dismiss the suit with costs throughout.

FAWCETT, A. J. C.—I concur. I think that this case is clearly distinguishable from *Narayan Ballal* v. *Secretary of State for India* (1), In that case the Forest Officer was an Officer appointed under a separate Act of the Imperial Legislature, and that Act made a clear distinction between them and Officers of the Revenue Department. In the present case the Collector is appointed under the Bombay Land Revenue Code, and is the "Collector" for the purposes of the Irrigation Act under the definition of that word in the Bombay General Clauses Act, 1904.

I also think that the words "all orders and proceedings of a Collector under this Act shall be subject to the supervision and control of the Commissioner" in section 67 of the Irrigation Act are not inconsistent with there being a right of appeal to the Commissioner. It is to be noticed that the Irrigation Act was passed subsequently to the Bombay Land Revenue Code, and it was, therefore, probably thought in view of the wide terms of section 203 of the latter Act, unnecessary to insert an express provision in regard to the right of appeal, such as is contained in section 6 of the Bombay Abkari Act, 1878, which was passed previously.

Appeal allowed.

(1) 20 B. 803.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 246 AND 253 OF 1909.

October 28, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

IN APPEAL NO. 246 OF 1909.

BHUPATHIRAZU VENKATAPATHIRAJU GARU AND OTHERS—PLAINTIFFS NOS. 1 AND 3 TO 5—APPELLANTS

versus

THE PRESIDENT, TALUQ BOARD, NARASAPUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN APPEAL NO. 253 OF 1909.

THE PRESIDENT, TALUQ BOARD, NARASAPUR—DEFENDANT NO. 1—APPELLANT

versus

BHUPATHIRAZU VENKATAPATHIRAJU GARU AND OTHERS—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

Poramboke—*Tank on village site—Rights of owners*—Taluk *Board*—*Right of fishing.*

Plaintiffs constructed a tank on the village *poramboke* and caused all the repairs to be made from time to time. The public had free access to the tank for the purpose of taking water for domestic purposes and for watering their cattle. The plaintiffs had the exclusive right to the fish in the tank and the trees on the bank. In 1885, the *Taluk* Board denied the title of the plaintiffs to the trees and auctioned their produce but the auction-purchasers never got possession of the trees:

Held, that the village site must be presumed to have been granted to the plaintiffs' family outright, perhaps subject to a condition that a tank should be constructed thereon and maintained for the use of the public:

Held, also, that the right to take fish and to enjoy the usufruct of trees was reserved to the plaintiffs.

Sivaraman Chetty v. *Muthaya Chetty*, 12 M. 241; 16 I. A. 48, *Karuthan Chetty* v. *Malimuthan*, 8 Ind. Cas. 114; 34 M. 323; 8 M. L. T. 363; (1910) M. W. N. 576, distinguished.

Appeal against the decree of the Subordinate Judge of Kistna at Ellore, in O. S No. 58 of 1907.

BHUPATHIRAZU VENKATAPATHIRAJU GARU *v.* PRESIDENT, TALUQ BOARD, NARASAPUR.

APPEAL No. 246 OF 1909.

Mr. *V. Ramesam*, for the Appellants.

Mr. *K. V. L. Narasimham* for Messrs. *T. Prakasam* and *L. A. Govindaragava Aiyar*, for the Respondents.

APPEAL No. 253 OF 1909.

Mr. *L. A. Govindaragava Aiyar*, for the Appellants.

Mr. *K. V. L. Narasimham* for Messrs. *T. Prakasam* and *V. Ramesam*, for the Respondents.

JUDGMENT.—The evidence which we are able to accept establishes the following facts.

The tank is constructed on village site *poramboke* in a Government village, and has always borne the name of the plaintiffs' family, Bhupatirazu Garu. The public of the Poduru village have, so far as is known, always had free access to the tank for the purpose of taking water from it for domestic purposes and of watering cattle. Such repairs as have been necessary were made by plaintiffs and their family. The plaintiffs have without dispute enjoyed the exclusive right of taking fish for fifty or sixty years. In 1885 the Collector denied the title of the plaintiffs to the ownership of the tank, but there is no evidence in the case to show on what ground he did so. The Taluq Board has been including the trees on the banks of the tank in the list of *poramboke* trees of which the usufruct is annually auctioned, but the purchaser has not obtained possession of these particular trees at any time.

From its name and the evidence as to repairs and as to exclusive possession of the fish and tree, we may fairly infer that the tank was constructed by the plaintiffs' ancestors, and the same evidence indicates that the allotment of village site was made to them outright, though possibly subject to a condition that a tank should be constructed and maintained thereon for the use of the villagers. There is no evidence in the case to suggest that the Government of the day in granting the site retained for themselves any rights in the tank when constructed. It is, therefore, impossible to accede to the contention of the *Taluq* Board that the decree ought to declare the tank their property and, on the other hand, the plaintiffs do not now ask for any modification of the declaration made by the Subordinate Judge that it is the property of the public.

The evidence of the exclusive use of the fish and trees by the plaintiffs' family further suggests that whether the grant originally made was conditional, or whether the plaintiffs' ancestors after obtaining it voluntarily dedicated the tank to the use of the villagers, the right to take the fish and to enjoy the produce grown on the banks was reserved for the family of the constructors; and there is nothing to suggest a different inference. The plaintiffs do not, as we understand the argument, contend now that they are not bound to maintain the tank in good order for the use of the villagers. Two cases were cited before us not exactly as laying down rules of law but rather as indicating the effect which we ought to give to the evidence of exclusive possession. They are *Sivaraman Chetti* v. *Muthaya Chetti* (1) and *Maruthan Chetty* v. *Kalimuthan* (2); but both those cases start from the position that the tanks concerned were the common property of the villagers. We do not start here from that position and that fact necessarily affects the inference to be drawn from evidence of user.

In the result, then all that is required now is a modification of the decree so far as it deals with the plaintiffs' right of fishery: as the decree stands, that right is restricted to a greater extent than is necessary for the preservation of the rights of the villagers.

Instead of the sentences in the Subordinate Judge's decree which deal with this subject the decree will declare that the plaintiffs alone are entitled to take fish from the tank, but that right is to be exercised in such a way as not materially to affect the rights of the villagers in the water of the tank, as regards quantity or quality. Appeal No. 253 is dismissed with costs; Appeal No. 246 is allowed to the extent indicated above; parties paying their own costs.

Appeal No. 246 accepted.
Appeal No. 253 dismissed.

(1) 12 M. 241; 16 I. A. 48.
(2) 8 Ind. Cas. 114; 34 M. 323; 8 M. L. T. 368; (1910) M. W. N. 576.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 63 OF 1910.

September 26, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

BILAWAL SON OF ALI MAHOMED—APPELLANT

versus

CHOITHRAM SON OF HASSOMAL—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), *s.* 10-*A —Retrospective—"Agriculturists at date of transaction," meaning of—Applicability—Evidence Act (I of* 1872), *s.* 92—*Sale or mortgage—Separate unregistered agreement to convey not admissible in evidence.*

Section 10-A of the Dekkhan Agriculturists' Relief Act is retrospective.

Pursumal Khushimal v. *Sadhumal Kimatmal*, 1 Ind. Cas. 935, 3 S. L. R. 1; *Gopal Ghela* v. *Rajaram*, 13 Ind. Cas. 851; 14 Bom. L. R. 14; 36 B. 305, referred to.

But a person is not entitled to the benefit of that section unless he was earning, at the time of the transaction, his livelihood from agriculture in a District to which the Act applied.

A written agreement to re-convey immoveable property not being registered can only operate as a contract, and, in the absence of fraud, cannot be admitted in evidence to prove a sale-deed to have been a mortgage deed.

Appeal from the decision of the District Judge, Hyderabad.

Mr. *Hirdaram Mewaram*, for the Appellant.

Mr. *Wadhumal Oodharam*, for the Respondent.

JUDGMENT.—The appellant sued to redeem the document, which they allege to be a mortgage, which is in form a deed of sale. The appellant relied on an oral agreement and an unregistered written agreement to re-convey and claim also that he should have the benefit of section 10-A of the Dekkhan Agriculturists' Relief Act.

Section 10-A is no, doubt, retrospective; *Pursumal Khushimal* v. *Sadhumal Kimatmal* (1) and *Gopal Ghela* v. *Rajaram* (2).

But appellant is not entitled to the benefit of that section unless he was an agriculturist at the time of the transaction, *i.e.*, in 1895. The term agriculturist in the proviso to section 10-A is defined in section 2 (1) of the Act. The appellant must, therefore, have been earning his livelihood in 1895 from agriculture in a district to which the Act applied. But the Act was not applied to Sind at all

(1) 1 Ind. Cas. 935; 3 S. L. R. 1.
(2) 13 Ind. Cas. 851; 14 Bom. L. R. 14; 36 B. 305.

in 1895. The appellant, therefore, cannot invoke section 10-A.

The case is, therefore, governed by section 92 of the Indian Evidence Act and the decision of *Balkishan* v. *Legge* (3). The written agreement, if registered, might have operated to convert the transaction into a mortgage by conditional sale. But not being registered it can only operate as a contract, and in the absence of fraud neither this writing nor the parole agreement are admissible in evidence to defeat the sale-deed.

We confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(3) 19 A. 434; A. W. N (1897) 109.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1461 OF 1912.

April 23, 1913.

Present:—Mr. Justice Rafique.

AMBA SAHAI—JUDGMENT-DEBTOR—APPELLANT

versus

BHAGWAN DIN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXXIV, r.* 10—*Mortgage decree—Cost of the Appellate Court, whether recoverable personally from judgment-debtor.*

In a mortgage suit, the mortgagee obtained a decree for foreclosure. One of the defendants appealed to the High Court which dismissed his appeal and ordered as to costs: "The appellant aforesaid do pay to the respondents present aforesaid the sum of Rs. 88-4 the amount of costs incurred by the latter in this Court:"

Held, that the costs of the High Court were awarded against the appellant personally.

Mohunga Ojha v. *Ram Bahadur Singh*, 15 Ind. Cas. 23; 16 C. W. N. 731, referred to.

Execution second appeal from the decision of the District Judge of Cawnpore, dated the 27th of May 1912.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Parmeshwor Dyal* (for Mr. *R. K. Malviya*), for the Respondents.

JUDGMENT.—The dispute between the parties to this appeal relates to the mode of realization of costs. The respondents who were mortgagees obtained a decree for foreclosure from the Court of the District

Judge of Cawnpore. The first Court having dismissed the claim, the decree was passed against the appellant and his minor son. The appellant alone had resisted the claim. He preferred an appeal to this Court and his appeal was dismissed with costs. The respondents, the decree-holders, sought to recover the costs awarded by this Court by proceeding against the property of the appellant other than that in respect of which the decree for foreclosure had been passed. The appellant objected on the ground that the costs sought to be recovered formed part of the mortgage-money in respect of which the foreclosure decree was passed. The remedy of the decree-holder was to get the said costs included in the decree for foreclosure. He relied in support of his contention on the provisions of Order XXXIV, rule 10, of the Code of Civil Procedure. The learned Subordinate Judge did not yield to the objection of the judgment-debtor and granted execution as asked by the decree-holders. On appeal the order of the Subordinate Judge was upheld. The judgment-debtor has come up in second appeal to this Court. He repeats his objection here and refers to an unreported case of this Court, *i.e.*, Second Appeal No. 871 of 1900(*Ambe Sahai* v. *Shambhu Nath*) decided on 28th June 1902. I do not think that the objection of the appellant is valid. As remarked by the learned Chief Justice of Bengal "In cases of this kind what we have to see is not what decree the Court ought to have passed, but what decree the Court has passed" vide *Mohunga Ojha* v. *Ram Bahadur Singh*(1). We have, therefore, to see in the present case not what decree should have been passed, or what the decree-holders should have done in obedience to the provisions of Order XXXIV, rule 10, but what was the decree as to costs passed by this Court. The decree runs thus "and it is further ordered that the appellant aforesaid do pay to the respondents present aforesaid the sum of Rs. 88-4 the amount of costs incurred by the latter in this Court." It is clear from the language of this decree that the costs of this Court were awarded to the respondents against the appellant personally. The case relied upon by the appellant does not help him for in that case the decree was construed to mean that costs were not recoverable from the judgment-debtor personally. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 15 Ind Cas. 23; 16 C. W. N. 731.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 482 OF 1908.

December 7, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Justice Sir Frederick Robertson, KT.

LABH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GURCHARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Alienation by widow—Hindu Law or custom—Gift in favour of daughter and her son—Khatris of Kauntrila in Gujar Khan Tahsil of Rawalpindi District—Incompetency of reversioners to object—Value of the Punjab rulings.

Khatries of Kauntrila in the Gujar Khan Tahsil of the Rawalpindi District follow Hindu Law and not agricultural custom in matters of alienation and inheritance, consequently, a gift by a widow of her husband's separate property in favour of her daughter and daughter's son cannot be questioned by reversioners.

Kartar Singh v. *Mehtab Singh*, 94 P. R. 1898 and *Bura Mal* v. *Narain Das*, 102 P. R. 1907; 78 P. W. R. 1907, referred to.

Questions of custom which arise in a case should be put in issue and decided upon the evidence, but should not be concluded on the authority of any ruling. The rulings of the Chief Court on similar points are instances of great weight but are not conclusive.

Second appeal from the decree of the Divisional Judge, Rawalpindi Divison, dated the 26th March 1908, reversing that of the Subordinate Judge, 1st class, Rawalpindi, dated the 7th January 1908, decreeing the claim.

FACTS.—In this case the claim was by collaterals of a *Khatri* widow for a declaration that a gift of land and a house made by her to her daughter and her daughter's son could be inoperative on their reversionary rights. The first Court found that the case was not governed by the decision reported as *Bura Mal* v. *Narain Das* (1) and that

(1) 102 P. R. 1907; 78 P. W. R. 1907.

by a family custom the plaintiffs have a superior right over the daughter and daughter's son of the last male owner. The grounds on which the first Court took the case out of the operation of the general rule enumerated in *Bura Mal* v. *Narain Das* (1) were:

(1) that when plaintiff's uncle Arjan Singh died his property was taken by his brothers to the exclusion of his daughters;

(2) that the daughter, *Musammat* Lajwanti, did not assert her claim when the plaintiffs on the previous occasions objected to the alienations by her mother. These grounds were not considered sufficient by the lower Appellate Court for dissenting from *Bura Mal* v. *Narain Das* (1) and consequently by accepting the defendants' appeal it dismissed the plaintiff's suit with costs throughout.

Rai Sahib Pundit *Sheo Narain* and Mr. *Devi Dial*, for the Appellants.

Lala *Sangam Lal* and Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether the parties are to be governed by the provisions of the Hindu Law or by custom in respect of the point in dispute between them.

Mr. Sheo Narain for the appellant attempted to show that the question between the parties was *res judicata* by reason of certain previous cases between the plaintiff and the alienor, a widow. We have examined these cases and we find nothing in them to justify us in accepting Mr. Sheo Narain's contention in respect of which we did not think it necessary to call upon the respondents for a reply. Previous litigation merely resulted in arrangements between the widow and certain reversioners and these could not be held to operate as "*res judicata*" in the case before us as regards the parties to this case. The learned Advocate for the appellant admitted that in view of previous decisions of this Court the onus of showing that the parties are governed by agricultural custom and not by their personal law, lay upon him, and he endeavoured to show by instances on the record and from instances recorded in previous authorities that this onus had been discharged.

The parties are *Khatris* of Kauntrila and belong to a large village in the Gujar Khan Tahsil of the Rawalpindi District, situated within a few miles of the small town of Sukho to which latter place the parties belonged in the case dealt with in *Kartar Singh* v. *Mehtab Singh* (2).

The principles to govern the enquiries in such cases are laid down in that judgment, *Kartar Singh* v. *Mehtab Singh* (2), and in that case it was found that as to the matter then in dispute the parties who were *Khatris*, as in this case, had not been shown to be governed by custom, but must be held to be governed by Hindu Law. The matter was again fully discussed in the judgment in *Bura Mal* v. *Narain Das* (1) in which case the parties were *Khatris* of the town of Rawalpindi. Rawalpindi is a town of very modern growth and there is not much to distinguish the *Khatris* of Rawalpindi town from those of the neighbouring villages. In that case in which instances from outside villages as well as from this town itself were considered, it was found that the parties were governed by Hindu Law, in regard to tho matter in dispute. We do not think that the learned Divisional Judge was precisely correct in saying that the case is governed by *Bura Mal* v. *Narain Das* (1) inasmuch as the question in dispute was one which must always be put in issue and decided upon the evidence; rulings of this Court on similar point being instances of great weight but not conclusive. We agree, however, with the learned Divisional Judge after hearing arguments and examining the instances which are cited in this record and those quoted in *Bura Mal* v. *Narain Das* (1) that the plaintiffs have failed to discharge the onus which lay upon them of proving that the parties to this suit in regard to the points in dispute are governed by custom and not by Hindu Law. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(2) 94 P. R. 1898.

VENKANNA IYER *v.* SECRETARY OF STATE.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 20 AND 21 OF 1911.

March 5, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Tyabji.

VENKANNA IYER AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—RESPONDENTS.

Madras Revenue Recovery Act (*II of* 1864), *ss.* 25, 26, 27, 44—*Notice to defaulter*—*Regulation XXV of* 1802, *s.* 7—*Order of procedure in respect of moveable and immoveable.*

White, C. J.—Service of demand and attachment notices on a defaulter under Act II of 1864 can be effected in any of the ways mentioned in sections 25, 26, 27. The sections do not provide for alternative modes.

To get the benefit of the proviso to section 44, it must be shown that a larger portion of the land was sold than was sufficient to discharge the arrears.

Section 6 of Act II of 1864 is exhaustive; it is for the plaintiff to show that he can claim the benefit of a *sanad* apart from section 7 of Regulation XXV of 1802.

Tyabji, J.—Section 44 of Act II of 1864 is only a permissive section.

To bring his case under section 6 of the Act, it is necessary for the defaulter to allege and prove that he holds a *sanad*.

Appeal against the decree of the District Court of Salem, in Original Suits Nos. 20 and 21 of 1909.

Mr. *B. Narasimha Rao*, for the Appellant.
Mr. *C. F. Napier*, for the Respondents.

JUDGMENT.

WHITE, C. J.—Three points have been raised on behalf of the appellant, who is the plaintiff in the suit. The first point is with reference to the notices in connection with the proceedings prior to the sale under Act II of 1864. The method of service of demand notice in such proceedings is prescribed by section 25 of the Act. That section provides, "before a Collector, or other officer empowered by the Collector in that behalf, proceeds to attach the land of a defaulter, or buildings thereon, he shall cause a written demand to be served upon the defaulter specifying the amount due, the estate or land in respect of which it is claimed" the name of the party in arrear, the *batta* due to the person who shall serve the demand, and the time allowed for payment, which shall be fixed with reference to the distance from the land on which the arrear is due to the place at which the money is to be paid; such demand shall be served by delivering a copy to the defaulter, or to some adult male member of his family at his usual place of abode, or to his authorised agent, or by affixing a copy thereof on some conspicuous part of the last known residence, or on some conspicuous part of the land about to be attached. The Government Pleader contends that that enactment provides for five independent methods of service. On the other hand, it is argued that the analogy of the provision under the Code should be followed, and that the method of service by affixing should only be adopted if personal service is found impossible. That is not an unreasonable argument, but it seems to me that, if the Legislature had intended to enact in the way suggested on behalf of the appellant, they would have said so in express language, I have not referred to the Code of 1859 which was in force when Act II of 1864 was passed, but I have no doubt it contained provisions substantially similar to those that are now to be found in Order V. There, express provision is made for what may be called 'substituted service' where personal service cannot be effected; and I think that, if in passing the Act of 1864 the Legislature had intended to provide that service by affixing should only be permissible where personal service could not be effected, they would have so enacted. It is not disputed here that a copy of the demand was affixed on the *chavady* and it is not denied that that *chavady* is situated on a conspicuous part of the land. Therefore, as regards the service of the notice of demand, I am not prepared to hold that the service was bad.

The next notice is the notice of attachment,—that is governed by sections 26 and 27 of the Act, section 27 says, in so many words, that the attachment shall be effected by affixing the notice on some conspicuous part of the land. Here it is admitted that the notice was affixed on the *chavady* which is situated on a conspicuous part of the land. I hold, therefore, that the point that the service of the demand notice and of the attachment notice was bad, fails.

The next point taken was with reference to the sale of the *mittah*. It was contend-

ed that the sale of a portion of the *mittah* would have been sufficient to satisfy the amount of arrears for which the sale took place. That matter is governed by section 44. It says, "It shall be lawful for the Collector, or other officer empowered by the Collector in that behalf to sell the whole or any portion of the land of a defaulter in discharge of arrears of revenue; provided always that, so far as may be practicable no larger section in the land shall be sold than may be sufficient to discharge the arrears with interest, and expenses of attachment, management and sale". Here, the amount which was realised was not enough to satisfy the arrears. It has been urged before us that the property was purchased for a sum very considerably in excess of the amount realised at the sale. It is not suggested that there was anything in the nature of fraud or concealment in connection with the sale, and, in the absence of any evidence which could vitiate the sale itself; on the ground that an insufficient price was realised the plaintiff cannot claim the benefit of the proviso to section 44; before he can claim the benefit of that proviso, he must show that a larger portion of the land was sold than was sufficient to discharge the arrears. Here, we have the fact that the amount realised although the whole *mittah* was sold, was not sufficient to satisfy the arrears.

The third point, which seems to me to be the only point of any substance, is that the sale is bad because the moveable property of the defaulter should have been sold before the land. As regards this, the learned Judge finds "I do not think it is established that plaintiffs had moveables sufficient to meet the demand (Rs. 1,037) and defendant's sixth witness proves that some inquiry at least was made about moveables". For the purpose of the question of law which has been raised before us and for that purpose only, we assume that there were moveables. Then the question arises on that assumption ought we to hold that this sale was bad? Now, section 5 of the Act provides that, when revenue is in arrear the Collector may proceed to recover it by the sale of the defaulter's moveable and immoveable property. Then section 6 provides that, if the defaulter holds under a *sanad*, the mode of recovering the arrears shall be in accordance with the term of the *sanad*, and that, in the case of other defaulters, the Collector may, at his discretion, realise the arrears by the sale of either the moveable or immoveable property of the defaulter or both. It seems to me that that section is exhaustive in so far as it divides the defaulters into two classes, *viz.*, the defaulters who hold *sanads* and defaulters who do not hold *sanads*. If the defaulter in the present case desires to rely upon the fact that he holds a *sanad* and that the method of recovering the arrears which has been adopted by the Collector in this case is not in accordance with the terms of the *sanad*, it is for him to show that he holds the *sanad* and that section 6 applies. We have been referred to section 7 of the Regulation XXV of 1802. That section comes after the section which provides that landholders shall regularly pay the amount of permanent assessment fixed on their lands and where they fail, their property shall be answerable. Section 7 says: "Where such failure may occur, the personal property of the landholders shall, in the first instance, be attached and ultimately their lands shall be liable to be sold and transferred from them for ever, if necessary, for the payment of the public revenue". It is argued on behalf of the appellant that that section applies and that the defaulter was entitled to say that, although he had failed to pay the arrears his personal property should in the first instance, be attached. I do not feel called upon to decide whether that section has been impliedly repealed by sections 5 and 6 of the Act of 1864, or, if it is held that it has not been repealed, what is the class of cases to which section 7 of the Regulation XXV of 1802 applies. It has been suggested that the section of Act II of 1864 applies in the case of *sanads* granted in connection with the permanent settlement effected by the Regulation XXV of 1802 and that section 7 of the Regulation applies to previously granted *sanads*. I express no opinion with reference to this. But it seems to me that, so far as this case is concerned, the right view is that section 6 of the Act should be treated as exhaustive and that it is for the plaintiff to show that he can claim the benefit of a *sanad*. I desire to express no opinion as to whether the plaintiff is or is not a *sanad*-holder. All I hold in this case is

that it was for the plaintiff to show that he was a *sanad*-holder, that in this case he failed to do so and that, in these circumstances we ought not, as we have been asked to do, give him a further opportunity of showing that he is a *sanad*-holder. The issue originally was "whether plaintiffs owned any moveable that could have been proceeded against for the recovery of the arrears." The issue was amended on March 12, 1910, by the addition of words, "and if so, is the attachment of the *mittah* thereby rendered illegal." Now, it seems to me that the object of the amendment was to raise the question whether in the view that the plaintiffs had moveables which could have been proceeded against, the attachment of the *mittah* was rendered illegal. That, I think, raises the question whether the defaulter held under a *sanad*. The hearing took place some months after the issue had been framed. It seems to me that the plaintiff had abundant opportunity of procuring evidence that he was a *sanad*-holder. The learned Judge, with reference to the question, says "plaintiffs have admittedly not got *sanads*." This, no doubt, is ambiguous. It may mean that the plaintiffs are not *sanad*-holders, or it may mean that the plaintiffs have not put in evidence of *sanads*, if any; what the actual admission was, I confess; I do not know, as apparently there is no evidence of any express admission by the plaintiff. But one thing is clear, that is that the plaintiff did not put in evidence of any *sanad*. He did not ask to be given an opportunity of so doing; he did not suggest, in the course of his evidence, that he had a *sanad*. It was said that there was something in the nature of an admission by the 1st defendant that the plaintiff was a *sanad*-holder. It has been argued by the Government Pleader that no such admission was made and so far as the record goes, I can find no trace of such admission. I am of opinion that this suit fails and that the appeal ought to be dismissed with costs. The judgment in Appeal No. 21 of 1911 follows.

TYABJI, J.—The plaintiff asks for a declaration that the sale of the land referred to in the plaint was illegal and of no validity. Three grounds are taken before us for establishing this claim. In the first place, it was argued that it was not necessary for Government to sell the whole of the land in question for the recovery of the arrears of revenue due in respect thereof, and that only a portion thereof should have been sold. This argument is based on section 44 of the Madras Revenue Recovery Act (II of 1864). That section, however, is merely a permissive section, and it seems to me that a sufficient answer to this contention is furnished by the fact that even though the whole of the land in question was put up for sale, the price realised was not enough to satisfy the whole of the arrears of revenue due thereon. The next point taken on behalf of the appellant was that the service of demand by the Collector was not made in a legal form under section 25 of the said Act. It seems to me that it is unnecessary for us to decide whether or not the mode of service adopted in this case was quite regular, for on the allegation contained in the plaint I am of opinion that the plaintiff must be considered to have accepted the service such as it was and that he cannot be heard to say that the mode of service was not legal and otherwise effectual. The question, therefore, does not arise, in my view of the case, whether the second sentence of section 25 of the said Act must be construed as contended for, by the appellant or as contended for by the respondent. The respondent contends that that sentence provides for five alternative modes of service, any of which may be elected *viz*, (1) by delivery of a copy of the notice of demand to the defaulter himself or (2) to a male adult member of his family or (3) to an authorized agent or (4) by the affixing a copy of the notice of demand on some conspicuous part of the land about to be attached. The argument on behalf of the appellant was that the said sentence, according to its true construction, falls under two main heads which are mutually exclusive, that under the first of these main heads, three of the five alternatives above referred to fall and the other two alternative fall under the second main head; that the first main head refers to cases where the residence of the defaulter is known in which circumstances the service may be effected in one of the following modes, *viz.* by a copy of demand being delivered (*i*) as a first alternative to the defaulter himself or (*ii*) secondly to some adult male member of his family at his usual place of abode, or (*iii*) thirdly to his authorized agent, and (2)

that the second main heads of the sentence provides for two alternative modes of service where the residence of the defaulter is unknown; and in that case service is to be effected by affixing a copy of the notice of demand on some conspicuous part either (i) of his last known residence or (ii) of the land about to be attached. In favour of the construction of this sentence that is put forward by the appellant it has been pointed out that the words "last known residence" do not exactly apply to cases where the residence of the defaulter at the time in question is known and that the way in which the sentence can be read so as to be most consistent with itself and most in accordance with the usually accepted meaning of the terms in which it is concluded and especially with the usually accepted meaning of the words "last known residence." If the construction suggested by the appellant is accepted the sentence would read as follows:—

"Such demand shall be served (1) [where the usual place of abode of the defaulter is known] by delivering a copy

(*a*) to the defaulter, or

(*b*) to some adult male member of his family at his usual place of abode; or

(*c*) to his authorised agent,

or (2)

where the usual place of abode of the defaulter is not known] by affixing a copy thereof.

(*a*) On some conspicuous part of the land about to be attached."

The words in square brackets are added by me to bring out the respective purposes to which the two main sub-divisons would be applicable, according to the contention of the appellant. As I have already said, however, it is unnecessary, in the view I take of the case, to express any opinion as regards the proper construction to be put upon this portion of section 25.

The third point that was taken on behalf of the appellant was that the attachment is illegal because the moveable property of the plaintiff should have been procceded against in the first instance, and that only in default of there being sufficient moveable property to satisfy the arrears of revenue could the immoveable property have been put up for sale. This contention is based upon section 7 of the Madras Permanent Settlement Regulation XXV of 1802, and what has to be determined in the first place is whether the land in question is to be governed by that section or by section 6 of the Madras Revenue Recovery Act of 1864. It is argued on behalf of the appellant that there is nothing to show that section 7 of Regulation XXV of 1802 has been repealed. It might be a question, however to be considered whether section 6 of the Madras Revenue Recovery Act does not impliedly repeal section 7 of the Regulation; for section 6 seems to provide only two mutually exclusive alternatives, *viz.*, the case where there is a *sanad* and the case where there is not. In the next place, though section 7 of the Madras Permanent Settlement Regulation is an absolutely general section, and though, on a reference to section 3 of the same Regulation, it is found that it was assumed that every *zemindar* or proprietor of land shall be granted a *sanad*, yet whether or not section 6 of the Act by implication repeals section 7 of the Regulation, in either case it would appear that, after section 6 of the Madras Revenue Recovery Act was passed, there are in the contemplation of the Legislature two classes of proprietors of land, *viz.*, holders of *sanads* and others than holders of *sanads*, and hence it would seem to be necessary for a defaulter, who alleges that he holds a *sanad* and on the strength of such allegations claims some relief, to prove his allegation. The defaulter in this case (who is the appellant) relied upon certain alleged admission on the part of the 1st respondent which, it was contended, showed that the defaulter was a *sanad* holder. As the learned Chief Justice has pointed out, there are no admissions sufficient to establish the fact that the defaulter is a *sanad*-holder. I mean there is nothing on the record of such a nature as to amount to any admission of the fact that the appellant is a *sanad*-holder and there was sufficient time, after the question had been definitely raised in Court previous to the trial of the suit, for the appellant to give satisfactory evidence of the alleged fact at the final hearing of the suit. Therefore, it seems to me that, for the purposes of the present proceedings it cannot be assumed that the appellant is a *sanad*-holder, under section 6

of the Madras Revenue Recovery Act. If that is so, then the mode of recovering the arrears of revenue adopted in the present case cannot be held to have been illegal. It would follow, therefore, that the appeal should be dismissed with costs.

The judgment in Appeal No. 21 of 1911 follows.

Appeals dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 139 OF 1912.

February 21, 1913.

Present:—Mr. Justice Banerji.

GANGA CHARAN—APPLICANT

versus

BADDEL AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Where appeal lies.

No revision lies where an appeal is allowed.

Civil revision against the order of the Munsif of Fetehpur, dated the 28th of August 1912.

Mr. *Purushottam Das Tandan*, for the Applicant.

The Hon'ble Mr *Gokul Prashad*, for the Opposite Party.

JUDGMENT.—The preliminary objection raised on behalf of the opposite party, that an application for revision does not lie, must prevail. The suit out of which this application has arisen was filed in the Court of a Munsif and was a suit for a declaration of the plaintiff's right. That suit was dismissed by the Munsif on the ground that it was not maintainable in his Court. An appeal lay from the decision of the Munsif and the remedy of the applicant was an appeal. He cannot apply in revision in a case in which there was another remedy. I dismiss the application with costs.

Application dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 179 OF 1911.

January 29, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

SHANKAR VISHVANATH WAGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

UMABAI SADASHIV WAGLE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Insurance policy—Wife named as beneficiary—Attachment in execution of decree against assured's assets—Transfer of Property Act (IV of 1882), s. 130—Trusts Act (II of 1882), s. 5—Married Women's Property Act (III of 1874), s. 6 inapplicable to Hindus—Contract Act (IX of 1872), s. 2 (i)—Suit by person not party to contract.

A. had effected a policy of insurance upon his own life for the benefit of his wife. The Insurance Company had promised, on proof of the death of the assured, to pay the policy monies to the trustee or trustees who might be appointed by the assured by separate writing and in default to the beneficiary, his widow. *A.* died without appointing any trustee or making an assignment of the policy in writing. His creditors sought to attach the policy in execution of their decrees against *A.*'s estate:

Held, (1) that the policy, on *A.*'s death, formed part of his estate, the right of action against the company being in his executors or other representatives untrammelled by any trust in favour of his wife;

(2) that *A.* could divest himself of his beneficial interest under the policy only by assignment in writing as provided by section 130 of the Transfer of Property Act, or by signed declaration of trust as provided by section 5 of the Trusts Act.

Bhikji v. *Dattatraya*, 2 Bom. L. R. 888, not followed.

Act III of 1874 does not apply to Hindus so a Hindu wife cannot claim the benefit of its provisions.

There is nothing in the Contract Act to show an intention that a person not a party to the contract can sue on it. So far as it goes, section 2 (*i*) is an indication to the contrary.

First appeal from the decision of the first class Subordinate Judge at Balgaum, in Suit No. 584 of 1910.

Mr. *S. S. Patlkar*, for the Appellants.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—The defendants are judgment-creditors of Sadashiv Nilkanth, the deceased husband of the plaintiff. In execution of their decree they attached a policy of insurance effected by the deceased upon his own life. The policy was expressed to be for the benefit of his wife, and the plaintiff, therefore, applied to raise the attachment. Her application being rejected she filed this

suit for a declaration that the policy is not liable to attachment in execution of the defendants' decree.

The policy is attachable if it falls within the description contained in section 60 of the Civil Procedure Code as "a security for money or other saleable property belonging to the judgment-debtor over which he had a disposing power which he might exercise for his own benefit". The policy is a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the Company promise on proof of the death of the assured to pay the policy monies to the trustee or trustees who may be appointed by the assured by separate writing and in default of trustees to the beneficiary (*i. e.*, the widow of the assured) and if the beneficiary be dead to the assured's heirs, executors, administrators or assigns. Unless and until trustees should be appointed on behalf of the wife it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest under the policy only by assignment in writing as provided by section 130 of the Transfer of Property Act or by signed declaration of trust as provided by section 5 of the Trusts Act. He adopted neither course. The policy on his death, therefore, formed part of his estate, the right of action against the Company being in his executors or other representatives untrammelled by any trust in favour of his wife. See *Cleaver* v. *Mutual Reserve Fund Life Association* (1). This distinguishes the case from *In re Flavell*, *Murray* v. *Flavell* (2). We were asked to adopt the view taken by a Bench of this Court in *Bhikaji* v. *Dattatraya* (3) that the policy was given in effect to the wife subject to the condition that she should survive the donor. In that case the rights of creditors of the assured did not come under consideration nor do the provisions of Chapters VII and VIII of the Transfer of Property Act appear to have been brought to the notice of the Court. We cannot, therefore, regard it as any authority upon the point which we have to decide.

It was in order to confer upon wives claiming under such policies the position of *cestuis que trustent* that the Married Women's Property Act, 1870, section 10, was enacted which in India is re-produced in section 6 of Act III of 1874. In *Holt* v. *Everall* (4) Lord Justice Mellish said:—"Supposing that before the Act a married man had effected a policy on his own life, it might be doubtful whether, before the Act, a simple declaration on the face of the policy that it was for the benefit of his wife and for his children, would have been sufficient to make a trust for the wife and children". It appears from Bunyan on Insurance (page 463) that before 1870 the difficulty was sometime overcome by getting the Insurance Company to declare themselves trustees for the wife. This, however, has not been done in the present case, indeed the Company stipulate by the policy that it shall have no concern with or be responsible for the validity or proper execution of any trusts to which the sum payable may be subject; and as the Act of 1874 does not apply to Hindus, the plaintiff cannot claim the benefit of its provisions.

It was, however, argued that as under section 2 clause (*d*) of the Contract Act the consideration might be provided by some other person, the plaintiff could sue on a policy the consideration for which was provided by her husband. There is, however, nothing in the present case to show that the plaintiff was either the promisor or the promisee and, therefore, a party to the agreement. There is nothing in the Act to show an intention that a person not a party to the contract can sue on it. So far as it goes section 2 (*i*) is an indication to the contrary. In *Samuel Pillai* v. *Ananthanatha Pillai* (5), relied for the plaintiff, the contract was between the plaintiff and the defendant though a third party supplied the consideration. In *Chinnaya Rau* v. *Ramaya* (6) there was also a direct agreement between the plaintiff and the defendants.

(1) (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180.

(2) (1883) 25 Ch. D. 89; 53 L. J. Ch. 185; 32 W. R. 102.

(3) 2 Bom. L. R. 888.

(4) (1876) 2 Ch. D. 266 at p. 275; 45 L. J. Ch. 433; 34 L. T. 599; 24 W. R. 471.

(5) 6 M. 351.

(6) 4 M. 137.

For the above reasons, we reverse the decree of the lower Court and dismiss the suit with costs throughout on the plaintiff.

Decree reversed.

OUDH JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 77 OF 1912.

August 28, 1912.

Present:—Pandit Kanhaiya Lal, A. J. C.

DURGA—DEFENDANT—APPLICANT

versus

TOTA RAM, DEAD AND AFTER HIS DEATH *Musammat* CHHUTKI—PLAINTIFF—RESPONDENT.

Simple money-bond—Right to sue in default of any of the conditions in the bond.

Where a simple money-bond provided that the money shall be re-paid with interest within three years, the interest should be paid monthly, that if default was made in the payment of interest for six months, the creditor would be at liberty to realize the principal and interest due on the bond without waiting for the expiry of the said term or after the expiry of the said term, whichever he thought proper:

Held, that, as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for re-payment, whether the interest for the first six months was paid, or not, the plaintiff's claim could not be regarded as barred by time because he chose to stick to the longer term.

Sheo Narain v. *Ram Din*, 11 Ind. Cas. 526; 14 O. C. 129; *Reeves* v. *Butcher*, (1891) 2 Q. B. D. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626, distinguished.

Application for revision against the decree of the Judge of Court of Small Causes, Lucknow City, dated 8th May 1912.

Babu *Lachman Das*, for the Applicant.

Mr. *Daya Kishen Seth*, for the Opposite Party.

JUDGMENT.—This was a suit for the recovery of money due on a bond executed by Durga, the defendant, in favour of Tota Ram, the plaintiff, on the 28th November 1907. The bond in question provided that the money shall be re-paid with simple interest thereon at Rs. 2 per cent. per mensem within three years; that interest shall be paid monthly, and that, if default was made in the payment of interest for six months, the creditor would be at liberty to realise the principal and interest due on the said bond, without waiting for the expiry of the said term or after the expiry of the said term, whichever he thought proper. The plaintiff alleged that the defendant paid Rs. 8 in part payment of the interest due for the first six months.

The Court below decreed the claim. In revision it is contended, on behalf of the defendant, on the strength of the decisions in *Reeves* v. *Butcher* (1) and *Sheo Narain* v. *Ram Din* (2), that the cause of action accrued to the plaintiff on non-payment of interest due for the first six months and that the claim was, therefore, barred by limitation.

The suit was filed on the 4th April 1912. The bond was unregistered. If the cause of action accrued to the plaintiff on the 28th May 1908, when the interest for the first six months fell due and was not waived awaiting the expiry of the longer term allowed by the bond, the claim was certainly barred by time. But the bond in suit specifically stated that if interest was not paid for the first six months, the plaintiff could either sue for the recovery of the whole money due on the bond at once without waiting for the expiry of the term or might do so after the expiry of the said term, if the latter course appeared to him to be proper. The bond in suit clearly gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for the re-payment, whether the interest for the first six months was paid or not. The plaintiff chose to stick to the longer term and his claim cannot, therefore, be regarded as barred by time.

The decision in *Sheo Narain* v. *Ram Din* (2) does not apply because that was a case of an instalment bond governed by Article 75 of the Limitation Act. The decision in *Reeves* v. *Butcher* (1) might have applied, had the bond in suit not expressly permitted the plaintiff to wait till the expiry of the original term, whether the interest for the first six months was paid or not.

In *Ball* v. *Stowell* (3) certain debtors executed a bond agreeing to re-pay the amount secured by the same within three

(1) (1891) 2 Q. B. D. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 426.

(2) 11 Ind. Cas. 526; 14 O. C. 129.

(3) 2 A. 322.

years from the date of the bond and covenanting to pay every half-year interest on the same and also to pay the premia on certain policies of insurance made over to the plaintiff by way of collateral security. In the event of the failure in payment on the due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond further provided that it shall be optional with the obligee to claim and, if necessary, to sue for the full amount of the bond on the failure of any one or more stipulated payments, on the full expiry of the period of three years. Stuart, C. J., and Spankie, J., held that the bond was not an instalment bond and, therefore, Article 75, Schedule II, of the Limitation Act was inapplicable.

In *Narain Babu* v. *Gouri Persad* (4) where a bond provided that interest shall be paid monthly and that the principal shall become due within six months from the date of its execution and further provided that, if the interest was not paid according to the terms of the bond, the creditor shall be at liberty to realize the principal and interest in any manner he might choose without waiting for the expiry of the term of six months originally fixed, it was held, that a suit on the bond brought within three years from the date specified therein for payment was governed by Article 65 of Act IX of 1871 and was not barred by time. The same principle was recognised in *Har Narain* v. *Beni Pershad* (5). In *Perumal Ayyan* v. *Alagirisami Bhagavathar* (6), Sir Arthur Collins, C. J., and Benson, J., held that, when a hypothecation bond provided for the payment of a certain sum on a certain date with interest in the meantime payable monthly, and stipulated that in case of default in payment of interest, the principal and interest shall become payable at once on demand, a suit for the money due on that bond was governed by Article 132 of the Limitation Act. There was, however, no covenant in that hypothecation bond expressly permitting the creditor to wait for the expiry of the longer term or to sue before its expiry as he thought proper. Where such a condition exists, the question is not one of waiver but of a pure contract and the creditor is entitled to adopt either of the two alternatives expressly contemplated by the bond, Article 65 or 80 of the Limitation Act applies to such cases, and the debtor has no right to compel the creditor to stick to the shorter term. The claim was, therefore, within time.

The application for revision fails and is dismissed with costs.

Application dismissed.

(4) 5 C. 21.
(5) 8 O. C. 77.
(6) 20 M. 245; 7 M. L. J. 222.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 595 OF 1911.

August 1, 1912.

Present:—Mr. Justice Rattigan.

JESA RAM—DEFENDANT—APPELLANT

versus

CHINKA MAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Custom—Pre-emption—Multan Tahsil—Transfer of adhlapi *tenure.*

The custom of pre-emption exists in *Mauza* Fajja, Tahsil Multan, in respect of a transfer of land upon what is known as an *adhlapi* tenure.

Second appeal from the order of the Divisional Judge, Multan Division, dated 6th March 1911, confirming that of the District Judge, Multan, dated 25th April 1910, decreeing plaintiff's claim.

Mr. *Vaughan*, (for Mr. *Oertel*), for the Appellant.

Mr. *Dalip Singh*, for the Respondents.

JUDGMENT.—The sole question is whether the custom of pre-emption exists in *Mouza* Fajja, Tahsil Multan, in respect of a transfer of land upon what is known as an *adhlapi* tenure. That the right is not recognised by custom in the Shujabad Tahsil of the Multan District is clear from the judgment of the Division Bench in Civil Appeal No. 885 of 1903, but that it is fully recognized by the custom of the Multan Tahsil is established by *Mulchand* v. *Mansa Ram* (1), an authority which was cited with approval in the unreported judgment above referred to. In view of these authorities the present appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

(1) 157 P. R. 1883.

MADRAS HIGH COURT.

CIVIL SUIT No. 280 OF 1911.

February 11, 1913.

Present:—Mr. Justice Wallis.

MULLANGI VENKATARANGAM CHETTY AND ANOTHER—PLAINTIFFS

versus

M. VENKATASUBBAMMAH AND OTHERS—DEFENDANTS.

Adoption—Evidence of adoption—Recitals in deeds—Evidence Act (I of 1872), ss. 32 (5) and (6), 50 Civil Procedure Code (Act V of 1908), s. 92—Suit to remove a trustee—Suit to enforce private rights.

Where the fact to be proved was an adoption alleged to have taken place about 40 years ago, the adopted son being dead:

Held, that under section 50 of the Evidence Act, evidence of enjoyment of the properties of the adoptive father by the alleged adopted son and evidence of acquiescence of such enjoyment by persons who but for the adoption would have been entitled to possession of such properties is admissible to prove the adoption:

Held, also, that recitals in sale-deeds and mortgage-deeds by the adopted son and in his Will, in which he described himself as such adopted son were admissible under section 32 (5) and (6) of the Evidence Act.

Illustration (*k*) to section 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement.

A Hindu widow who was the holder of a hereditary office of trustee of a public charity having alienated the office, the next reversioner contended that by reason of the said alienation the office had become vacant and that he was entitled to immediate possession:

Held, that the effect of the alienation was not to determine the estate of the trustee and let in the next reversioner, but that such an illegality was a good ground for removal of the trustee in a proper suit.

Pydigantam Jagannadha Row v. *Rama Doss Patnaik*, 28 M. 197 at p. 200, explained.

Held, also, that the next reversioner was entitled to have the widow removed from the office of trustee and that section 92 (2), Civil Procedure Code, was no bar to the suit.

The scope of section 92 (2) is to protect the right of the public and it is not aimed at the infringement of private rights and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy.

FACTS.—The plaintiffs claim that the suit properties were set apart by their ancestors about the year 1815 for the performance of certain *Utsavams* in connection with the shrine of Sri Gajendravarada Swami, located in Sri Parthasarathy Swami Koil, Triplicane, Madras. They state that their father Mullangi Venganna Chetty and the 1st defendant's husband were jointly conducting the charities, that Venganna Chetty died in 1898 leaving the plaintiffs, who were then minors, his sons, that Subraya Chetty died in the year 1899 and that the 1st defendant, his widow on the 12th December 1900 assigned the office and the properties belonging thereto by a deed bearing that date in favour of defendants Nos. 2 and 3. The plaintiffs claim that the office is hereditary in their family and in that Subraya Chetty and after his death his widow the 1st defendant conducted the charities on his or on her behalf and on behalf of the plaintiffs who were then minors. The plaintiffs state that the alienation by the 1st defendant of her office as joint trustee is invalid, cannot affect their rights as joint trustees and confers no rights on defendants Nos. 2 and 3. They claim that by reason of the said alienation, she has forfeited her right to the office and has rendered herself liable to be removed from the same. They further claim in the alternative that in the event of the Court finding that the said Subraya Chetty was the sole trustee, they, as his nearest reversioners, are entitled to claim that office at once. They state that in any event the alienation cannot confer upon defendants Nos. 2 and 3 any title beyond a right to the life-interest of the 1st defendant. The plaintiffs pray for judgment declaring that they are the present trustees and are entitled to the present possession of the properties, and that the alienation is void. They also pray for a declaration that (if the Court finds they are not entitled to the office on the ground that their father was a joint trustee) they are the nearest reversioners of Subraya Chetty and that by reason of the alienation they have become entitled to the present enjoyment of the office.

The plaintiffs ask that if necessary the 1st defendant should be removed from her office as trustee, for possession and accounts.

The defendants in their written statement deny that the properties were set apart by the ancestors of the plaintiffs, that the office is hereditary in the family of the plaintiffs, that the plaintiffs are the nearest reversioners of Subraya Chetty, or that their father is a joint trustee with Subraya Chetty. The following issues were raised:—

1. Are plaintiffs the nearest reversioners of Subraya Chetty deceased?

2. Were the suit properties dedicated to charity by the plaintiffs' ancestors?

3. Was the management of the charities vested in the plaintiffs' family, and are the plaintiffs now entitled thereto?

4. Is the suit barred by limitation?

5. Is the alienation of the suit office by the 1st defendant valid and binding?

6. Have the plaintiffs any cause of action?

7. To what relief are plaintiffs entitled?

The suit was filed within 12 years from the date of alienation.

At the hearing the plaintiffs did not press their claim that their father was a joint trustee with Subraya Chetty. They urged that they were the nearest reversioners of Subraya Chetty and they were entitled to complete relief. They were not able to trace descent of Subraya Chetty and themselves to a common ancestor. They filed the deed of alienation executed by the 1st defendant which contained a recital to the following effect:—

"The properties were set apart for charities by the ancestors of Subraya Chetty. His great-grandfather, afterwards his grandfather and then his father managed the trust. After his father's death while Subbarayulu Chetty was a minor, a member of the family Venkatarangam administered it for some time. After Venkatarangam, his widow Annapoornamma managed it. The latter handed back the charity to Subraya Chetty."

The plaintiffs contended that this was an admission binding on defendants Nos.2 and 3 that Venkatarngam was a *dayadi* of Subbarayulu Chetty. His widow Annapoornammal adopted Venganna their father. This adoption was denied by the defendants. On behalf of the plaintiffs several sale-deeds and mortgage deeds were put in wherein Venganna was described as adopted son of Venkatarangam. A Will of Venganna was also put in containing a similar recital. Collector's certificates were also filed containing similar statements. Under section 32 (5) and (6) of the Evidence Act it was contended that these statements were evidence of the relationship alleged. It was next contended that Venganna disposed of several properties which admittedly belonged to Venkatarangam. The sale and mortgage-deeds that were put in related to such properties; on behalf of the plaintiffs it was argued that if the adoption was not true these properties would have been claimed by the reversioners of Annapoornamma among whom would be Subarayulu Chetty and that this long acquiescence by them in the dealings with these properties by Venganna afforded evidence of the relationship alleged, under section 50 of the Evidence Act.

The several other contentions raised for the plaintiffs and the defendants are dealt with fully in the judgment.

Messrs. *Venkatasubba Rao* and *Radhakrishnaiya*, for the Plaintiffs.

Messrs. *C. P. Ramaswamy Aiyar* and *G. Krishnaswamy Aiyar*, for the Defendants.

JUDGMENT.—This is a suit brought by the next reversioners of the deceased Subaraya Chetty, who died in 1899, against his widow Mullangi Venkatasubbammah, who on his death became trustee for her life in succession to him of the charity which is the subject of this suit. On the 12th December 1900, finding according to her evidence, that she was old and unable to manage the charity and that the reversioner, Thambu Chetty, was also old and infirm and left her to do what she liked with it, she alienated it to the 2nd and 3rd defendants who were maternal relations of her husband. The plaintiffs claim that they are the next reversioners and that this alienation of the trust was illegal, and they ask for a declaration that they are the present trustees of the endowment referred to and entitled to possession of the bazaars and to conduct the charities specified in the schedule, that the alienation may be declared void and that they may be declared to be the nearest reversioners and to have become entitled to the present enjoyment of the office by reason of the alienation and that, if necessary, the defendant may be removed from her office as trustee of the endowment.

Now it is not denied on the part of the defendants—it could not be denied, that the widow has no power to alienate the trusteeship; their main defence rests upon this that the plaintiffs are not the next reversioners of the 1st defendant's husband and have no rights in the matter. The plaintiffs are the sons—it has not been seriously disputed—of one Mullangi Venkanna who according to their case was the adopted son of Mullangi Venkatarangam, adopted by his wife Annapoornamma after his death. In the very

deed of release, Exhibit A, by the 1st defendant to the 2nd and 3rd defendants, it is recited that this Mullangi Venkatarangam was a close relation of the 1st defendant's husband, Mullangi Subaraya Chetty, and for some years had managed the charity during his life-time and that his widow, under his directions, had handed it over, after his death, to Subaraya Chetty who had then become of age to manage it himself. In view of this and other evidence in the case, it is not now disputed by the defendants that this Venkatarangam was a *dayadi* of the 1st defendant's husband and the only question that remains as to the pedigree is whethere it has been proved that the plaintiff's father Venkanna was the adopted son of Venkatarangam. Now the alleged adoption must have taken place, if it took place at all, a very long time ago, as Venkatarangam would appear to have died about the year 1862—at least it is so stated in a plaint filed by the defendant—and only one old lady has been called to speak to it and she gives, as might be expected, a very confused account, at any rate, as to the date. But there is a strong body of documentary evidence and evidence of conduct going to establish the adoption. Though it is proved that there were in existence two *dayadis* of the deceased Venkatarangam one Thambu Chetty and 1st defendant's husband Subarayulu, yet it is most clearly proved that even after death of Annapoorni the properties of the deceased Venkatarangam were enjoyed by this man Venkanna who always described himself Mullangi Venkanna as his son; and that this enjoyment which was known to the reversioners was acquiesced in by them and no claim was ever put forward on their behalf. A rather weak suggestion was made by one of the witnesses that the 1st defendant's husband who was a Sub-Registrar was a man of too much dignity to assert any title to these properties, but I think that may be disregarded; and it certainly cannot apply to the other *dayadi* Thambu Chetty. Now under section 50 of the Evidence Act I think that the conduct of all parties is very strong evidence that there really was an adoption. Then there is important documentary evidence contained in sale-deeds and mortgages by the deceased Venkanna and in his Will in which he describes himself as the adopted son of Venkatarangam.

This evidence has been tendered and admitted under sub-section 5 of section 32 of the Evidence Act which says that "when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised," it is admissible. Mr. Kristnaswami sought to argue that though Venkanna must have had special means of knowledge whether he was adopted or not, his statement was inadmissible because it related to his own relationship. Therefore what his contention came to is this—that he wished to read the section thus: "When the statement relates to the existence of any relationship by blood, marriage or adoption between persons other than the person making the statement." Not only are those words not there and, therefore, there is no justification for inserting them, but such a construction of the section would make illustration (*k*) wrong; because illustration (*k*) says "where the question is whether *A*., who is dead, was father of *B*. a statement by *A*. that *B*. was his son is a relevant fact" and if a statement by the father that *B*. was his son is a relevant fact, I cannot see why a statement by *B*. that *A*. was his father should not equally be a relevant fact; and I am not satisfied that there is any English authority to the contrary, if that were material. It seems to me that on the plain wording of the section this evidence is admissible. Then it comes to this, this man Venkanna not only inherited the property of Venkatarangam without objection but also disposed of it in these various documents which have been put in. And then we have his Will in which he described himself as the adopted son of Venkatarangam, and as showing his connection and his relations with the husband of the 1st defendant, there is this very noteworthy circumstance that he made Subbarayulu his executor, and provided that if Subbarayulu decided to adopt one of his sons no objection was to be raised to such adoption. There is absolutely no reason for supposing that that Will was not made *bona fide* and did not represent the real state of the relations existing between the parties.

For the defence we have only had som

exceedingly unsatisfactory and mostly interested evidence. The first witness, however, for the defence, who was called to speak to the granting, or non-granting of certain temple honours to the plaintiffs and their father stated that Venkanna and the plaintiffs were recognised as *dayadis*; in cross-examination he stated that Venkanna was the 1st defendant's husband's *dayadi*. And the 2nd witness, the 1st defendant who made the alienation in favour of the 2nd and 3rd defendants and is interested in supporting it, in her examination in chief, only went so far as to say "I am not aware whether Venkatarangam had adopted Venkanna" and she had to admit that she knew, but said that she did not know if the plaintiffs were sons of Venkanna. This evidence seems to me exceedingly unreliable. Venkanna, she says, used to go to her house and there were disputes; "he used to say 'we are *dayadis*;' my husband used to say 'you are not blood relations, you are not our *dayadis*.'" I have no hesitation whatever in disbelieving this evidence. It appears further both from her evidence and that of the 3rd defendant that, when as Venkatarangam's widow she sold a house which formed part of her husband's estate, she and the purchasers considered it necessary to take a release from the plaintiffs in which their present claims are clearly stated by them, and to pay them Rs. 1,200 in consideration of their giving up all objections to her alienations. The plaintiffs appear to be now in poor circumstances owing to the alienations made by their father, but it certainly seems to me a very strong circumstance in support of their case that this release should have been taken. The evidence of the 3rd defendant did not impress me as satisfactory. He did not admit that he actually took the plaintiffs to Mr. Venkatasubba Row to give instructions for the preparation of the plaint, but he admits that he went there and that he gave instructions as to the whole of the pedigree except the adoption. As against his evidence here I set his conduct in insisting on getting a release from the plaintiffs when he became one of the purchasers of the property I have mentioned. The only documentary evidence relied on, on the other side, is a plaint which was filed in 1873 by another *dayadi* against Subbarayulu the 1st defendant's husband and Annapoornammal. It complains that certain property belonging to that branch had been looked after by Annapoornam's husband Venkatarangam during his life-time and had afterwards been looked after by the 1st defendant's husband Subaraya Chetty during the life-time of the widow of the last owner, and that, on her death, Subaraya Chetty was appropriating the rents and profits to himself, and that he and Annapoornam—so it is alleged—were seeking to have the property registered in their own names. All that appears with regard to this suit is that five years afterwards in 1878 it was dismissed for want of prosecution. It does not even appear that any pleadings were ever filed on the other side, or even that the parties were served, except in so far as a Vakil appeared for them on the occasion when the suit was dismissed. I do not think that any reliance whatever is to be placed upon what is asserted or omitted in a plaint of that character and it is, of course, possible that the plaintiff in that suit may have been interested in ignoring or denying the adoption now in question.

On the whole I have come to the conclusion that the plaintiffs have made out their case. It is true that there is no satisfactory evidence, on which I should be prepared to act, of witnesses who actually saw the adoption. Nor is there any such evidence that the adoption was made with the consent of the *sapindas*. As to that, there is the indirect evidence of conduct, because I find that Venkanna was treated as the adopted son of Venkatarangam by the 1st defendant's husband for years, when it would have been for his interest to dispute his adoption if he could. According to the well-known cases* which have been referred by Mr. Venkatasubba Row in the case of adoptions which occurred, at any rate, forty years ago, one cannot expect actual evidence that all the proper formalities were observed, and it is quite sufficient to show that the parties have always been treated as adopted and have enjoyed the rights of adopted sons. I find, therefore, that, in so far as the

**Rajendro Nath Holdar* v. *Jogendro Nath Holdar*, 14 M. I. A. 67; 7 B. L. R. 216; 15 W. R. (P. C.) 41; 20 Eng. Rep. 711; *Anandrav Sivaji* v. *Ganesh Eshvant Bokil*, 7 B. H. C. R. App. 33 at p. 35.

adoption is concerned, the plaintiffs have established their claim The next question is, to what relief are plaintiffs entitled? That the alienation was illegal is not disputed nor is it claimed that the suit is barred by limitation. A case of *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (1) was referred to as to the consequences of illegal alienation of this kind. As I read that case, all that was meant to be laid down was not as was first contended for the plaintiffs, that the effect of the alienation was to determine the estate of the trustee and let in the next reversioner, but that such an illegality was a good ground for the next reversioner to sue for the removal of the trustee in a proper suit. The language of Mr. Justice Subramania Iyer at pages 200 and 201 seems to me to be susceptible of that meaning and such a position also seems to me to be in accordance with good sense.

It is, however, contended that under section 92 of the Code of Civil Procedure no suit lies to remove a trustee of a public charitable endowment without the sanction mentioned in the section. The new section, no doubt, provides, sub-section (2) that no suit claiming any of the reliefs specified in sub-section (1), one of which is removing any trustee, shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section; and at first sight that would appear to be a bar to the present suit. Even so the scope of the section is to protect the rights of the public, and it is not aimed at the infringement of individual rights, and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. In Woodroffe and Ameer Ali's Edition of the Code, page 350 (first edition) the learned authors discuss the question and appear to be of opinion that such a case does not come within it and that, if a general administration of the trust which has included the removal of the trustee is necessary to provide an efficient remedy for the infringement of the individual right in question, such general administration may be granted without regard to the provisions of the section. Applying these principles to the present case, I hold that in view of what has happened it is necessary for the protection of the plaintiffs' rights as reversioners that the 1st defendant should be removed from the office of trustee by reason of misconduct in alienating it to the 2nd and 3rd defendants, and I accordingly remove her and declare that the plaintiffs as next reversioners are entitled to succeed as trustees and give them a decree against the defendants for possession of the trust properties with costs.

The trustees to file an account of trust properties came to their hands since 12th December 1900, and the case to be referred to Chambers for taking the necessary accounts, defendants Nos. 2 and 3 to file account within two months seven days for objections.

(1) 28 M. 197 at p. 200.

OUDH JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 79 OF 1912.

August 28, 1912.

Present:—Pandit Kanhaiya Lal, A. J. C.

SHEO DULARE—PLAINTIFF—APPLICANT

versus

Musammat BATASHA—DEFENDANT—OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), s. 72—Property hypothecated sold in execution of a simple money-decree—Sale likely to imperil mortgagor's security—Usufructuary mortgagee not entitled to mortgage money nor to a personal decree.

The plaintiff was the mortgagee in possession of certain plots of land. Subsequent to the mortgage the said plots were attached and proclaimed for sale in execution of a simple money-decree against the mortgagor. On plaintiff's objection the plots were ordered to be sold subject to his lien. The plaintiff thereafter paid the decretal money and filed the present suit against his mortgagor for recovery of the money paid with interest:

Held, that section 72 of the Transfer of Property Act is intended to apply to cases where the forfeiture or sale is likely to imperil the mortgagor's security:

Held, further, that if the plaintiff exercised his right by virtue of his having been a usufructuary mortgagee, that money became a part and parcel of the mortgage-money and he was not entitled to a personal decree for that amount.

Muhammad Husain v. *Sheodarshan Das*, 4 A. L. J. 176; A. W. N. (1907) 71, *Abdul Qayum* v. *Sadr-ud-din Ahmad Khan*, 27 A. 403; 2 A. L. J. 23; A. W. N. (1904) 11, referred to.

Application for revision against the order of the Subordinate Judge, Rai Bareli, dated 23rd February 1912, upholding that of the

Munsif of Rai Bareli, dated 28th August 1911.

Mr. *Hargovind Das*, for the Applicant.

Mr. *I. Masaldin*, for the Opposite Party.

JUDGMENT.—*Musammat* Batasha was an under-proprietor of certain plots in *Mouza* Shora. On the 16th June 1909, she mortgaged the same with possession in favour of Sheo Dulare, the plaintiff-applicant. Bhola subsequently got the said plots attached and proclaimed for sale in execution of his simple money-decree against *Musammat* Batasha. On the objection of the plaintiff the plots were ordered to be sold subject to his lien. The plaintiff thereupon paid the decretal money due to Bhola and filed the present suit for its recovery with interest thereon at Rs. 2 per cent. per mensem from *Musammat* Batasha personally.

The Court below dismissed the claim on the ground that section 69 of the Contract Act did not apply as the plaintiff had no jurisdiction for making the payment if his security was not in danger. Under section 72, clause (*b*), of the Transfer of Property Act, when, during the continuance of a mortgage, the mortgagee takes possession of the mortgaged property, he is entitled to spend such money as is necessary for its preservation from destruction, forfeiture or sale and to add the money so spent to the principal sum secured by the mortgage with interest thereon at the rate payable on the principal amount. If the plaintiff exercised his right by virtue of his having been a usufructuary mortgagee, that money became a part and parcel of the mortgage money and he was not entitled to a personal decree for that amount. Section 72 of the Transfer of Property Act is intended to apply to cases where the forfeiture or sale is likely to imperil the mortgagor's security. In *Muhammad Husain* v. *Sheodarshan Das* (1) and *Abdul Qayum* v. *Sadrud din Ahmad Khan* (2), a usufructuary mortgagee was allowed, under those circumstances, to retain possession until the amount due in respect of the original mortgage and the amount paid to protect the mortgaged property from sale were both re-paid. The Court below was, therefore, justified in not passing a personal decree against the mortgagor. It is not shown that the mortgaged property is insufficient for the purposes of paying up the amount originally secured by the mortgage and that paid by the usufructuary mortgagee under section 72 of the Transfer of Property Act. The original mortgage-deed has not been filed and there is nothing to show that there is a personal covenant therein making the other property of the mortgagor liable for any payment made by the mortgagee to protect the mortgaged property. The payment was made by the plaintiff for his own benefit or for the benefit of his security.

The application is, therefore, dismissed with costs.

Application dismissed.

(1) 4 A. L. J. 176; A. W. N. (1907) 71.
(2) 27 A. 403; 2 A. L. J. 23; A. W. N. (1905) 11.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1069 OF 1912.

May 1, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Lyle.

BALGOBIND BHAGAT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NAGINA MISIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 20—Mortgage of occupancy holding—Sub-mortgage by mortgagee—Right of sub-mortgagee to recover money.

An usufructuary mortgage of property, consisting partly of a fixed-rate holding and partly of an occupancy holding, was made in favour of *N.* in 1906. In 1909 *N.* sub-mortgaged his right under the mortgage to *B*:

Held, that *B.* could recover his money from *N.* inasmuch as no interest in occupancy holding had been transferred to him under the deed of 1909.

Second appeal from the decision of the District Judge of Ghazipur, dated 21st June 1912.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—This apppeal arises out of a suit in which the plaintiffs claimed the sum of Rs. 499-15-0 principal and Rs. 270 interest, in the alternative they claimed that they might be put into possession of certain property. The Court of first instance gave a simple money-decree, the lower Appellate Court reversed the decree of the Court of

of first instance and dismissed the plaintiff's suit, hence this appeal.

It appears that certain property consisting partly of a fixed-rate holding and partly of an occupancy holding was transferred by way of usufructuary mortgage to Nagina Misir in 1906. In 1909 Nagina Misir purported to make a a sub-mortgage of the same property in favour of the plaintiffs. There can be no doubt that the mortgage of 1906, in so far as it purported to mortgage an occupancy holding, was absolutely void. Indeed we think though it is not essential for the decision of the present case to decide the point that the whole mortgage of 1906 was invalid. The defendants contend that the very same doctrine ought to be applied to the sub-mortgage and that the contract being an illegal one the plaintiffs should not be allowed to get even a simple money-decree. If the mortgagees under the mortgage of 1906 were unable to recover either the property or to get separate money decree for the amount lent (and it is admitted they did not get possession) it would be on the ground that the contract was an illegal contract. We have, therefore, to see whether the contract which was made in 1909 between the plaintiffs and the defendants was also illegal. Section 20 of the Tenancy Act provides that the interest of an occupancy tenant is not transferable save as therein mentioned. But in 1909 Nagina Misir was not an occupancy tenant nor had he any of the rights of an occupancy tenant vested in him. The transfer to him by the occupancy tenant was absolutely void at least in respect of the occupancy holding.

Therefore, it seems to us that Nagina Misir, not being an occupancy tenant, did nothing in contravention of section 20 of the Tenancy Act when he executed the sub-mortgage. He really did nothing worse than if he had purported to make a mortgage of property which did not belong to him. In the absence of fraud there would be no illegality in this. We, therefore, think that under the circumstances of the present case the plaintiffs were entitled to a simple money decree. We, accordingly, allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 660 OF 1911.

December 13, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

KILARU KOTAYYA—DEFENDANT—APPELLANT

versus

POLAVARAPU MALLAYYA—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 39—Cancellation of sale—Consideration not paid or inadequate.

Where plaintiff sought to set aside a sale-deed executed by him in favour of the defendant on the ground of fraud, undue influence and absence of consideration and also inadequacy of consideration but subsequently abandoned the plea of fraud and undue influence:

Held, that the non-payment or inadequacy of consideration was not sufficient to justify cancellation of a deed of sale.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 319 of 1909, presented against that of the Additional District Munsif of Bezwada, in Original Suit No. 23 of 1909.

Mr. *T. Prakasam*, for the Appellant:—Pleas of fraud and undue influence were abandoned in Courts below. Want of consideration or inadequacy no ground for cancellation. This is covered by authority. See *Amirthathammal* v. *Periasami Pillai* (1) Collett on Specific Relief, page 238, 1 Story's Equity 245.

Mr. *V. Ramadoss*, for the Respondent.—Fraud and undue influence not given up. Statement of District Judge in his judgment is a mistake. Gross inadequacy of sale price itself amounts to fraud.

JUDGMENT.—The plaintiff sought to set aside a deed of sale in favour of the defendant, mainly on two grounds (1) fraud and undue influence and (2) absence of consideration In the Court of trial the plaintiff's Pleader did not press the plea of fraud, and the District Judge states that the plea of undue influence was not pressed before him by the Pleader for the plaintiff. Both the Courts have found that the consideration mentioned in the sale-deed of sale, *viz.*, Rs. 800 was not paid and that it is in fact inadequate. But the non-payment or inadequacy of consideration is not sufficient to justify cancellation of a deed of sale. It being, however, found that the consideration was not paid, Mr. Prakasam, the learned

(1) 4 Ind. Cas. 507; 32 M. 325; 5 M. L. T. 255.

Counsel for the defendant, says that his client is willing that there should be a decree for Rs. 800, the amount of consideration and that this amount shall be a charge on the property.

The decrees of the lower Courts will, therefore, be modified by refusing the prayer for cancellation of the sale-deed and giving the plaintiff a decree for Rs. 800 with interest at Rs. 6 per cent. from this date to be recovered by sale of the property in case of non-payment within six months of this date.

Each party will bear his own costs throughout.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 965 OF 1910.

July 13, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

JIWAN SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

PAL SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Custom—Adoption—Randhawa Jats—Mauzah *Bhangli Tahsil and District Amritsar*—Riwaj-i-am—*Degree of relationship immaterial—Age limit only recommendatory — Execution of deed — Sufficient — Registration sufficient publicity—No other ceremonies necessary.*

The *Riwaj-i-am* of the Amritsar District (1865) permits a *Randhawa Jat* to adopt a person from among his collaterals irrespective of his degree of relationship to him, and the provision as regards the age of the adopted son is of a recommendatory and not of a mandatory character. The execution of a deed of adoption before the brotherhood is sufficient, and the registration of it is sufficient publicity of adoption, and the non-performance of other ceremonies is immaterial.

Budh Singh v. *Mula Singh*, 40 P. R. 1905; 18 P.L.R. 1905, referred to.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated 2dd April 1909, confirming that of the Munsif, 1st class, Amritsar, dated 31st August 1909, dismissing the claim.

Mr. *J. C. Vaughan*, for the Appellants.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants against the defendants-respondents for setting aside the adoption of defendant No. 1 by defendant No. 2, evidenced by the deed of adoption, dated the 24th March 1908. Both the lower Courts have held that the adoption in question is valid, and they have accordingly concurred in dismissing the suit.

The sole question for decision in this appeal is whether under the custom applicable to the parties the adoption of defendant No. 1 by defendant No. 2 is invalid. The parties are *Jats* of *Randhawa gôt*, residents of *Mauza* Bhangali, Tahsil and District Amritsar.

Defendant No. 1, Pala Singh, is a collateral of defendant No. 2, Kahna Singh, but is related to him in the 9th degree, and at the time of adoption he was about 16 years of age. The plaintiffs-appellants are nearer collaterals of Kahna Singh, and on their behalf it is contended that according to the *riwaj-i-am* of 1865, by which the parties are governed, Kahna Singh could not have validly adopted Pala Singh (1) because he was a remote collateral of his, and (2) he was not under the age of 12 years at the time of adoption. The *riwaj-i-am*, however, permits a *Randhawa Jat* to adopt a person from among his collaterals irrespective of his degree of relationship to him, and the provision as regards the age of the adopted son must, as laid down in *Budh Singh* v. *Mula Singh* (1) page 147, last paragraph) be held to be of a recommendatory and not of a mandatory character. It is further urged that since no ceremonies were performed at the time of the adoption of Pala Singh and no publicity was given to the fact of adoption, the adoption must be declared to be invalid. As pointed out in the decision first cited, according to the *riwaj-i-am*, the execution of a deed of adoption before the brotherhood was sufficient, and the registration of it was sufficient publicity of adoption, and the non-performance of other ceremonies was immaterial.

We accordingly hold that the adoption of Pala Singh by Kahna Singh is perfectly valid, and maintaining the decree of the lower Appellate Court, we dismiss this appeal with costs.

Appeal dismissed.

(1) 40 P. R. 1905; 18 P. L. R. 1905.

LALTA PRASAD *v.* HORI LAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 303 OF 1911.

Present:—Pandit Kanhaiya Lal, A. J. C.

LALTA PRASAD and others—PLAINTIFFS —APPELLANTS

versus

HORI LAL—DEFENDANT—RESPONDENT.

Mortgage—Simple mortgage—Mortgagee entitled to possession on non-payment of instalment—Mortgagee's right to take possession on failure of mortgagor failing to deliver possession—Transfer of Property Act (IV of 1882), s. 98, non-applicability of—Simple and usufructuary mortgage—Decree for sale.

Where a mortgage-deed provided that the mortgage-money with interest at 2 per cent. would be paid in two instalments and in case of non-payment of the first instalment the mortgagee would be entitled to be put in possession of the mortgaged property taking profits in lieu of interest and in case of failure to deliver possession the mortgagee would be at liberty to take possession with the help of the Court:

Held, that the mortgage was not an anomalous mortgage but the combination of a simple and usufructuary mortgage to which section 98 of the Transfer of Property Act did not apply.

If the mortgagors did not deliver possession, the mortgage continued to retain its character of a simple mortgage and a decree for sale is, therefore, permissible.

Lingam Krishna Bhupati Deva Garu v. *Maharaja Manya Sultan Bahadur of Vizianagram*, 8 A. L. J. 594; 10 Ind. Cas. 272; 15 C. W. N. 441; 9 M. L. T. 445; 13 C. L. J. 584; 13 Bom. L. R. 447; (1911) M. W. N. 429; 21 M. L. J. 1147, followed.

Tikam Singh v. *Makrand Singh*, 6 O.C. 167, doubted.

Sardar Singh v. *The Collector of Shahjahanpur*, 10 O. C. 14, distinguished.

Held, also, that in the case of a simple mortgage a personal covenant is always implied and a decree for sale in such a case can be granted.

Appeal against the decree of the District Judge of Sitapur, dated 28th July 1911, reversing that of the Subordinate Judge, Sitapur, dated 29th April 1911.

Mr. *Man Mohan Nath Ohak*, for the Appellants.

Babu *Ishwari Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for the recovery of money due on a mortgage-bond executed by the predecessors-in-title of the defendant-respondent in favour of the predecessor-in-title of the plaintiffs on the 21st July 1868. The mortgage-bond provided that the mortgagors shall re-pay Rs. 100, out of the mortgage-money, in *Jeth* 1276 *fasli* and the balance in *Jeth* 1277 *fasli* with interest at Rs. 2 per cent. per mensem and that, in case of non-payment of the first instalment, the mortgagee would be entitled to be put into possession of the mortgaged property for a period of four years, taking the profits in lieu of interest.

The mortgage-bond further provided that, on the expiry of the said term of four years, the mortgagors shall redeem the mortgaged property on payment of the principal sum with interest thereon from the date of the execution of the mortgage-bond till the date of obtaining possession, and that, in case of a breach of the covenant in regard to the delivery of possession, the mortgagee would be at liberty to take possession with the help of the Court.

The plaintiffs alleged that they received Rs. 50 in part payment of the first instalment and Rs. 188 in part payment of the second, but the learned District Judge disbelieved that statement, though the defendant in paragraph 15 of his written statement stated that the amount due to the plaintiffs had been paid up and that the plaintiffs should rest content with what they had received.

The learned District Judge treated the mortgage-bond as anomalous and, applying section 98 of the Transfer of Property Act, dismissed the suit on the ground that it did not authorize the plaintiffs to sue for sale.

The mortgage in question was, however, not an anomalous mortgage. It was a combination of a simple and usufructuary mortgage in the sense that it was convertible from a simple mortgage-bond into a usufructuary mortgage on the happening of a certain event and, until that contingency happened, all the conditions attaching to a simple mortgage continued to appertain to it and were enforceable as such. The mortgage-bond in question gave a power to the mortgagee to obtain possession in case of non-payment of the first instalment but if the mortgagee did not choose to exercise that power his omission to do so did not derogate in any way from his right to enforce that deed as a simple mortgage-bond.

Section 98 of the Transfer of Property Act does not apply to a combination of simple and usufructuary mortgages and, as held by their Lordships of the Privy Council in *Lingam Krishna Bhupati Deva Garu* v. *Maharaja Manya Sultan Bahadur of*

SAFURAN BIBI *v.* SHAH MUHAMMAD.

Viziangaram (1), if the mortgagors did not fulfil their obligation of delivering possession on their failure to pay the first instalment, the mortgage-bond continued to retain its character of a simple mortgage, and a decree for sale of the mortgaged property is, therefore, permissible. The decision in *Tikam Singh* v. *Makrand Singh* (2), in so far as it laid down that a combination of a simple and usufructuary mortgage must be so from its very inception, has been practically overruled by the decision of their Lordships of the Privy Council in the case cited above.

In *Sardar Singh* v. *The Collector of Shahjahnpur* (3), a Bench of this Court held that where a mortgage of a usufructuary character contains a personal covenant to pay, the mortgagee is entitled to sue for sale of the property on the basis of such a covenant. The decision in *Musammat Kuraishi Begam* v. *Mumtaz Mirza* (4) does not apply because it was a case of a mortgage by conditional sale, which carried with it no personal liability. In the case, however, of a simple mortgage a personal covenant is always implied and, as held in *Musammat Umrao Begam v. Vali-ul-lah* (5) and *Jangi Singh* v. *Chandar Mal* (6), a decree for sale in such a case can be granted.

I, therefore, allow the appeal and, setting aside the decree of the Court below, restore that of the Court of first instance with costs in all the Courts.

Appeal allowed.

(1) 10 Ind. Cas. 272; 15 C. W. N. 441: 9 M.L.T. 445; 13 C. L. J. 584; 13 Bom. L. R. 447; (1911) M. W. N. 429; 21 M. L. J. 1147; 8 A. L. J. 594.
(2) 6 O. C. 167.
(3) 10 O. C. 14.
(4) 3 Ind. Cas. 871; 12 O. C. 275.
(5) A. W. N. (1888) 171.
(6) 30 A. 388; A. W. N. (1908) 161; 5 A. L. J. 670.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 71 OF 1912.

April 21, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

Musammat SAFURAN BIBI—PLAINTIFF—APPELLANT

versus

SHAH MUHAMMAD—DEFENDANT—RESPONDENT.

Pre-emption—Pre-emptor not in possession of the share on the basis of which pre-emption is claimed—Maintainability of suits.

The plaintiff in a pre-emption suit was not and had never been in possession of the share on the basis of which her claim to pre-empt was founded. The persons who were in possession of the share were, as a matter of fact claiming adversely to the plaintiff:

Held, that under the circumstances the plaintiff could not maintain the suit.

Sakina Bibi v. *Amiran*, 10 A. 472; A. W. N. (1888) 177, referred to.

Letters Patent Appeal from the decision of Mr. Justice Karamat Husain in Second Appeal No. 473 of 1912, dated the 6th of May 1912.

Mr. *Shafi-uzaman*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff came into Court claiming her right on the basis of a custom as set forth in the *wajib-ul arz*. According to this entry a co-sharer wishing to sell has first to offer the property to a near co-sharer and then to a co-sharer in the *thok* and so on, even to persons resident in the village. It appears as the result of the findings of the Court below that the plaintiff is not and has never been in possession of the share on the basis of which her claim to pre-empt is founded. The alleged right of her predecessor-in-title to possession accrued as far back as the year 1905 but possession has never been taken nor apparently her claim asserted, save in the present proceedings, up to the present time. There is a finding of the Court below that the parties in possession are claiming adversely to the plaintiffs. It seems to us very difficult to imagine how under circumstances like these the vendor could comply with the terms of the custom as proved by the evidence adduced on behalf of the plaintiff, herself. It is very difficult to understand how the vendor could have made an offer to the plaintiff before he sold to the defendant vendee. The name of the plaintiff is not even recorded in the revenue papers. Reliance is placed on the case of *Sakina Bibi* v. *Amiran* (1). In that case the facts were not very unlike the present. There is one important distinction, however, namely, that in that case the *wajib-ul arz* provided for pre-emption in strict accordance with the Muhammadan Law. In the course of the

(1) 10 A. 472; A. W. N. (1888) 177.

hearing of that case a passage from the Hedaya was cited on behalf of the vendee as follows: "Besides, it is an express condition of *shuffa* that a man be firmly possessed of the property from which he derives his right of *shuffa* at the time when the subject of it is sold a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *shuffi* remain firm until the decree of the Qazi be passed, and as this does not hold on the part of the deceased *shuffi*, the *shuffa* is, therefore, not established with respect to any one of his descendants, because of the failure of its conditions" Mahmood, J., stated that he thought that the translation was loose, and that the passage did not mean actual physical possession but merely meant that "the pre-emptor should have a vested right of ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership." If the present case had been a case under the Muhammadan Law, whatever our individual views might be on the subject, we should follow this case, as we think a single Judge ought to have done. We, however, consider that the case cited can be distinguished from the present on the ground mentioned. We have already pointed out how impossible it would have been for the plaintiff to have complied with the provisions of the custom as alleged by the plaintiff. Having made it almost, if not quite, impossible for the vendor to comply with the conditions of the custom, we do not think that it would be just or equitable that the plaintiff should be allowed to interfere with the sale to the vendee. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 927 OF 1910.

July 20, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

Musammat AMIRAN—PLAINTIFF—APPELLANT

versus

Musammat JANO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Succession—Mianwali District—Sister excluded by mother and step-mother.

According to the Customary Law of the Mianwali District the mother and step-mother of the last male proprietor succeed to his property to the exclusion of his sister.

Hamira v. *Ram Singh*, 134 P. R. 1907 (F. B.); 85 P. W. R. 1907; 74 P. L. R. 1908, referred to.

Second appeal from the decree of the Divisional Judge, Shahpur, dated the 13th August 1909, confirming that of the District Judge of Mianwali, dated 12th May 1909.

Mr. *Muhammad Khan*, for the Appellant.

Mr. *Gulab Din* for *Musammat Jano*, for the Respondent.

JUDGMENT.—Sarwar Khan, a *Pathan* of *Mauza* Ballu Khel, Tahsil and District Mianwali, had two wives, *Musammat* Fatima and *Musammat* Jano. By *Musammat* Fatima he had a daughter, *Musammat* Amiran, and by *Musammat* Jano, a posthumous son Dost Muhammad. He died some time in July 1904, and Dost Muhammad was born in the beginning of 1905. Mutation in respect of the land left by Sarwar Khan was effected by the Assistant Collector in favour of Dost Muhammad on the 29th March 1905; but on appeal the Collector by order dated the 14th June 1905 entered 40 *kanals* out of Sarwar Khan's holding in the name of *Musammat* Fatima as a provision for her maintenance, the remainder of the land being allowed to stand in the name of Dost Muhammad. Dost Muhammad died in 1906, and the mutation of the land then took place in equal shares in the names of *Musammat* Jano and *Musammat* Fatima.

The present suit was instituted by *Musammat* Amiran, half sister of Dost Muhammad, for possession of half share of the holding left by Dost Muhammad on the allegations that she, as the unmarried daughter of Sarwar Khan, was entitled to share the land left by him equally with his widows; that *Musammat* Jano was unchaste and so had forfeited her right to hold her share of the land as Sarwar Khan's widow; and

that as sister of Dost Muhammad, the plaintiff was also entitled to share the land equally with his mother *Musammat* Jano. Both the Courts have dismissed the suit, holding that the land in suit was left by Dost Muhammad, and not by Sarwar Khan, and that the plaintiff as sister of Dost Muhammad was excluded from succession by his mothers.

The plaintiff, *Musammat* Amiran, has preferred a further appeal to this Court, and on her behalf it has been urged that she is entitled to succeed to the land in dispute as the unmarried daughter of Sarwar Khan, inasmuch as Dost Muhammmad who was the posthumous son of Sarwar Khan died in his infancy and did not become a fresh stock of descent. According to the Full Bench decision of this Court [*Hamira* v. *Ram Singh* (1)] this contention is clearly untenable, and the appellant in order to succeed must show that she is entitled to inherit the land in suit as sister of Dost Muhammad in preference to his mothers. On this point the Customary Law of the Mianwali District is against the appellant, as according to it the mother of the last male proprietor succeeds to his property to the exclusion of his sister (Section V, Question and Answer 21). The instances cited by the appellant in the Court of the District Judge relate to cases in which a daughter has succeeded equally with the widow of the last male owner, and obviously they have no relevancy to the question before us.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 134 P. R. 1907 (F. B.); 85 P. W. R. 1907; 74 P. L. R. 1908.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1306 OF 1912.

May 3, 1913.

Present:—Mr. Justice Lyle.

TARA CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

BOTI RAM—PLAINTIFF—RESPONDENT.

Wrong entry in revenue paper—Suit for declaration—Cause of action—Limitation Act (IX of 1908), *Sch. I, Art.* 120.

A. mortgaged his occupancy holding with possession to *J.* in 1877. In 1880 the name of *A.* was expunged from the revenue papers and that of *J.* was recorded as tenant-in-chief. In 1907 *A.* applied to the Settlement Officer for correction of the revenue papers, but the application was dismissed. Thereafter *A.* brought a suit for declaration that he was the mortgagor and *J* was the mortgagee:

Held, that the suit was time-barred inasmuch as the cause of action to bring the suit accrued in 1880.

Second appeal from the decision of the Additional Judge of Moradabad, dated 15th August 1911.

Mr. *M. L. Sandal*, for the Appellants.

Mr. *R. K. Malviya*, for the Respondent.

JUDGMENT.—The plaintiff in this case sues for what he calls "formal possession as mortgagor" of a certain occupancy holding and for a declaration that he is the mortgagor of that holding. As I understand the words this is simply a suit for a declaration and nothing else. The plaintiff's case is that his father, Asa Ram, mortgaged his occupancy holding on the 5th of December 1877 for Rs. 75 to Jasram, the predecessor of the defendants. In the year 1287 *fasli* corresponding to the year 1880 A. D. the name of the plaintiff was expunged from the village papers and the defendants were entered as the tenants-in-chief. In the year 1907 the plaintiff applied to the Settlement Officer for the correction of this entry but without success, hence this suit. The lower Courts have decreed it. The defendants came here on second appeal. The only point argued in this appeal is one of limitation which was admittedly never raised in either of the Courts below. It seems to me that the appeal must prevail. The learned Vakil for the respondent after a full discussion on all the rulings quoted admitted frankly that the Article which governs this case is Article 120. The only point, therefore, which remains for consideration is on what date did the cause of action arise. The appellants contend that it arose in 1287 *fasli* when the plaintiff's name was expunged from the papers and the suit, therefore, is barred. The respondent contends that it arose on the 27th of October 1907 the date on which the Settlement Officer decided against him. It seems to me that the appellants' contention is correct and that the cause of action for a suit for declaration arose in 1880. The respondent's contention is that having mortgaged the holding the matter of the erroneous entry was no concern of his

and that it was the duty of the mortgagee to see that his name was maintained in the papers. I am unable to accede to this contention. It is true that it has been held that a mortgage by a tenant of his occupancy holding is not illegal, but that there is no privity of contract between the landlord and the mortgagee of an occupancy holding. It is the occupancy tenant who is primarily responsible to the landlord for the rent and it is against the occupancy tenant, if he is still an occupancy tenant that the landlord must proceed in ejectment. It is not open to an occupancy tenant to say that so long as the mortgagee is in possession those questions do not concern him. As I find that the cause of action arose in 1880, the present suit which is for a declaration pure and simple is barred. The learned Vakil for the respondent informs me that he is not entitled to redeem until the year 1325 *fasli*. Under these circumstances I fail to see what good the declaration now prayed for could do him. Of course, this decision will have no effect on any claim that may be made for redemption when the plaintiff becomes entitled to sue for it. In this appeal I decide nothing but the point of limitation, and as to that point I decide nothing but that the suit for the relief now claimed is barred. I allow the appeal and dismiss the suit with costs in all Courts. Fees in this Court on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 193 OF 1911.

May 6, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

LACHMI MISSIR—PLAINTIFF—APPELLANT

versus

DEOKI KUAR—DEFENDANT—RESPONDENT.

Landlord and tenant—Adjustment of accounts—Money left in deposit with tenant for payment to superior landlord—Default by tenant—Suit by superior landlord against landlord of tenant and realisation of amount—Subsequent suit by landlord for amount paid to superior landlord, against tenant—Character of amount left with tenant, whether rent or not—Subsequent suit, whether one for rent or damages—Limitation—Contract Act (IX of 1872), s. 46—Limitation Act (XV of 1877), Sch. II, Art. 115.

The defendant is the tenant of the plaintiff. There was an adjustment of accounts between them, and the defendant was found liable for Rs. 158 on account of rent for 1309 to 1312. It was arranged that Rs. 136 should be left with the defendant as a deposit for payment to the superior landlord on account of rent payable by the plaintiff to the latter for 1309 to 1312 and that the balance Rs. 22 was to be paid to the plaintiff. The defendant did not pay the said sum of Rs. 136 to the superior landlord who sued the plaintiff and obtained a decree for Rs. 225 which was realised from the latter. The plaintiff has brought a suit to recover the amount which she had to pay to the superior landlord:

Held, that the determination whether the money left in deposit with a tenant for payment to the superior landlord, is rent or not depends upon the terms of the contract in each case; that here there was a discharge for this portion of the rent, and although the superior landlord was not a party to the contract, so far as that portion of the rent was concerned, it ceased to be rent and recoverable as such; and that the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages and not for rent.

Hemendra Nath Mukerjee v. *Kumar Nath Roy*, 32 C. 169, relied upon.

Basanta Kumari Debya v. *Ashutosh Chuckerbutti*, 27 C. 67 (F. B.); 4 C. W. N 3, referred to.

Appeal from the decree of the Sub-Judge of Patna, reversing that of the Munsif of Behar, dated December 1st, 1909.

Babu *Karunamoy Bose*, for the Appellant.

Babu *Gonesh Dutt Singh*, for the Rospondent.

JUDGMENT.—The defendant-appellant is the tenant of the plaintiff-respondent. There was an adjustment of accounts between them as regards rent on the 26th *Aughrayan* 1312 *fasli* corresponding to the 18th December 1904. This adjustment of account is embodied in a *washil baki* and and it appears that the defendant was found liable for Rs. 158-14-3 on account of rent for the years 1309 to 1312 *fasli* out of which Rs. 136-2 was left with the defendant as a deposit for payment to the superior landlord on account of rent payable by the plaintiff to the latter for the years 1309 to 1312 *fasli* and the balance, *viz.*, Rs. 22-12-3, was stated as payable to the plaintiff. The defendant did not pay the said sum of Rs. 136-2 to the superior landlord and the latter sued the plaintiff and obtained a decree for Rs. 225 which was realised from her on the 28th January 1907. The plaintiff thereupon brought the present suit to recover the sum

of Rs. 599-2-3 from the defendant on account of rent for the years 1313 to 1315 *fasli* and the amount which she had to pay to the superior landlord with interest. There is no dispute as to the rent for the years 1313 to 1315 *fasli* in this appeal. As regards the claim for the amount which the plaintiff had to pay to the superior landlord the defence is that the claim should be considered as one for rent and that it was barred by limitation and that the plaintiff alone had no right to sue for the amount, the *wasil baki* being in favour of the plaintiff and her mother-in-law who was not joined as a party to the suit. The Court of the first instance decreed the suit in part on account of rent for the years 1313 to 1315 *fasli* and held that the other portion of the claim was barred by limitation. That decree was confirmed on appeal, but on review, the lower Appellate Court held that the claim was not barred by limitation except as to the Rs 22-8 and gave a decree accordingly to the plaintiff. The defendant has appealed to this Court. It has been contended on his behalf that the amount which was assigned by the plaintiff for payment to the superior landlord was part of the rent and the claim for recovery of the said amount must be considered as one for rent and not for damages and reliance is placed upon the Full Bench case of *Basanta Kumari Debya* v. *Ashutosh Chuckerbutti* (1). In that case it was held upon a construction of the lease that the money which the tenant agreed to pay to the superior landlord by assignment of his landlord was rent and recoverable as such and that it did not cease to be rent by reason of the so called assignment, an assignment to which assignee was not a party and which was not accepted by him. Macpherson, J., in delivering his judgment (with which the majority of the learned Judges agreed) said:—"The money was, undoubtedly, a part of the entire sum which the defendant undertook to pay to the plaintiff, his landlord, as rent for the use of the land. According to the terms of his lease he was to pay this money on the plaintiff's account to certain persons who were the plaintiff's landlords; he was to take from them receipts in the plaintiff's name for the money so paid, and at the end of the year he was to produce those receipts and take from the plaintiff a receipt for the entire amount of the rent inclusive of the balance which he was to pay to the plaintiff direct. This, I think, clearly shows that in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such. If the defendant defaulted to pay the money in the way agreed on between himself and his landlord, the assignee had no cause of action against him and the plaintiff never in any way lost or waived his right to recover the money which was not so paid as a part of rent. In fact there was to be no discharge for the rent, unless and until the defendant produced the receipts for the payments which he undertook to make".

The determination of the matter depends upon the terms of the contract in each case. In the present case the *wasil baki* shows that Rs. 136-2 which was to be paid to the superior landlord was left in deposit with the defendant and we think that the lower Appellate Court was right in holding that there was a discharge for this portion of the rent. It is true the assignee was no party to the contract but if as the contract shows the amount was left in deposit with the defendant for payment to a third party and it amounted to a discharge, so far as that portion of the rent was concerned, we think it ceased to be rent and recoverable as such. The case, therefore, does not fall within the principle laid down by the Full Bench in *Basanta Kumari's* case (1) but would fall within the principle of the case of *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (2). But as we have said each case must depend upon the terms of the particular contract and it seems to us having regard to the terms of the contract contained in the *wasil baki*, that the amount left in deposit with the defendant ceased to be part of the rent. We are accordingly of opinion that the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages and not for rent and we agree with the lower Court upon this point. We also agree with that Court in holding that Article 115 of the Limitation Act is applicable to the case. That Article provides that the period of limitation in a suit for compensation for the breach of

(1) 27 C. 67; 4 C. W. N. 3.

(2) 32 C. 169; 9 C. W. N. 96.

any contract, express or implied not in writing registered and not herein specially provided for is three years from the time when the contract is broken. It has not been found, however, by the Court below when the contract was broken. The Court below held that the plaintiff was within time as she came within three years from the date when the plaint was filed against her by her landlord on account of non-payment of the money by the defendant, *i.e.*, on the 9th June 1906. So that it assumed that that was the date on which the contract was broken. It has been contended on behalf of the appellant that the money having been left with the defendant for payment to the superior landlord on account of the rent due by the plaintiff to the latter for the years 1309 to 1312 *fasli* the plaintiff must have intended that the money was to be paid by the defendant to the superior landlord at once, at any rate, at the end of the agricultural year, and the agricultural year 1312 having come to an end in September 1905, the contract must be deemed to have been broken in September 1905 which was more than three years before the suit was instituted and that, at any rate, as no time was fixed for the performance of the contract it ought to have been performed within a reasonable time. It has been contended, on the other hand, on behalf of the respondent that the defendant could have paid the rent to the superior landlord even after the end of the agricultural year 1312, or at any time before the suit for rent was brought by the superior landlord against the plaintiff and that the contract must be taken to have been broken when the superior landlord instituted the suit for rent against the plaintiff. Under section 46 of the Indian Contract Act where by the contract a promisor is to perform his promise without application by the promisee and no time for performance is specified, the engagement must be performed within a reasonable time and under that section "what is a reasonable time" is in each particular case a question of fact. We think, therefore, that the case ought to go back to the lower Appellate Court for a finding as to when the parties intended the contract to be performed. If it was intended by the parties that the contract was to be performed at any time before the superior landlord instituted the suit for rent against the plaintiff then the contract must be taken to have been broken when that suit was instituted and in that case the suit is not barred by limitation. If, on the other hand, the parties intended that the money kept in deposit with the defendant was to be paid by him to the superior landlord at the end of the agricultural year 1312 or within a reasonable time from the date on which the contract was entered into, the Court will have to find whether the time was within three years of the date of the institution of the suit. The Court will come to a finding upon this point upon a consideration of the contract as well as all the circumstances of the case and dispose of the appeal accordingly. The next question is whether the suit can be maintained by the plaintiff. The *washil baki* was, no doubt, in favour of the plaintiff and her mother-in-law and the superior landlord brought the suit for rent both against the plaintiff and her mother-in-law. It has, however, been found by the Munsif as well as by the learned Subordinate Judge who heard the appeal originally, that the plaintiff's mother-in-law had no right to the holding in respect of which the *washil baki* account was made as the holding belonged to the plaintiff's husband and the plaintiff alone was his heiress. But that by itself would not be a sufficient answer to the objection raised on behalf of the defendant because the contract in question is a contract with respect to certain sum of money and does not deal with the holding itself. The question, however, does not appear to have been raised before the learned Subordinate Judge who heard the appeal on review. It is open to the defendant to waive non-joinder of one of the joint promisees and it may be that having regard to the fact that both the Courts below found the question against the defendant, he waived the question of non-joinder at the hearing of the appeal after review. Under these circumstances we decline to entertain the objection at this stage of the case. The result is that so far as the claim for rent of years 1313 to 1315 *fasli*, and the claim for Rs. 22-8, *i.e.*, the amount shown as balance due by the defendant in the *washil baki* are concerned, the decree of the lower Appellate Court will stand confirmed with proportionate costs, and that the decree in so far as the claim for the amount the plaintiff had to pay to her landlord is concerned, is set aside and the

case sent back to the Court of Appeal below to be dealt with according to the directions given above and for disposal according to law. Costs to abide the result.

Appeal partly allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 848 OF 1912.

February 28, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge.

Mirza QAMRUDDIN—DEFENDANT—
—APPELLANT

versus

PRABHU DIAL—PLAINTIFF—RESPONDENT.

Minor—Mortgage by guardian—Suit by mortgagee—Mortgage set aside—Mortgagee cannot fall back on prior mortgage paid off by him—"One who seeks equity must do equity," not applicable to cases where minor is defendant.

Where in a suit by a mortgagee of minor's property mortgaged by the minor's guardian the mortgage is found not to bind the minor, the mortgagee cannot fall back on a prior mortgage paid off by him out of the consideration of the mortgage in suit.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, 10 C. 1035; 11 I. A. 126 (P. C.); *Jhabar* v. *Singh Ram*, 67 P. R. 1899, *Radha Ram* v. *Rala Ram*, 30 P. R. 1904; 139 P. L. R. 1904, referred to.

The rule that a person suing to set aside a transaction purporting to have been effected on his behalf during his minority, and thus seeking equity, must do equity and restore any benefit derived by him from the transaction, does not apply where the minor is defendant, so as to enable the plaintiff, in whose favour the transaction was effected, to claim restoration from the minor.

Anant Ram v. *Nazir Hussain*, 144 P. R. 1883; *Fazal Ilahi* v. *Yakub Mirza*, 192 P. R. 1889; *Dharam Singh* v. *Sayad Zahur-ul-Husain*, 58 P. R. 1891; *Nizam-ud-din Shah* v. *Anandi Prasad*, 18 A. 373; A. W. N. (1896) 99, referred to.

Second civil appeal from the decree of the Divisional Judge, Delhi, dated the 30th March 1912, reversing that of the Sub-Judge, 2nd class, Delhi, dated 24th July 1911, dismissing the plaintiff's claim.

Mr. *Kanwar Narain*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—The suit was based on a mortgage for Rs. 2,500 and both Courts below have held that the appellant is not bound by that mortgage. In this conclusion I concur for reasons recorded in the judgment of the lower Appellate Court. That Court has, however, given the respondent a decree for Rs. 151-4 the proportionate sum charged on the appellant's share of his father's estate by his father in favour of a third person, paid off by the respondent mortgagee out of the consideration for the mortgage in suit.

This decision goes far beyond the ruling of their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), in which it was held that the purchaser of property subject to a mortgage who redeemed that mortgage could use it as a shield against subsequent mortgages and must be presumed to have kept it alive for his own benefit and protection.

This ruling was followed in *Jhabar* v. *Singh Ram* (2) and *Radha Ram* v. *Rala Ram* (3), cited for the respondent, and these authorities do not support the contention that the respondent could in this suit abandon his claim on the puisne mortgage and fall back on the prior mortgage.

Anant Ram v. *Nazir Hussain* (4), *Fal Ilahi* v. *Yakub Mirza* (5), *Dharam Singh* v. *Sayad Zahur-ul-Husain* (6) and *Niam-ud-Din Shah* v. *Anandi Prasad* (7) lay down the rule that although a person suing to set aside a transaction purporting to have been effected on his behalf during his minority, and thus seeking equity, must do equity and restore any benefit derived by him from the transaction, the rule does not apply, where the minor is a defendant, so as to enable the plaintiff, in whose favour the transaction was effected, to claim restoration from the minor.

For these reasons I decree the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance dismissing the suit against the appellant with costs of all Courts.

Appeal decreed.

(1) 10 C. 1035 (P. C.) ; 11 I. A. 126.
(2) 67 P. R. 1899.
(3) 30 P. R. 1904; 139 P. L. R. 1904
(4) 144 P. R. 1883.
(5) 192 P. R. 1889.
(6) 58 P. R. 1891.
(7) 18 A. 373; A. W. N.(1896) 99.

INDIA G. S. N. CO. LD. *v.* GOPAL CHANDRA GUIN.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 60 OF 1911.
May 9, 1913.
Present:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

INDIA GENERAL STEAM NAVIGATION CO., LTD.,—DEFENDANT—APPELLANT
versus
GOPAL CHANDRA GUIN—PLAINTIFF—RESPONDENT.

Common carrier—Carrier—Liability for loss of property—Negligence or criminal act—Merchandize property delivered to carrier to be carried as luggage—Onus—Proof of negligence—Common Carriers' Act (III of 1865), ss. 3, 4, 8, 9.

Although a common carrier is not liable for the loss of or damage to property of certain description above one hundred rupees in value, unless the value and description thereof are expressly declared by the person delivering them to be carried and although the carrier is entitled to charge a higher rate for such properties, he is liable for the loss of or damage to such property if such loss or damage arises from the negligence or criminal act of the carrier or any of his agents or servants. This liability does not cease to exist even if the property is delivered to the carrier as luggage, but which is in fact merchandize.

Cahill v. *The London and North Western Railway Company*, 13 C. B. (N. S.) 818, 31 L. J. C. P. 271; 8 Jur. (N. S.) 1063; 10 W. R. 321; 134 R. R. 748; *The Great Northern Railway Company* v. *Shephard*, 8 Exch. 30; 7 Rail. Cas. 310; 21 L. J. Ex. 286; 91 R. R. 370; *Belfast and Ballymean Railway* v. *Keys*, 9 H. L. C. 556; 8 Jur. (N. S.) 367; 4 L. T. 841; 9 W. R. 793; 131 R. R. 332; 11 Eng. Rep. 846; *Sheikh Roheemalla* v. *Palmer*, Coryton Report 133 and *Veleyat Hossein* v. *Bengal and North Western Railway Company*, 3 Ind Cas. 470; 36 C. 819; 13 C. W. N. 847, distinguished.

The onus of proving negligence of the carrier is not upon the plaintiff who seeks to make the carrier liable.

Appeal from the decree of the District Judge of Murshidabad, dated September 26th, 1910, confirming that of the Sub-Judge of Berhampur, dated August 13th, 1909.

Mr. *Avetoom*, Counsel, and Babu *Manmatha Nath Mukherjee*, for the Appellant.

Babus *Mohendra Nath Kow* and *Upendra Narain Bagchi*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for recovery of damages for the loss of six packages of Mutka silk thread which were booked as luggage by the plaintiff No. 2 (who was the agent of the plaintiff No. 1) for conveyance by a steamer by the defendant Company from Muldah to Kasimbazar. It has been found that the packages were destroyed by fire owing to the negligence of the defendants. The Court of first instance gave a decree to the plaintiff No. 1 for Rs. 1,784-15-3 that being the price of the articles lost. On appeal that decree was affirmed and the defendant Company has appealed to the Court.

It has been contended on behalf of the appellant, *first* that the plaintiff not having disclosed the fact that the luggage contained Mutka silk of the value of more than Rs. 100 upon which the Company could charge at a higher rate under sections 3 and 4 of the Common Carriers' Act (III of 1865), the defendant was not liable to pay any damages for the loss, and *secondly* that there was no contract to carry any merchandize, the defendant having undertaken to carry luggage only.

As regards the first contention, the liability of the defendant Company is to be determined according to the provisions of the Common Carriers' Act (Act III of 1865). Section 3 of that Act provides that "No common carrier shall be liable for the loss or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorised in that behalf, shall have expressly declared, to such carrier or his agent, the value and description thereof" and section 4 provides that "Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix." Mutka silk thread comes within the description of properties contained in the schedule to the Act which mentions "silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials." It is argued on behalf of the appellant that had the plaintiff disclosed that the packages contained silk, of the value exceeding one hundred rupees, the Company would have been entitled to levy a higher rate of charge under section 4 of the Act, and the said fact not having been disclosed the Company were not liable for the loss or damage to the property. But section 8 of the Act provides that "Notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to

be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants." Reading sections 3 and 4 with section 8 it appears that although a common carrier is not liable for the loss of or damage to property of certain description above one hundred rupees in value, unless the value and description thereof are expressly declared by the person delivering them to be carried and although the carrier is entitled to charge a higher rate for such properties, he is liable for the loss of or damage to such property if such loss or damage arises from the negligence or criminal act of the carrier or any of his agents or servants. Had the *Mutka* silk thread been lost otherwise than through the negligence of the Company, they would not have been liable for the loss, as the value and description of the property had not been declared as provided by section 3 and as there was no payment of a special rate as provided by section 4. But as the property was lost owing to the negligence of the Company, we are of opinion that they are liable for the loss although the value and description of the property were not declared and a higher charge was not paid for them and that in such a case sections 3 and 4 of Act III of 1865 do not afford any protection to the carrier.

The learned Counsel for the appellant relied upon the cases of *Cahill* v. *The London and North Western Railway Co.* (1), *The Great Northern Railway Company* v. *Shepherd* (2), *Belfast and Ballymena Railway* v. *Keys* (3) and *Sheik Raheemalla* v. *Palmer* (4) in support of his second contention that where property is delivered to a carrier as luggage, but which contain merchandize only, there is no contract to carry, and that consequently he is not liable for the loss of such property. But these cases (with the exception of the last) were decided with reference to the liability of the Railway Companies under the Common Law of England or under Act, which do not apply to this country. In the case of *Veleyat Hossein* v. *Bengal and North Western Railway Company* (5) a passenger took a journey on the Railway and booked as his luggage a package containing merchandize (96 pieces of *durries* or carpet) and paid a certain sum as extra charges in respect of the excess weight of the package beyond what was allowed as free luggage. The package was lost and consequently not delivered at the end of his journey. He, therefore, sued the Railway Company for damages caused by its loss, and it was held that the case was governed by section 72 of the Indian Railways Act (IX of 1890) and sections 15 and 152 and 161 of the Indian Contract Act referred to therein, and that the Railway Company was liable for the loss of the package. The above English cases were cited in argument on behalf of the Railway Company but the learned Judges observed—"A variety of English cases have been referred to according to which it is contended that the defendants cannot be fixed with liability in this case; but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here."

The liability of the defendant Company in the present case is to be determined not according to any Common Law, but according to the provisions of Act III of 1865. In the present case, certain property (six packages of Mutka silk) were delivered for carriage by the defendant Company, and it is found that the packages were lost owing to the negligence of their servants. The defendants are, therefore, liable under the provisions of section 8 of the Act. The Act does not make any distinction between 'personal luggage' and goods or merchandize, and merely speaks of 'property delivered.' There is no doubt that the six packages of Mutka silk were "property delivered" within the meaning of the Act, although they were passed off as luggage and not declared to be merchandize. They were paid for as luggage excepting for 30 seers allowed as free luggage. It does not appear that there are different rates for luggage and goods in the defendant Company's rules, and even if there were, we think it would not make any difference, because the liability for loss in consequence of negligence had refer-

(1) 13 C. B.(N. S.) 818; 31 L. J. C. P. 271; 8 Jur. (N. S.) 1063; 10 W. R. 321; 134 R. R. 748.

(2) 8 Ex. 30; 7 Railw. Cas. 310; 21 L. J. Ex. 286; 91 R. R. 370.

(3) (1861) 9 H. L. C. 556; 8 Jur. (N. S.) 367; 4 L. T. 841; 9 W. R. 793; 131 R. R. 332; 11 Eng. Rep. 846.

(4) Cryton's Reports 133.

(5) 3 Ind. Cas. 470; 36 C. 819; 13 C. W. N. 847

ence to 'property delivered' which includes luggage as well as goods.

In the case of *Sheikh Rehimulla* v. *Palmer* (4) (affirming the decision reported at page 24 of the said reports) it was, no doubt, held that misdescription of the nature of goods entrusted to a common carrier disentitles the sender to recover for their loss although the goods, would not be subject to any extra rates had they been properly described. The case was decided before the Indian Carrier's Act III of 1865 was passed. On the other hand in the case of *Narang Rai Agarwala* v. *River Steam Navigation Company, Limited* (Appeal from Appellate Decree No. 2310 of 1900 decided on the 6th May 1903, referred to in I. L. R. 34 Cal. 419 at pp. 421, 422) the defendant Company claimed exemption from liability for loss of the Endi silk under section 4 of the Carrier's Act, as there was no payment of the special rate in respect of the Endi silk which fell under the description of excepted articles and which the plaintiffs delivered to the defendant to be carried. The learned Judges referring to the Common Law liability of common carriers observed "the liability, however, may be limited as to loss of valuable articles unless the sender has declared their value and paid a higher rate for their carriage. But even then he is liable for loss occasioned by his negligence or criminal act, as no Court will exonerate a bailee under such circumstances. These rules have been adopted in India by Act III of 1865 and section 8 of the Act lays down a rule as to a common carrier's liability in all cases of negligence or criminal act." In that case although the fact that the property delivered to be carried was not disclosed to be silk, and although no special rate was paid for it, it was held that the defendant would be liable, if the loss was occasioned by the negligence of the defendant and the case was remanded to the lower Court for a finding upon the point.

It was argued that the onus of proving negligence was upon the plaintiff and the case of *Sheo Barat Ram* v. *The Bengal and North Western Railway Co.* (6) was relied on. That case, however, was under the Railways Act and the goods were consigned under a risk-note, under which the Railway Company were absolved from all liability for loss or damage to the goods, subject to the proviso that the Company would be liable for loss due to wilful negligence on the part of their servants. Section 9 of the Carriers' Act clearly shows that the onus of proving negligence is not upon the plaintiff. Moreover, in this case the plaintiff gave positive evidence of negligence which has been apparently believed by the Court below.

We are accordingly of opinion that the Courts below came to a right conclusion and that the appeal must be dismissed. Having regard, however, to the circumstances of the case, we think that each party should bear his own costs in all Courts.

Appeal dismissed

(6) 15 Ind. Cas. 56; 16 C. W. N. 766.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1278 OF 1912.

April 29, 1913.

Present:—Mr Justice Lyle.

JUGLA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Thakur HAR NARAIN SINGH—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 106—*Notice to quit, conditional, whether valid.*

A landlord gave a notice to his tenant that he must within fifteen days either execute an agreement binding himself to pay enhanced rent, or he must vacate the house:

Held, that the notice was valid.

Kikabhai v. *Kalu*, 22 B. 241, followed.

Bradley v. *Atkinson*, 7 A. 899; A. W. N. (1885) 288, distinguished.

Second appeal from the decision of the Additional Judge of Aligarh, dated the 26th August 1912.

Mr. *P. L. Banerji*, for the Appellant.

The Hon'ble Mr. *Abdul Raoof*, for the Respondent.

JUDGMENT.—The plaintiff in this case sues to eject the defendants from a house. Both the lower Courts decreed the suit. The defendants come here in second appeal. It is argued in the first place that the plaintiff is the owner of the site only and that the rent which has been paid hitherto by the defendants is ground-rent only. The defendants allege that they are themselves the owners of the building. This point was not raised in the written statement. In fact the defendants expressly refrained from claiming

to be the owners of the house. In paragraph 2 of the written statement they say that the defendants occupy the house in dispute as *tenants* for generations. They admit that they pay rent and in paragraph 6 they say that the house is an ancestral one whatever that may mean. They nowhere state that they are proprietors. They raised the plea in the memorandum of appeal to the lower Appellate Court but abandoned it. I cannot admit it now. In the second place it is urged that the notice did not comply with section 106 of the Transfer of Property Act inasmuch as the period of fifteen days expired on the 4th of October. Section 106 lays down that the fifteen days must expire with the end of the month of tenancy. But a tenancy does not necessarily commence on the 1st day of every month. This plea was not taken either in the written statement or in the memorandum of appeal to the lower Appellate Court. Had it been, the plaintiff could have called evidence to show on what day of the month the tenancy commenced. Next plea is that the notice was not an unconditional one. This plea again was not taken in the written statement. It seems to me that the notice is clear and valid. The defendants were informed that they were within fifteen days to execute an agreement binding themselves to pay enhanced rent, otherwise they were to vacate the house. In my opinion it was a perfectly valid notice. The appellant rely on a ruling of *Bradley* v. *Atkinson* (1). But the wording of the notice in that case was altogether different from that in the present case. In this case the notice is similar to the one in *Kikabhai* v. *Kalu* (2). I dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

(1) 7 A. 899; A. W. N. (1885) 288.
(2) 22 B. 241.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 11 OF 1911.

January 27, 1912.

Present:—Mr. Drake-Brockman, J. C.

GANPAT—DEFENDANT—APPELLANT

versus

TRIMBAK—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (*XI of* 1898), s. 35 (4)—*'Leaves his holding uncultivated'—Interpretation—Jurisdiction—Suit by tenant for possession of land against landlord as alience from guardian of the tenant when minor—Civil Court competent to hear*—Venue, *how decided—Practice—Decision of District Judge binding on Subordinate Judge as regards jurisdiction—Person acquiring rights of another—Validity of transfer to be proved.*

The nature of the claim as brought decides the *venue* in a case.

Bapuji Raghunath v. *Kuvarji Edulji*, 15 B. 400 and *Musammat Durbasa* v. *Khalak Singh*, 4 N. L. R. 63, referred to.

Where according to the plaint the possession of the landlord is due to a sale by the tenant's guardian, and the authority of the guardian to alienate is challenged, and recovery of possession prayed for, the suit is not between the landlord and tenant as such and the jurisdiction of the ordinary Civil Court is not ousted.

It is a well known rule of construction that an Act by which the jurisdiction of the ordinary Courts of judicature is taken away must be construed strictly.

Prosonno Coomar v. *Koylash Chander*, 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 327, referred to.

Where a Subordinate Judge returned a plaint with the endorsement that the suit was between landlord and tenant, and the plaint having been presented to an Extra Assistant Commissioner and Additional Judge was again returned by that officer to the Court of the Subordinate Judge as being within the jurisdiction of the Subordinate Judge and on appeal to the District Judge this last order was confirmed:

Held, that the Subordinate Judge was bound by the decision of the District Judge and was competent to try the suit.

A person cannot claim to have acquired the right of another unless such acquisition is by a valid transfer from the person to whom such right belonged or by the operation of any law.

Peary Mohun v. *Radhika Mohun*, 8 C. W. N. 315 at p. 317; 5 C. L. J. 9, referred to.

The expression 'leaves his holding uncultivated' in section 35 (4) of the Tenancy Act means 'omits to cultivate the holding himself or to arrange for its cultivation.' The provision applies also to cases where a minor's guardian makes a bad bargain in surrendering on his behalf.

Appeal against the decree of the District Judge, Nagpur, dated the 8th September 1910, reversing that of the Subordinate Judge, Nagpur, dated the 2nd April 1910.

Dr. *H. S. Gour* and Mr. *M. B. Kinkhede*, for the Appellant.

Messrs. *J. Mittra* and *S. C. Dutt Chaudhari*, for Respondent No. 1.

JUDGMENT.—This case comes up in second appeal after the trial in the Court of first instance which followed upon the decision of Skinner, A. J. C., reported as *Ganpat* v. *Trimbak* (1).

The plaint was filed in the Court of Mr S. B. Gharpure, Subordinate Judge v.

(1) 3 Ind. Cas. 51; 5 N. L. R. 97 at p. 100.

Nagpur, on the 20th April 1906. The claim made was succinctly and correctly described by Skinner, A. J. C., as one "to recover possession of an occupancy holding sold to the defendant-appellant during the tenant's minority by his mother and grandmother acting as his guardians in the year 1897." The persons joined as defendants are Ganpat, Mira Bai (plaintiff's mother) and Sita Bai (plaintiff's grandmother). The first named is styled in the plaint "a *malguzar* residing at Mohpa" and throughout the document there is no reference whatever to the fact that he is sole landlord of *Mauza* Gondi-Mohgaon where the occupancy holding is situate. After giving details of the fields constituting the holding, which number four with an aggregate area of 40·33 acres rented at Rs. 7-8, the plaint went on to allege that the original tenant was the plaintiff's grandfather Tukaram who died in or about the year 1886 A. D., that Tukarm was succeeded by his son Ramji who died in 1892 and that the plaintiff inherited as Ramji's sole heir. Then followed two very important paragraphs which have been translated thus:—

"2. During the plaintiff's minority with a deliberate intention of putting him to loss the defendant Ganpat fraudulently cajoled the plaintiff's mother and grandmother, seeing that both were ignorant females, took a sale-deed from them as the plaintiff's guardians on the 3rd October 1897 in respect of the fields claimed, the consideration being Rs. 200 and had the deed registered on the 8th October 1897.

"3. The defendant Ganpat knew fully well that the minor plaintiff was solely entitled to the fields in dispute, that the other defendants had no authority whatever to sell them to him, that he had no right to take a sale-deed in respect of them and that there was no necessity for the sale. This act, committed by the sheer fraud of the defendant Ganpat, cannot in any way bind the plaintiff. The sale-deed is illegal. The possession of the entire fields in dispute taken by the defendant Ganpat on the strength of the sale-deed is also illegal."

It is to be observed that while no details of the alleged fraud were given the sale was admitted to have been the act of the plaintiff's guardians.

Mr. Gharpure returned the plaint on the 30th July 1906 with the bald endorsement that the suit was one between landlord and tenant. It was presented the following day in the Court of Mr. Walayat-ullah, Extra-Assistant Commissioner and Additional Judge to the Court of the Subordinate Judge. That officer, after dealing with the case for nearly a year and framing issues, decided in accordance with a contention raised by the Pleader representing the defendant Ganpat that the Subordinate Judge had jurisdiction, the suit as framed being against Ganpat as a creditor or purchaser, not as landlord, the basis of the claim being want of legal necessity for a sale by the plaintiff's guardians. Against Mr. Walayat-ullah's order returning the plaint the plaintiff appealed to the District Judge. The appeal was dismissed, the District Judge remarking as follows:—

"It is not that every case in which one of the parties happens to be a tenant and the other his *malguzar* comes within the purview of section 97, Central Provinces Tenancy Act, 1898. The section mentions only suits between landlord and tenant *as such*. In the present case the defendant's position is that of a purchaser from persons who had no title to sell. He is not sued as a landlord or as the village *malguzar*. The learned Additional Subordinate Judge has very rightly remarked that the purchaser of the plaint land happening in this case to be the landlord of the village would not make the suit one between landlord and tenant as such.....The suit is one of a purely Civil nature and is triable by a purely Civil Court."

In accordance with this last decision Mr. Gharpure again received the plaint. Ganpat's Pleader—the very practitioner who before Mr. Walayat-ullah had urged that the Subordinate Judge had jurisdiction—then contended that the Subordinate Judge was bound by his order dated the 30th July 1906 which had not been set aside on appeal or in revision or reviewed. This contention having been overruled on the ground that the District Judge, having decided that the ordinary Civil Court had jurisdiction had expressly directed the plaintiff to present the plaint to the Judge who under the distribution of work in force at the time should try suits brought to avoid transfers made by a guardian. Pleadings were then recorded.

GANPAT *v.* TRIMBAK.

The defence set up was that before the current Settlement one Damji became co-tenant with Tukaram of the fields in dispute, the landlord consenting to this arrangement and receiving from each tenant half the rent; that at the said Settlement both Tukaram and Damji were consequently recorded as tenants; that on the 15th April 1897, after Damji's death, his widow *Musammat* Balu and his daughter *Musammat* Rukhma surrendered his share of the holding, being unable to cultivate it; that the plaintiff's share had by this time become incapable of yielding enough to pay the rent while he owed the defendant Rs. 131-8-3 on account of *sir* fields in *Mauza* Mohpa; that the plaintiff's mother and grandmother, acting on the advice of two male relations of the plaintiffs, therefore, agreed to sell or surrender the plaintiff's share of the holding for Rs. 200, including a cash advance of Rs. 68-7-9 required for cultivation and other necessary purposes; that in any view the plaintiff had lost all right in the holding by reason either of failure to cultivate or pay rent for over two years or of ejectment in 1897; that he attained majority more than three years before the institution of the suit, which was, therefore, time-barred; and that the claim could not be equitably decreed without requiring the plaintiff to refund the consideration (Rs. 200) for the surrender of his share in 1897, and also to pay Rs. 535, the sum spent by the defendant Ganpat in improvements.

The plaintiff put in a written reply. He denied that Damji had any share in the holding and the surrender by *Musammats* Balu and Rukhma. He also denied the alleged debt of Rs. 131-8-3 and the receipt of or need for borrowing Rs. 68-7-9, and pleaded that his mother and grandmother had been unduly influenced to transfer his rights for inadequate consideration and without any necessity for transferring. This transaction he described as a sale, not a surrender. He further stated that he attained majority on the 22nd April 1904 and denied that the defendant Ganpat had spent Rs. 535 in improvements or was entitled to any refund of the consideration for the sale or re-imbursement for money he might be shown to have expended in improving the land.

There were other pleas and counter-pleas which need not be noticed here.

The following issues were framed by Mr. Gharpure in November 1907:—

(1) Was Damji a co-tenant of the fields in dispute along with the plaintiff? Was his name so recorded along with the plaintiff's in the Settlement and did he pay his quota of rent separately to the *malguzar* defendant and cultivate half of the fields?

(2) Did Damji's widow surrender half of the fields to the defendant and execute a registered deed of surrender in his favour on the 15th April 1897 and has the defendant been in possession of Damji's share in the fields since that date in pursuance of the deed?

(3) Was the plaintiff indebted to the defendant to the extent of Rs. 131-8-3 on account of the share of *sir* fields at Mohpa? Did the plaintiff's mother and grandmother (defendants Nos. 2 and 3) borrow Rs. 68-7-9 from the defendant for cultivation purposes and execute a sale-deed of half the fields in dispute on the 3rd October 1897 in the defendant's favour? Was the sale a prudent transaction and justified by legal necessity and, therefore, binding on the plaintiff? Had the ladies authority to execute the sale deed? Was undue influence and fraud practised on them?

(4) Did the sale-deed amount to a surrender of the tenancy rights in the defendant's favour?

(5) Were the fields in dispute in a very bad state and did the defendant spend Rs. 535 for improving them? Is the defendant entitled to that amount in case of eviction?

(6) Is the claim barred by time under section 94, Central Provinces Tenancy Act?

(7) When did the plaintiff attain majority?

(8) Has not the plaintiff lost his occupancy rights in the fields inasmuch as he did not pay rent of the field since the date of the sale-deed and keep his tenancy alive?

Mr. Amardekar, who succeeded Mr. Gharpure, delivered judgment in May 1903 deciding some of these issues. He found that the transaction of October 1897 was a surrender; that assuming the surrender to have been brought about by fraud, undue influ-

ence and misrepresentation the tenancy was not extinguished by the plaintiff's failure to pay rent or cultivate; but that the suit was barred by time under the special provisions of section 94, Central Provinces Tenancy Act.

The plaintiff appealed to the District Judge who held that the defendant Ganpat obtained possession as purchaser not as landlord and remanded the case for a fresh trial. It was this order of remand which was upheld by Skinner, A. J. C., in the judgment printed as *Ganpat* v. *Trimbak* (1).

Two more Judges, Messrs. Bhargava and Palsuley, handled the case before the Court of first instance finally disposed of it in April 1910. Mr. Palsuley found on the 1st issue that after Tukaram's death Ramji in 1293 *fasli* (1883-1884 A. D.) aknowledgad Damji as co-tenant with the landlord's consent, that each paid half the rent from that year and that Damji should, therefore, be regarded as co-tenant. The second issue also was decided in the affirmative, the learned Judge correctly pointing out that the plaintiff was clearly wrong in alleging that the defendant Ganpat had taken possession of the entire holding under the deed executed in October 1897 by the plaintiff's mother and grandmother. On the third issue the findings were that the plaintiff owed Rs. 131-8-3 on account of *sir* in Mohpa; that his mother and grandmother took a further sum of Rs. 68-7-9 in cash, which the defendant Ganpat advanced after satisfying himself by due inquiry that it was needed for cultivation and necessaries; that the surrender by them was prudent and necessary, the plaintiff having no other means of meeting the debt due by him and his relatives advising that the land in Gondi-Mohgaon should be given up as unprofitable; that the ladies were the plaintiff's guardians and had authority as such in the circumstances of the case to surrender; and that no evidence to support the allegations of fraud and undue influence had been adduced. The fourth issue required no independent consideration and received none, for Skinner, A. J. C., had already ruled that the transaction of October 1897 was a surrender, not a sale. On the 5th issue the defendant Ganpat was held to have spent Rs. 535 on improving the holding and to be entitled, if ousted as the result of this litigation, to be re-imbursed to that extent. Issue 6, like issue 4, had been disposed of by Skinner, A. J. C. The date of the plaintiff's birth was found to be the 21st April 1886. No separate finding was given on the question whether the mere failure to cultivate and pay rent put an end to the plaintiff's rights apart from the sale of April 1897 and the surrender of the following October.

The plaintiff's claim having been dismissed *in toto* the plaintiff appealed to the District Judge, who held that Damji had no rights in the holding in the absence of a legal transfer in his favour by either Tukaram or Ramji; that the plaintiff is consequently not bound by the surrender ostensibly effected by Damji's widow, that the defendant Ganpat took no possession under that surrender, but entered upon the entire holding in October 1897 only; and that the surrender of April was ineffective, inasmuch as it extended to no more than half the holding, even if *Musammat* Balu had any rights to surrender. The District Judge also held that the defendant Ganpat made no proper inquiries when advancing Rs. 68-7-9 to the plaintiff's mother and grandmother; that no need for taking the loan is made out; that so much (Rs. 84-0-3) of the rest of the consideration for the surrender of October 1897 as consists of rental arrears and *kotwar's* dues is not proved and that balance was due under a decree the execution of which had become time-barred; that the guardians had no legal authority to revive the time-barred decretal debt; and that consequently the plaintiff could recover possession of the holding without refunding any part of the ostensible consideration for the said surrender. As to improvements the conclusion reached was that the items claimed had not been proved as required by law, and that even supposing they had been proved the plaintiff could not be required to refund the money, seeing that the defendant Ganpat had enjoyed increased profits by reason of any improvements he may have effected.

In second appeal it is urged firstly that the suit is one between a landlord and tenant as such and that the plaint should now be returned for presentation to a Subordinate Judge who is also a Revenue Officer. The question whether a suit like the present is one of the kind alleged does not appear to have been expressly decided by this Court. In *Ragho* v.

Sadoo (2) the circumstances were very similar except that the plaintiff claimed an absolute occupancy instead of—as here—an occupancy holding. That case was tried by a Subordinate Judge who was not a Revenue Officer and no question of jurisdiction was raised. What decides the venue in a case is the nature of the claim as brought: see *Bapuji Raghunath* v. *Kuvarji Edulji* (3) and *Musammat Durbasa* v. *Khalaksingh* (4). Judged by this test it would seem clear that the plaintiff did not sue the defendant Ganpat as landlord; for in his plaint he refrained from so much as mentioning the fact that Ganpat has any proprietary rights in *Mauza* Gondi-Mohgaon, and in his written statement of the 12th November 1907 he persisted that the transaction of October 1897 was not a surrender at all but a sale. Even conceding that the real position of Ganpat must be taken into consideration, although the plaintiff was for leaving it out of account, it is to my mind extremely doubtful whether when a landlord is sued as alienee the Legislature intended his special position to affect the jurisdiction. It is a well-known rule of construction that an Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly; see *Prosonno Coomar* v. *Koylash Chunder* (5). The importance of this rule should be emphasized in a Province where Revenue Officers are for the most part employed also as Magistrates and are necessarily unable to devote much time to the study of civil law. I would also point to the descriptions of suits mentioned in Notification No. 586 dated the 28th January 1904, which was issued by the Local Administration under the power conferred by provise (*b*) to section 97 of the Tenancy Act. It is doubtless true that the enumeration of suits in the Notification is not in terms exhaustive of those which the administration considered to be suits between landlords and tenants as such: none-the-less the omission to provide specially for what must generally be a difficult kind of suit is not without significance. Moreover, in the present case it is common ground that the landlord has been in possession since 1897, and according to the plaint his possession is due to a sale by the tenant's guardians: it is, therefore, on the personal law of the tentant and not no the special law governing agricultural tenancies that the plaintiff must be taken to rely; for on the facts alleged by him section 35 (4) of the Tenancy Act applies and the case is not one of the kind dealt with in *Daola* v. *Chitoo* (6) where against the wishes of the minor tenant or his guardian the landlord prevents them cultivating the land though they desire to cultivate it. I hold, therefore, that the suit is not one between landlord and tenant as such.

The next question for determination is whether Mr. Gharpure and the Subordinate Judges who succeeded him were debarred from trying the suit because Mr. Gharpure's order of the 30th July 1906 was not appealed against. The appellant's contention that the said order continued to bind Mr. Gharpure even after the District Judge decided the appeal from Mr. Walayat-ullah's order returning the plaint is rested on *In re Hausambhai Abdulabhai* (7) and *Musammat Ratna* v. *Pandoba* (8). In neither of those cases was there any decision by an Appellate Court as to the proper Court to try the suit. It seems to me clear that the plaintiff cannot be prejudiced because he acted in accordance with Mr. Gharpure's order. To adopt the view contended for by the appellant would be in effect to deprive altogether of his right to sue a plaintiff who acts as the present plaintiff has done. As authority for the view that he was entitled to present his plaint to Mr. Walayat-ullah as directed by Mr. Gharpure, I may refer to *Beni Madhub Das* v. *Jotindra Mohun Tagore* (9). He had similarly a right to appeal from Mr. Walayat-ullah's order and unless we are to regard the appellate decision as nugatory it must be allowed its full logical outcome, namely that the former order was wrong. Moreover, although Mr. Gharpure could not set aside his own order he was bound to obey the order of his District Judge who had considered the question of jurisdiction and decided that Mr. Walayat-ullah's view was correct. In my opinion Mr. Gharpure was clearly bound to comply with

(2) 5 Ind. Cas. 428; 6 N. L. R. 6.
(3) 15 B. 400.
(4) 4 N. L. R. 63.
(5) 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 327.
(6) 9 C. P. L. R. 1.
(7) 20 B. 283.
(8) 12 C. P. L. R. 15.
(9) 11 C. W. N. 765; 5 C. L. J. 580.

the District Judge's order in appeal and to try the suit.

Thirdly, it was contended that there is no basis in the record for the lower Appellate Court's view that Damji was a mere *bataidar*. It suffices by way of answer to this to refer to the depositions of the plaintiff's mother, Mira Bai (P. W. No. 11), Maruti (D. W. No. 3) and Chindhu (D. W. No. 5). The lower Appellate Court considered and disbelieved the direct evidence adduced to prove the transaction by which Damji's status was changed: it also considered the documentary evidence on which the defendant Ganpat relied to prove Damji's title. This Court is consequently bound by the finding that Damji had no tenant-right in the holding. As remarked by Banerjee, J., in *Peary Mohun* v. *Radhika Mohun*(10), it is a general principle of law that a person cannot claim to have acquired the right of another unless such acquisition is by a valid transfer from the person to whom such right belonged or by the operation of any law.

The next question for determination is whether the failure of the defendant Ganpat to make good a case of legal necessity for the transaction of October 1897 suffices to enable the plaintiff to re-gain possession of his holding. The plaintiff has entirely failed to make good his allegations of fraud and undue influence. Had he been a major in 1897, it is clear that he would have lost all his rights by virtue of an implied surrender; for the landlord has been in possession since that year and no rent has been paid. The expression "leaves his holding uncultivated" in section 35 (4) of the Tenancy Act means, I think, "omits to cultivate the holding himself or to arrange for its cultivation." Can it reasonably be held that the provision just cited, though worded in perfectly general terms, was intended by the Legislature to be inoperative where a minor's guardians make a bad bargain in surrendering on his behalf? I think not. I can see no reason for distinguishing between such a case and the one provided for in section 94 of the Act in which a minor tenant is violently ousted by his landlord. As pointed out on behalf of the present appellant when the case was before Skinner, A. J. C., the management of an agricultural village would be very seriously hampered if surrenders by the guardian of an infant tenant could be challenged after 20 years. Nor do I see my way to drawing a substantial distinction between a case where a holding is not taken up at all on behalf of a minor tenant and one in which after some time the holding is given up: in both there is practically similar failure to perform the duties of tenant which the Special Act on the subject prescribes, and it is this failure—as explained in *Ragho* v. *Sadoo* (2)—which destroys the tenant-right.

The lower Appellate Court has relied on *Sarjuprasad* v. *Muratlal* (11) as authority for the view that inasmuch as the transaction of October 1897 did not affect the entire holding it was meaningless and ineffectual. That was not a case in which a sole landlord was dealt with, and I would refer to *Holme* v. *Brunskill* (12) as authority for the view that notwithstanding the surrender of part of the land demised the former tenancy of the remainder continues. In the present instance Damji and after him his widow was a mere *bataidar* according to the plaintiff or a co-tenant according to the defendant. Whether the plaintiff's guardians surrendered an undivided half share or a half divided by metes and bounds and whether there was or was not a co-sharer in the tenant right there seems to be no reason in equity or good conscience why the landlord should be deprived of what that surrender gave him: see *Peary Mohun* v. *Radhika Mohun* (10).

It is unnecessary to decide the questions raised in the 8th and 12th grounds of appeal. The former relates to the age of the plaintiff when he filed his suit and was left untouched by the lower Appellate Court: I may say as to this that I agree with the first Court for the reasons given by it that the plaintiff did not attain majority till the 21st April 1904.

The decree of the lower Appellate Court is reversed and that of the first Court dated the 2nd April 1910 is restored. Having regard to all the circumstances of the litigation I direct that costs throughout be borne as incurred.

Decree reversed.

(10) 8 C. W. N. 315 at p. 317; 5 C. L. J. 9.

(11) 14 C. P. L. R. 33 at p. 34.

(12) (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.

In the matter of SIR STUART SAMUEL.

PRIVY COUNCIL.

REFERENCE BY HIS MAJESTY IN ACCORDANCE WITH THE ADDRESS OF THE HOUSE OF COMMONS DATED THE 31ST JANUARY 1913.

April 11, 1913.

Present—Lord Chancellor, Earl of Halsbury, Earl Loreburn and Lord Dunedin.

In the matter of SIR STUART SAMUEL.

Act of Parliament 22 Geo. III, c. 45, s. 1—'Any other person'—Doctrine of ejusdem generis—*Public service—Source of payment and place immaterial—Construction of Acts—Later Act surplusage—41 Geo. III, c. 52, s. 4 not surplusage—Secretary of State—His status in the British Government and also with regard to his Council.*

When the first section of the Act of Parliament, 1782 (22 Geo. III, c. 45) after enumerating several office-holders proceeds to add the words 'any other person or persons whatever,' the doctrine of *ejusdem generis* applies. Any 'other person' means any one who holds an office in the British Government of a similar kind to those enumerated.

The 'public service' required by the Act need not be one either executed or requited within Great Britain or paid for out of any particular fund.

The 4th section of 41 Geo. III, c. 52 passed in 1801 is not surplusage. It enlarged the area of disqualification, and its presence on the Statute book is in no way inconsistent with the construction put by their Lordships upon the Act of 1782.

It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way, a later enactment would be surplusage.

The Secretary of State for India is in fact one of His Majesty's five principal Secretaries of State, and as such can discharge most, if not all, of the duties of the other four, as they can discharge most, if not all, of his duties. He is an officer of the British Government in the fullest sense.

A contract is none-the-less made with the Secretary of State that he has to obtain the concurrence of others (members of his Council) before making it, and that he and they are designated by statute as liable to be sued or to sue on it as a corporate body.

The personality of the Secretary of State is not merged in any corporation by the statute (Act of Parliament, 1858, for the better Government of India) nor in that of the Council.

A member of Parliament is disabled from sitting and voting in the House, if he or his firm (of which he is a partner) makes contracts with the Secretary of State for India in Council for or on account of the public service of the Crown in India.

FACTS.—Special reference under the provisions of 3 and 4 William IV, c. 41, section 4 as to whether by reason of certain facts Sir Stuart Samuel M. P. for the Whitechapel Division of the Tower Hamlets was disabled from sitting and voting in the House of Commons.

In November 1912 the House of Commons appointed a Select Committee presided by the Prime Minister to consider whether Sir Stuart Samuel had vacated his seat as a member of the House of Commons in consequence of the firm Samuel Montagu and Co. of which he was a partner, having entered into transactions with the Secretary of State for India in Council. The Committee recommended a reference to the Judicial Committee for its opinion on a definite question of law. The House adopted that course while reserving to itself the right of ultimate decision.

Sir *Robert Finlay, K. C*, *M. P. Atkin, K. C.* and *Alexander Neilson*, appeared for the Treasury.

Messrs. *Danckwerts, K. C., Buckmaster, K. C., M. P.* and *Spens*, appeared for Sir Stuart Samuel.

Sir *Robert Finlay, K C., M. P.*, contended that the India Office employed the firm to purchase silver for the Indian Currency paying the customary remuneration of 1/8 per cent. on the purchase price of the silver. The relation between them was that of seller and buyer. The firm took the responsibility of carrying out the transaction and undertook the duty of agents to see that it was done to the best interests of the buyer. The question was whether the contract with the Secretary of State fell within the terms of the statute, that is to say, whether the Secretary of State for India was one of the Government Departments to which the Act of Parliament applied.

[Mr. *Danckwerts*:—The contract was not with the Secretary of State, but with the Secretary of State in Council which was a special body.] That made no difference as the Secretary of State acted with the consent of the majority of the Council which was merely a machinery. The question as to the position of the Secretary of State for India was raised in the case of *Royse* v. *Birley, Manchester Election Petition, In re* (1) but it was not decided. 22 Geo. III, Chapter XIV (1781-82) was entitled: "An Act for restraining any person concerned in any contract, commission or agreement made for the Public Service from being elected or sitting and voting as a member of the House of Commons" and 41 Geo. III, Chapter III (June 20, 1801) was entitled: "An Act for declaring what persons shall be disabled from sitting and voting in the House of Com-

(1) (1869) L. R. 4 C. P. 296; 38 L.J. C. P. 203; 20 L. T. 786; 17 W. R. 827.

In the matter of SIR STUART SAMUEL.

mons of the United Kingdom of Great Britain and Ireland by providing in what cases persons holding office or place of profits under the Crown of Ireland shall be incapable of being members of the House of Commons of the Parliament of the said United Kingdom." That Act provided, *inter alia*, that all persons disabled from sitting in the British House of Commons should be disabled from sitting in the United Kingdom as members for Great Britain. In 1782 when the Act was passed the *independence* of the *House of Commons* was in view. In 1858 India was taken over by the Crown and from that date the Act of 1782 applied to any contract with the Government Department established for the Government of India. As soon as a Government Department was established, it made no difference what it dealt with, it came within the plain words of the Act which was drawn in such terms as to apply to all times. In case of contracts for armaments for the Crown Colonies like Canada, when the Secretary of State for War acted on behalf of the Colonial Government, he did not take any personal responsibility. He merely acted as the agent for the Colony concerned. In 1801 an Act was passed by which all persons hitherto disabled from sitting in British or Irish Parliament were disabled from sitting for the United Kingdom of Great Britain and Ireland as members for Great Britain, and persons disabled by British Statutes were not thereby enabled to sit for Ireland nor *e contra*. They were persons who should directly or indirectly, himself or by any other person whatever in trust for him or for his use or benefit or his account, undertake, execute, hold or enjoy any contract agreement, or commission of His Majesty's Treasury in Ireland or any other person or persons whatever for or on account of Public service in Ireland. "Public service" meant anything done for the service of the public in any part of the British Empire and not exclusively in Great Britain or Ireland and that it could be done through the medium of the Secretary of State for India or the Colonies or any executive branch of the Government. The person making the contract must be some one connected with the Executive Government of the country. The Crown Agents or Agents-General for the Colonies did not come within this category as they could make arrangements apart from the Colonial Office. In 1865 the office of Mr. William Forsyth, K. C., M. P. for Cambridge, who was standing Counsel to the Secretary of State for India, was held a place of profit under Crown. There was the case of Baron Lionel De Rothschild, one of the city members, who was said to have forfeited his seat by reason of his firm making some arrangement with the Government for a loan of 16 millions. The matter was referred to the Select Committee of the House of Commons which included eminent lawyers like Sir Alexander Cockburn, Sir Richard Bethel who seemed to take the opposite view of the matter. The majority decided in favour of the Baron, but the decision was on a different issue. The arrangement for the loan had to be confirmed by an Act of the Parliament and when the Act was passed some other arrangement was made.

Mr. *Atkin*, *K. C.*, following.

Mr. *Danckwerts*, *K. C.*, for Sir Stuart Samuel, contended that the whole case depended on the construction of the Act of 1801, or whether Samuel Montagu and Co.'s transactions came within any of the various categories of disqualification enumerated in that statute. The contract was made with a body entirely independent of either House of Parliament and whose transactions were not binding on the British Crown and only took effect in India, and out of the resources of the Government in India and not out of the national resources of Great Britain. The Secretary of State for India in Council was a body of which the present alone had any official connection with the Government or the Crown. They were to be removed only after an address to His Majesty by both Houses of Parliament. They were placed in complete independence of anything that passed in the Parliament. The Act of 1782 applied only to contracts made by the Crown in Great Britain through administrative officials acting under the Crown in this country and ordinarily with reference to the resources of Great Britain for such public services as the revenues of Great Britain were applicable for. The importance of the Select Committee's decision in Baron Rothschild's case is greatly minimised, but it included Sir Alexander Cockburn and Sir Richard Bethel, Mr. Dirracli, Mr. Spenser Walpole and Mr. Freshfield.

[LORD LOREBURN.—The eminent statesmen

were not necessarily experts in the interpretation of Acts of Parliament. The decision of the Select Committee—eminent though the members were—did not possess the same authority on the interpretation of a statute as that of a Court of Law].

Act VI Anne, C. 41 dealt with officers of the Crown disabling one from sitting in the House. Whenever any Act of Parliament intended to include officers outside the United Kingdom, it was always specially mentioned. The Act of 1782 was a British Act. Contracts entered into by High Officers of State bound the Crown. They could not bind themselves. The case of contracts with the Secretary of State for India stood on a different footing. Further the Acts said that such a member should not sit and vote during the time the contracts were in force. He did not vacate his seat.

[LORD CHANCELLOR:—This is quite a new point.]

He would vacate it only when he was expelled. The Secretary of State in Council was a legislative body and whatever it did had the force of legislation. The Acts of 1782 and 1801 applied to contracts with the revenue of the United Kingdom. The contracts in question were outside these Acts, as they were made for the Government of India. The Act of 1858 placed the Council in the same position as the East India Company. The King was vested with powers and duties only for the purposes of India. The contract was with the majority of members who could only be removed like Judges on an address demanding their removal carried by both Houses of Parliament. Their salaries were paid out of the revenue from India. The addition of "in Council" meant that the Secretary of State could do nothing individually or without the approval of the Council or except in their name. The contracts made by the Secretary of State for India in Council were wholly outside the Acts of 1782 and 1801.

Mr. *Buckmaster, K. C.*, following argued that the contracts in question could not bind the Crown. They bound only a corporate body. Nor could they be paid out of the revenue of Great Britain. This really was the test. Whether it was for public good or this or that was really wide of the mark.

Sir *Robert Finlay* in reply said that by the Act of 1858 which transferred the Government of India to the Crown the territory was vested in the Crown and India was to be governed in the name of the Sovereign. It could not make the slightest difference whether the machinery for enforcing a contract were proceedings against the Government Department which entered into it or by Petition of Right. The Secretary of State contracted in the name of the King who was the Ruler of India. The real test was whether the matter was entered into for the public service, in other words, on behalf of the Crown. Public service was the public service of the whole of the Empire whether in Great Britain or beyond the seas.

JUDGMENT.

LORD CHANCELLOR.—His Majesty was pleased, in accordance with an humble address of the House of Commons, dated the 31st January 1913, to communicate to the Judicial Committee a Report of the Select Committee of the House of Commons, and to refer to the Judicial Committee the following question of law for their hearing and consideration, *viz.*: "Whether by reason of the facts which have been reported by the above-named Select Committee of the House of Commons the said Sir Stuart Samuel is disabled from sitting and voting in the House."

The facts which raise the question are that Sir Stuart Samuel, being a Member of the House of Commons for the Tower Hamlets, was partner in a firm which made contracts with the Secretary of State for India in Council for borrowing money upon short loans, for purchasing India Council Bills and India Treasury Bills, for subscribing to India Government loans, and for purchasing silver for the purposes of the Indian currency.

If any one of these contract answers the description given in section 1 of 22 Geo. III., c. 45 (1782), as to the person with whom and the service for which it was made, then the seat was forfeited.

This Act of Parliament itself declares that it was made to preserve the freedom and independence of Parliament, and the mischief guarded against is the sapping of that freedom and independence by Members being admitted to profitable contracts. But the enacting words do not apply to all contracts. Their application is limited in two ways. In the first place the member of Parliament must have "directly or indirectly" undertaken the contract with "the Com-

missioners of His Majesty's Treasury, or of the Navy or Victualling Office" or "the Master-General or Board of Ordnance" or "any one or more of such Commissioners" or "any other person or persons whatsoever."

In the second place it must appear that the contract was made "for or on account of the public service." And it was argued that in this particular case both these limitations had the effect of taking Sir Stuart Samuel's case out of the Statute.

The meaning of the first limitation was much discussed in argument at the Bar, and must be determined by the familiar canons of construction. All the persons enumerated in the first section of this Act were servants of the Crown in 1782 (the date of the Act) holding offices in the British as contrasted with the Irish Government or any other Government of the King's dominions or dependencies beyond the seas. They were officers of the British Government, which was also the Imperial Government of the King. When, therefore, the first section of the Act of 1782, after enumerating these several office-holders, proceeds to add the words "any other person or persons whatsoevor," the doctrine of *ejusdem generis* applies. Any "other person" meant any one who held an office in the British Government of a similar kind to those enumerated.

The second limitation—that the contract must be one made "for or on account of the public service"—was much relied upon by Counsel for Sir Stuart Samuel. They urged that these words meant "the public service of Great Britain" (now incorporated in the United Kingdom), and that no service could be so denominated unless it was paid for out of moneys voted by Parliament, or at all events out of British money. It does not seem to their Lordships that the public service required by the Act need be one either executed or required within Great Britain or paid for out of any particular fund. No such language is to be found in the Act, and such an interpretation would leave applicable to the purposes of bribery all the hereditary revenues of the Crown, now for the most part received by the Exchequer under temporary Civil List Acts, together with all revenues from sources inside or outside this country which Ministers might have the power to dispose of without a vote of Parliament, such as funds derived from some dependency beyond the seas. No reason can be given for thus cutting down the scope of this Act. The source from which contracts are to be paid for is immaterial. So is the place where they are made.

It is desirable to notice an argument derived from the 4th section of 41 Geo. III, c. 52, passed in 1801. This section disqualifies for a seat in the Parliament of the United Kingdom any one who makes a contract with a Commissioner of His Majesty's Treasury in Ireland or with any other person whomsoever for or on account of the public service in Ireland. This was surplusage (such is the argument) if the Act of 1782 had already made such contracts, irrespective of place, a ground of disqualification for the British Parliament, since all persons disqualified for the British Parliament were by section 1 of the Act of 1801 already disabled from sitting in the Parliament of the United Kingdom, at all events for British constituencies. There are several answers to this contention. It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, *ex abundante cautela*, to remove possible doubts. Further, their Lordships do not consider that section 4 of the Act of 1801 was in fact surplusage. Contracts made with a Commissioner of the Irish Treasury or with any one in a like position for any purpose were not within the Act of 1782, because these Irish officials were not officials of the British Government. Such a contractor was, therefore, not disqualified by section 1 of the Act of 1801 for a British constituency in the Parliament of the United Kingdom. He was also not disqualified for an Irish constituency, because in the legislation affecting the Irish Parliament, though certain placemen were disqualified, contractors were not. As then the Irish Treasury continued to have a separate existence after 1801, it was thought right to create a fresh disqualification in regard to contracts made with them or with other persons in a like position to them. So, the 4th section was not surplusage. It enlarged the area of disqualification, and its presence on the Statute

book is in no way inconsistent with the construction which their Lordships put upon the Act of 1782.

Accordingly the case of Sir Stuart Samuel falls within this Act if the Secretary of State for India in Council is a person answering to the statutory description and the contracts which he has made were "for or on account of the public service," that is to say, any service of the Crown anywhere.

It is obvious that these contracts were made for the public service of the Crown in India, and the point remaining for consideration is whether the Secretary of State for India in Council falls within the description to be found in the 1st section 22 Geo. III., c. 45. This was strenuously contested.

By the Act of 1858 the Government of India, which had theretofore been carried on by the East India Company on behalf of the Crown, under divers Acts of Parliament, was transferred to the direct control of the Crown, acting through officers whose duties were prescribed by the Act. One of these officers is a Secretary of State. In early times there was one English Secretary of State. Then, there were two British Secretaries of State, and before 1858 the number was increased to four. The Act of 1858 created a fifth, who is paid out of the revenues of India. To him are in practice allotted the duties of transacting that part of the business relating to India which requires the intervention of a Secretary of State, and he is commonly called the Secretary of State for India. But he is in fact one of His Majesty's five Principal Secretaries of State and as such can discharge most, if not all, of the duties of the other four, as they can discharge most, if not all, of his duties. He is an officer of the British Government in the fullest sense.

A Secretary of State would certainly have come within the description of the Act of 1782, and members of the British Parliament in 1782 would have been disabled from sitting in the Parliament of Great Britain by reason of contracting with him within that Act. This disability was continued so as to affect members of the Parliament of the United Kingdom by 41 Geo. III., c. 52, which enacts that "all presons disabled from, or incapable of, being elected, or sitting and voting in the House of Commons of any Parliament of Great Britain, shall be disabled from, and be incapable of, being elected or sitting and voting in the House of Commons of any Parliament of the United Kingdom, as Kinghts, Citizens or Burgesses for any County, Stewartry, City, Borough, Cinque Port, Town, or Place in that part of the United Kingdom called Great Britain." It follows, therefore, that to contract with a Secretary of State after the union with Ireland has the same effect upon the seat of a British member of Parliament (which Sir Stuart Samuel is) as it would have had in 1782 before that union. Sir Stuart Samuel is disabled if the firm, of which he was a member, did in fact make the contracts in question with the Secretary of State.

Now the contracts were expressed to be made with the Secretary of State in Council, pursuant to the Act of 1858 for the better Government of India, and were made with the concurrence of a majority of the Council, to be paid for out of the revenues of India as required by that Act, and without any personal liability on the Secretary of State. And by section 65 of that Act, "the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate. It was urged that it was not with the Secretary of State at all that the firm contracted, but with a corporation. Their Lordships cannot take this view. A contract is none-the-less made with the Secretary of State that he has to obtain the concurrence of others before making it, and that he and they are designated by this Statute as liable to be sued or to sue on it as a corporate body. He and they have distinct function prescribed by the statute which enables them to bind their successors, and this provision affords facilities for litigation which are not afforded by a Petition of Right. But this is merely machinery; the personality of the Secretary of State is not merged in any corporation by the statute nor is that of the Council. In some particulars they can check him or he can override them. They and he remain with separate and possibly conflicting responsibilities, though for purposes of litigation

they can be treated as though they were one legal personality. These contracts were made with one of His Majesty's Principal Secretaries of State and with his Council, or with the concurrence of a majority of his Council, it matters not, for they were made at all events with him.

Under these circumstances, though no suggestion has been made of any improper motive, and though the construction placed upon the statutes by Sir Stuart Samuel finds some countenance in former proceedings before Committee of the House of Commons, their Lordships are obliged to answer the question of law referred to them as follows. They will humbly advise His Majesty that by reason of the facts which have been reported by the above-named Select Committee of the House of Commons, the said Sir Stuart Samuel was disabled from sitting and voting in the House.

Solicitors for the Treasury: *Treasury Solicitors.*

Solicitor for Sir Stuart Samuel: Mr. *Freshfields.*

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 87 OF 1908.
May 19, 1913.
Present:—Mr. Justice Kensington and Mr. Justice Shah Din.
MAHIDITTA MAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MRS. NICHOLSON AND OTHERS—DEFENDANTS—RESPONDENTS.

Benami *purchase—Money paid by another—Burden of proof—Pleadings—Ground of claim never put forward before hearing of appeal not allowed—Recitals in deeds—Third person.*

Where property is purchased in the name of *A.*, the burden of proving that *A.* has no beneficial interest in the property, and the purchase is really *benami*, lies on the person alleging it. Mere payment of the purchase money by another from his own pocket cannot establish the *benami* nature of the transaction, if the facts of the case are such as to show that he had made an advance in favour of the apparent purchaser intending that the purchase should enure to the benefit of the latter.

A ground of claim never put forward before and throughout the pleadings cannot be allowed to be raised at the hearing of the appeal in the Chief Court.

Recitals in a deed are not relevant evidence against a person who is in no way concerned with the deed. But as regards the parties to the deed, it is reasonable to presume that they allowed the recitals to be embodied in the deed without objection.

First appeal from the decree of the District Judge, Simla, dated the 25th November 1907, dismissing plaintiff's suit.

The Hon'ble K. B. Mr. *Muhammad Shaffi*, for the Appellants.

The Hon'ble R. B. Mr. *Shadi Lal* for Mrs. Nicholson and Mr. *B. Bevan Petman* for *Musammat Pano*, for the Respondents.

JUDGMENT.

SHAH DIN, J.—(*April 29th*, 1913)—A return has now been received to this Court's order of remand, dated the 14th November 1910. The two issues sent down to the District Judge for trial were these:—

(1) Was Sukh Lal owner of a half share in shop No. 6 which was mortgaged by him to the plaintiffs by deed of mortgage, dated the 5th October 1899, and was he competent to effect that mortgage?

(2) Did Jiwan Singh own the said half share in shop No. 6 on the 25th November 1904 when a sale thereof was effected by Jiwan Singh's guardian, *Musammat* Ghamiro, in favour of Mrs. Nicholson?

Upon the first issue the District Judge has held that Sukh Lal was not the owner of the half share in dispute and that he was not, therefore, competent to effect a mortgage thereof in favour of the plaintiffs on the 5th October 1899. On the second issue his finding is that, whether Jiwan Singh was the son of Nand Ram or not, he was certainly in possession of the half share in dispute at the time of the sale in Mrs. Nicholson's favour by *Musammat* Ghamiro, as his guardian, and that Sukh Lal's alleged proprietary title to the said half share not being established, Jiwan Singh must be treated as the owner thereof as against the present plaintiffs who claim under Sukh Lal.

In this Court's order of remand the meaning and scope of the first issue set out above was defined in the following terms:—

"It must now be taken as settled that Nand Ram never executed a Will in favour of Sukh Lal, bequeathing to him a half

share in the shop in dispute. The alleged title of Sukh Lal to that share must, therefore, now be based on the alleged *benami* purchase thereof by Sukh Lal in the name of Nand Ram, or, if Nand Ram was the real purchaser of that share, upon some fact or facts showing that Sukh Lal acquired the ownership of it after the death of Nand Ram. The alleged purchase by Sukh Lal in the name of Nand Ram or the other fact or facts aforesaid must be proved affirmatively by the plaintiffs in this case."

In discussing the question whether the share of the shop in question had been purchased *benami* by Sukh Lal for his own benefit and not for that of Nand Ram, in whose name the sale-deed was executed, the District Judge holds that it was Sukh Lal who "paid the purchase-money for the half share in the shop and transferred it by what is equivalent to a deed of gift to Nand Ram." He then proceeds further and says:—"The second alternative that Sukh Lal acquired the ownership after the death of Nand Ram need not be gone into, as the Chief Court has directed that this possibility is only to be discussed if it is found that Nand Ram was the real purchaser, *i. e.*, found the money. This has not been found, but, on the contrary, it has been found that Sukh Lal found the money." It is admitted on all hands that here the District Judge has gone wrong, because he has wholly misunderstood the directions given by this Court in the paragraph which has been set out above. This Court did not lay it down that if it is held that Sukh Lal paid the purchase-money for the share in dispute, he should necessarily be considered as the real purchaser of that share and not Nand Ram. It is not disputed before us that despite the payment of the purchase-money by Sukh Lal, Nand Ram may, under certain conditions, be still the real purchaser; and what this Court said in its order of remand was that if Nand Ram is held to be the real purchaser of the property in suit in the first instance (and that may be so even if Sukh Lal paid the purchase-money) the alleged title of Sukh Lal to it would have to be proved by reference to some fact or facts showing that Sukh Lal acquired the ownership of it after the death of Nand Ram. The District Judge has clearly erred in not going into this part of the case, and the value of his findings is considerably discounted by a strange confusion of ideas which is discernible in his return.

The question embodied in the two issues sent down by this Court for trial have been discussed at great length by the learned Counsel on both sides, but they are comparatively simple in character and may be stated as follows:

(1). Was the purchase of the half share of the shop in dispute, which was made by Nand Ram on the 8th August 1896, a *benami* purchase for the benefit of Sukh Lal, who was the real purchaser thereof and who was, therefore, the owner of it when he mortgaged it to the plaintiffs in October 1909?

(2). If Nand Ram was the real purchaser of the share in question, did Sukh Lal acquire rights of ownership therein after the death of Nand Ram?

(3). Was Jiwan Singh, under whom Mrs. Nicholson claims by virtue of the deed of sale, dated the 25th November 1904, a legitimate son of Nand Ram, and did he, as such son succeed to the property in suit after Nand Ram's death?

In discussing the evidence in this case reference has to be made to three printed paper-books and for facility of such reference, we have marked them as follows; the paper-book in the present appeal which was printed *before* the remand is marked A; the paper-book printed *after* the remand has been marked B; and the paper-book in First Appeal No. 41 of 1905, which arose out of Original Suit No. 59 of 1903 brought by the present plaintiffs against *Musammat* Nandi and the heirs of Sukh Lal to enforce the mortgage of the 5th October 1899, is marked C. For proper elucidation of the facts of the case it is convenient to give in this place the history of the family of Sukh Lal and Nand Ram, with special reference to their connection with the property in dispute, which is contained in the judgment of Mr. Dundas, District Judge, in Suit No. 59 of 1903 (Book A, page 10).

Sukh Lal was a *Brahmin* of the Rohtak District who was employed as a teacher in a Simla school.

About the year 1876 or 1877, he abducted *Musammat* Pano, *Kanet* by caste, the wife of

one Mani Ram, *Kanet* a coolie mate living and holding ancestral land in Simla below the Kaithu Bazaar.

Sukh Lal and Pano fled to the Bhajji State some 20 miles from Simla followed by Mani Ram who appears to have made a murderous attack on them with an axe, the scars of which *Musammat* Pano still bears.

Mani Ram was arrested in Simla, tried and imprisoned in Bhajji, and died in Jail there at some date probably before 1894; his body being brought into Simla for cremation.

With *Musammat* Pano were two children, *Musammat* Nandi (defendant No. 1) and Nand Ram, concerning the latter of whom there is a dispute as to whether Mani Ram or Sukh Lal is the parent.

Sukh Lal rose to be *Wazir* of the Bhajji State and appears to have administered the State with considerable profit to himself for a good many years.

He married his daughter or adopted daughter, *Musammat* Nandi, to one Mahi Dyal, *Bania* of Simla, who carried on a fairly lucrative business in Simla in the shop now mortgaged of which he was half owner, the other half being owned by the Rana of Bhajji.

Mahi Dyal, however, died early in 1896 leaving his property by Will to his widow, *Musammat* Nandi, who obtained Probate on 18th March 1896.

Two days later on 20th March 1896, she appointed Nand Ram her agent by a power-of-attorney.

In August 1896 half the shop was sold by the Rana of Bhajji, nominally at all events, to Nand Ram for Rs. 2,650. Thus *Musammat* Nandi became owner of half and Nand Ram nominally of the other half. In the middle of March 1897 Nand Ram died suddenly in Simla and on May 27th Sukh Lal produced a Will in his favour of which he obtained Probate in June after somewhat summary proceedings which have since been impugned. Early in 1898 certain defalcations in Bhajji led to the arrest of Sukh Lal who only obtained his release by paying up Rs. 10,000 to the State after which Sukh Lal came to live in Simla. The method in which the money was raised will be discussed later. In December 1898 comes the first mention of Jiwan Singh in a small sale-deed of land in Kaithu. Jiwan Singh is alleged to be the posthumous son of Nand Ram by one *Musammat* Chandchillo, a *rit* wife, since deceased, born in Bhajji in June or July 1897. His first public appearance is where his existence is put forward as a defence, on 8th April 1899 to a suit brought against Sukh Lal in Simla. The defence was put in by Sukh Lal's brother, Tara Chand. Jiwan Singh henceforward has been a very convenient person whose existence is alternately affirmed or ignored as opportune.

The plaintiffs allege that he is an importation from Rohtak merely adopted by one of Sukh Lal's wives not by either Sukh Lal or Nand Ram, and entitled neither to Sukh Lal's, or Nand Ram's estate.

Sukh Lal died in March 1900. Mahi Dyal, husband of *Musammat* Nandi, who is mentioned in the above extract as the owner of one-half of shop No. 6 had purchased that one-half on the 14th March 1892 (Book A page 6). He died in or about March 1896 and his widow, *Musammat* Nandi, became sole owner of the said half share of the shop under a Will which had been made in her favour by Mahi Dyal on the 6th May 1889. On the 8th August 1896 the half share of the shop now in dispute was purchased from the Rana of Bhajji for Rs. 2,650 and the sale-deed was executed by the vendor in the name of Nand Ram. After this purchase the shop was owned half and half at least ostensibly by *Musammat* Nandi and her brother, Nand Ram; and it is important to note here that prior to this on the 20th March 1896 Nand Ram had been appointed agent by *Musammat* Nandi to carry on the business of the shop, her husband having died shortly before.

The first question for decision is whether the purchase of the half share in the shop made from the Rana of Bhajji in August 1896 was a really *benami* purchase so far as Nand Ram was concerned, the real vendee being Sukh Lal. As has already been held in the order of remand, the onus lies on the present plaintiffs, who claim under Sukh Lal, of proving that he was the owner of the property in suit; in other words, it is the plaintiffs who have to prove affirmatively that Sukh Lal was the real purchaser and that Nand Ram had no beneficial interest in the property purchased under the deed of 8th August 1896. In order to prove

this, the plaintiffs have tried to establish that the purchase-money, Rs. 2,650, was paid to the vendor by Sukh Lal and not by Nand Ram; and their learned Counsel has strenuously contended that if that fact is held to be established, then, in view of the relationship between Sukh Lal and Nand Ram, there is a strong presumption that Sukh Lal intended to purchase the property for himself and that he became the owner thereof under the sale-deed in question. To prove the payment of the purchase-money by Sukh Lal reference is made to the evidence of the Rana of Bhajji (page 86 of Book C). In answer to question No 30, "who paid you Rs. 2,650?" the Rana says, "Nand Ram paid me this sum through Sukh Lal." This is the only relevant evidence on the record as to the alleged payment of the purchase-money by Sukh Lal; and it has been tried to supplement this evidence by showing that, at the time when the purchase in question was made, Nand Ram had no independent source of income so as to be able to pay the purchase money out of his own pocket. It has also been argued in this connection that in and before 1896 Sukh Lal, who was then *Wazir* of the Rana of Bhajji, had embezzled a large amount of money belonging to the State that being apprehensive that the embezzlements might be discovered and his property seized by the Rana, he was taking the precaution of purchasing property outside the State in the name of Nand Ram but really for his own benefit in order to place it out of the reach of the Rana; and that the property in dispute was also purchased by him in Nand Ram's name as part of the same scheme. This last branch of the argument has, in our opinion, little force. If Sukh Lal, being afraid of his defalcations coming to light, had intended to deceive the Rana as to his own acquisitions, he would have been the last person to purchase the property in question from the Rana himself and to have paid the purchase-money out of his own pocket. Sukh Lal would have realized the hazardous nature of the proceedings because *ex hypothesi* it was to his interest to keep the Rana entirely in the dark as to whether he had any cash in his possession and as to how he was investing the proceeds of his embezzlements. Apart from this, the evidence of the Rana as to the actual payment of the purchase-money by Sukh Lal does not very much help the plaintiffs in this case. The Rana's answer to the question put to him suggests that he thought that the money was really paid by Nand Ram, but that it was paid through Sukh Lal, who in view of his connection with Nand Ram through the latter's mother, *Musammat* Pano, would be the proper person to negotiate a purchase for him from the Rana. As regards the contention that at the time of the purchase Nand Ram was almost penniless and was not in a position to pay the money out of his own pocket, it must be remembered that after all the purchase-money, Rs. 2,650, was not a large amount; that before the purchase Nand Ram's sister, *Musammat* Nandi, had succeeded to the property of her husband, Mahi Dyal (who apparently had carried on a flourishing business in Simla (Book A, page 12, line 31) and had appointed Nand Ram as her agent to carry on the said business, that Nand Ram himself had been realising the income of some property belonging to the Rana, which, according to the Rana, he had misappropriated (Book C, page 87, Answer 46); and that he had also succeeded to the land which his father, Mani Ram, had left in Kaithu within the limits of Simla. There is nothing, therefore, inherently improbable in Nand Ram having been assisted by his sister, *Musammat* Nandi, with a portion of the purchase-money and his having supplied the rest from his own pocket; and the mere fact that he was keeping four *rit* wives and was otherwise of dissolute habits, as alleged by the plaintiffs is insufficient to show that it was impossible for him to advance any portion of the purchase money himself.

But even if Sukh Lal be held to have paid the purchase-money out of his own pocket, the facts proved in this case are such as to show that he had made an advance in favour of Nand Ram intending that the purchase should enure to the benefit of the latter and not to his own benefit. Nand Ram's mother *Musammat* Pano, was abducted by Sukh Lal in or about 1875 (*Samabt* 1932), and according to Jauhari Mal (Book C, page 69) Nand Ram must then have been about $3\frac{1}{2}$ years of age. This shows that in August 1896, when the purchase in dispute was made, Nand Ram's age must have been about 25

years; and since Nand Ram was not Sukh Lal's own son but the son of a favourite mistress who had been abducted by him, it may well be presumed that he was persuaded by her to provide Nand Ram with funds to purchase the half share of the house in dispute for his benefit so that *Musammat* Nandi and Nand Ram, sister and brother, should between themselves become the owners of the whole shop. It is clear on the record that after the purchase Nand Ram sat in the shop and carried on business both on his own behalf and on behalf of his sister; that the shop and the goods were insured in the names of both the sister and the brother (Book A, page 12, last paragraph); and that though Sukh Lal also looked after the shop he did so on behalf of Nand Ram, who was really in possession of it (evidence of Rana of Bhajji, Book A, page 86, Answer 32). But apart from all this, the most important piece of evidence in support of the contention that the shop had been purchased for the benefit of Nand Ram and that he was the real owner thereof, is contained in the Will dated the 13th March 1897, which is alleged to have been executed by Nand Ram in favour of Sukh Lal and on which Sukh Lal has all along based his title to the property in suit. According to that Will (Book C, page 8) the said property was purchased by Sukh Lal for Nand Ram and the ownership thereof vested in the latter and it was under the Will in question that Sukh Lal became heir of that property. This Will has, no doubt, been held to be a forgery, but the fact that Sukh Lal in his life-time put forward this Will as genuine and claimed the half share in the shop on the strength of it, goes far to show that he himself never regarded the purchase of the 6th August 1896 as a *benami* one under which he himself could claim the shop as against Nand Ram. This view of the case is further strengthened by the recitals in the mortgage-deeds dated the 15th June 1898 and 5th October 1899, which were executed by Sukh Lal and *Musammat* Nandi in favour of the present plaintiffs in respect of the entire shop No. 6 for Rs. 2,500 and Rs. 6,000, respectively (Book C, pages 2 and 4). In both the said deeds Sukh Lal, as mortgagor of the one-half share of the shop in question, speaks of it as having been left by Nand Ram deceased; to whose property he (Sukh Lal) had succeeded by virtue of the Will of Nand Ram of which Probate had been granted to him by the District Judge on the 12th June 1897. And further, in both those deeds the eastern boundary of the other half share of the shop which was mortgaged by *Musammat* Nandi, mortgagor No. 2 is given as the half share which is now in dispute and which is described as having been "owned formerly by Nand Ram, deceased, and now belonging to Sukh Lal, mortgagor No. 1". It is exceedingly difficult to see how, in the face of these three documents, *viz.*, the Will of 13th March 1897 and the two mortgage deeds of 15th June 1898, and 5th October 1899, the present plaintiffs, as representatives of Sukh Lal, can say that the property in suit was purchased by Sukh Lal nominally for Nand Ram, but really for his own benefit, and that the beneficial interest in it vested in him from the date of the sale. Upon the facts disclosed on the record the correct view to hold is, in the first place, that it is not proved that the purchase-money was paid by Sukh Lal, out of his own pocket, and, in the second place, that even if he did pay the purchase-money, he did so as an advance to Nand Ram intending to purchase the property in his name and for his benefit and recognising his exclusive proprietary rights therein. On this view of the case, it is unnecessary to refer to, or discuss, the long array of authorities which were placed before us by the learned Counsel on both sides as bearing generally upon the nature of *benami* transactions in this country and more especially on the question of the allocation of the burden of proof in cases where the person who pays the purchase-money claims to be the beneficial owner thereof as against one whose name is entered in the deed of sale as the vendee. The general principles which govern such cases are too well established to admit of any doubt, and the question in each case is how, with reference to its peculiar facts, those principles are to be applied in practice. Bearing in mind those principles, we have no hesitation in holding in the present case that the plaintiffs have failed to prove that the purchase of 1896 was a *benami* one and that the property in suit belonged to Sukh Lal and not to Nand Ram.

The next question is whether Sukh Lal acquired a valid title to the property after

the death of Nand Ram and was owner thereof at the time when he mortgaged it to the plaintiffs. This part of the case can be disposed of in a few words. The alleged Will of the 13th March 1897, upon which Sukh Lal based his title to the property, has to be left out of account, and, so far as the mortgage-deeds of 1898 and 1899 are concerned, there is nothing in them to show that Sukh Lal ever claimed this property otherwise than as heir to Nand Ram under the said Will. *Prima facie*, therefore, it is clear that Sukh Lal's alleged title to the property was defective; and the plaintiffs must show, if they can, that he succeeded to Nand Ram's estate upon some title other than the one put forward by himself. Admittedly, Nand Ram was the son of Mani Ram and *Musammat* Pano and not that of Sukh Lal and in the presence of *Musammat* Pano and *Musammat* Nandi or any other heir of Nand Ram, Sukh Lal would have no right whatever to inherit his estate. Confronted with this difficult position, the plaintiffs' learned Counsel has tried to argue that Nand Ram was the adopted son of Sukh Lal, and that he (Nand Ram) having died without leaving a lineal descendant his adoptive father would succeed to his property in preference to *Musammat* Pano and *Musammat* Nandi or to any one of his *rit* wives. This ground of claim was never put forward by the plaintiffs before and throughout the pleadings there is not the least reference to it. We cannot, therefore, allow this point to be raised at this stage of the case; but even if the matter were allowed to be argued, we are quite clear that there is not a scrap of evidence on the record to prove that Nand Ram was, in the proper sense of the term, the adopted son of Sukh Lal, and the plaintiffs cannot, therefore, rely upon Sukh Lal's alleged title to Nand Ram's property in the alleged capacity of his adoptive father.

From what has been said above it is clear that Sukh Lal was not the owner of the half share in the shop in dispute in October 1899 when he mortgaged it in favour of the plaintiffs, and it follows that the said mortgage can confer no valid title to the property upon the latter. In view of this finding it is unnecessary to decide whether Jiwan Singh was a legitimate son of Nand Ram or not; for even if he was not his legitimate son, he, through his *de facto* guardian, *Musammat* Ghamiro, was in possession of the shop at the time when Mrs. Nicholson purchased it from *Musammat* Ghamiro, and, since the plaintiffs have failed to prove their title, their suit as against Mrs. Nicholson must stand dismissed. But as this part of the case was also argued before us at some length, we think that it might obviate further trouble if we express our opinion on the point.

Some amount of oral evidence has been produced on both sides in this connection but we may say at once that it is not of much value and we are not prepared to attach any weight to it. *Musammat* Chanchilo, one of the alleged *rit* wives of Nand Ram, is said to have been the mother of Jiwan Singh, and *Musammat* Ghamiro, widow of Nand Ram, states that Jiwan Singh was his son and was born three or four months after his death. This witness is clearly interested in the present litigation and her statement must, therefore, be received with caution. The evidence of the other witnesses produced for the defendants is of even less value than her testimony. On the other hand, the evidence adduced by the plaintiffs to show that after the death of Nand Ram, Jiwan Singh, who was then an infant, was brought from the Rohtak District to Bhajji and adopted by a wife of Sukh Lal as her son, is beneath notice, and we have no hesitation in rejecting it.

It remains now to notice the documentary evidence on the record which has been relied upon by the defendants' Counsel to prove that Jiwan Singh was son of Nand Ram. The two sale-deeds of the 13th December 1898 and 23rd September 1899 (Book C, pages 11 and 13), in which Jiwan Singh is referred to as the son of Nand Ram and the grandson of Sukh Lal, are clearly not relevant evidence against the present plaintiffs, for the simple reason that the plaintiffs were in no way concerned with these deeds. We find, however, that on the 6th February 1902 a registered post card was sent by Puran Mal, plaintiff, to *Musammat* Pano, *Musammat* Nandi and Jiwan Singh, in which he referred to all these three persons as being in possession of Sukh Lal's property "as his heirs," and

he called upon them to pay him Rs. 1,300 alleged to be due under a promissory note, dated the 22nd February 1900, executed by Sukh Lal. This post card shows that Puran Mal treated Jiwan Singh as one of Sukh Lal's heirs, and it has not been explained how he could be regarded as his heir unless he was Nand Ram's son. Next in a deed of mortgage, dated the 29th July 1903 (Book B., page 6), executed by *Musammat* Nandi in favour of the present plaintiffs, we find that the property covered by the deed is spoken of as owned and possessed by the mortgagor *Musammat* Nandi and Jiwan Singh, son of Nand Ram, in equal half shares. The plaintiffs being parties to the deed, it is reasonable to presume that they allowed the recital in question to be embodied in the deed without objection because Jiwan Singh was, as stated in the deed, son of Nand Ram. Then there is the further fact that the land in Kaithu which belonged to Nand Ram was mutated after his death in the name of Jiwan Singh who was entered in the revenue papers as his son. In view of all this documentary evidence the balance of probabilities is distinctly in favour of Jiwan Singh being the legitimate son of Nand Ram by *Musammat* Chanchilo, it not being seriously disputed that she was a lawful wife of Nand Ram. We hold, therefore, that on the 25th November 1904, when the half share in shop No. 6 was sold by *Musammat* Ghamiro guardian of Jiwan Singh, to Mrs. Nicholson, Jiwan Singh as Nand Ram's son, was the rightful owner of the said half share; and it follows that the title of Mrs. Nicholson to the share in question is valid as against the present plaintiffs.

For the foregoing reasons, we maintain the decree of the District Judge and dismiss the appeal with costs throughout.

KENSINGTON, J.—(*May 19th*, 1913).—I agree with the conclusions of my learned colleague in this difficult and confusing case. The difficulty arises from our having to consider a series of facts about which there can be no absolute certainty, and as to which the District Judges of Simla have not always given decisions which can be reconciled.

Put shortly my reasons for holding that the appeal should be dismissed are:—

(1). That Nand Ram was not the adopted son of Sukh Lal, who died in March 1900, there being no plea or evidence in this case upon which such adoption can be held established.

(2). That there is no support for the theory that the half shop in dispute was really bought by Sukh Lal for himself in August 1896, as a *benami* transaction under cover of Nand Ram's name. This theory of a *benami* purchase was only started at a late stage after the alleged Will by Nand Ram of 1897 had fallen through, and the balance of evidence is strongly in favour of Nand Ram's being the actual as well as ostensible purchaser.

(3). That Sukh Lal had no sort of right of succession to Nand Ram, on the latter's death in March 1897, whether Jiwan Singh was Nand Ram's legitimate son or not, and could not, therefore, mortgage the property in dispute to plaintiffs in October 1899.

(4). That on the whole it is more probable than not that Jiwan Singh was the legitimate son of Nand Ram, as found by Major Burlton, District Judge, on 17th December 1903 (Book A, page 5), the contrary finding by Mr. Dundas, District Judge, of 28th November 1904 (Book, A page 16), being based on assumption rather than evidence.

The appeal is accordingly dismissed with costs to defendants Nos. 1 and 2.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1772 OF 1911.

March 28, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHANDRA MOHINI DEBI—PLAINTIFF—APPELLANT

versus

KENARAM CHITI—DEFENDANT—RESPONDENT.

Mortgage—Land mortgaged sold in execution of rent decree—Notice given by purchaser under section 167, *Bengal Tenancy Act—Whether mortgage extinguished—* Ghatwali *tenure held upon quit rent payable to* H. *and* ghatwali *service—Resumption of land by Government and Settlement with* zemindar *who settled with mort-*

CHANDRA MOHINI DEBI *v.* KENARAM CHITI.

gagor—Condition of settlement that mortgagor would pay quit rent payable to H. *and value of* ghatwali *service to* zemindar—*Suit by* zemindar—*Whether suit for rent or for money—Whether* zemindar *and* H. *are joint landlords—Bengal Tenancy Act (VIII of* 1885*), ss.* 159, 167.

The plaintiff brought this suit to enforce a mortgage security. The land mortgaged was purchased by defendant No. 13 at a sale held in execution of a decree for arrears of rent. After his purchase, he caused a notice to be served upon the mortgagee, the plaintiff, in accordance with the provisions of section 167 of the Bengal Tenancy Act:

Held, that the mortgage was thereby extinguished, and the plaintiff's suit must fail.

The mortgaged land was comprised in a *ghatwali* tenure. The *ghatwal* held the land upon payment of quit rent to one *H.*, and was also liable to render *ghatwali* service. The land was resumed by the Government and transferred to the *zemindar* who settled the land with the mortgagor, upon condition that the quit rent which was to be paid to *H.* would be paid by the *zemindar*, and that the lessee, the mortgagor, would pay to the lessor, the *zemindar*, a consolidated rent representing the value of the *ghatwali* service and the amount of quit rent. On default of payment the *zemindar* sued the lessee for arrears of rent and obtained a decree in execution of which the defendant No. 13 purchased the land:

Held, that the *zemindar* and *H.* were not joint landlords and the decree was not a decree for money as one obtained by a co-sharer landlord, but one for rent and the purchaser acquired the land with power to annul incumbrances.

Appeal from the decree of the District Judge of Bankura, dated May 22nd, 1911, reversing that of the Munsif of Bankura, dated April 30th, 1910.

Babus *Mohendra Nath Roy* and *Khetra Mohun Sen*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Baranashi-bashi Mukerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit to enforce a mortgage security executed in her favour on the 23rd November 1901. The sole question in controversy at this stage is whether the fifth and sixth parcels are still subject to the mortgage. These parcels were purchased by the thirteenth defendant at a sale held in execution of a decree for arrears of rent. After his purchase, he caused a notice to be served upon the mortgagee in accordance with the provisions of section 167 of the Bengal Tenancy Act and the point for determination is, whether the mortgage was thereby extinguished. The solution of this question must depend upon the nature of the decree in execution whereof the properties were sold.

The facts are not in controversy and may be briefly recited. The lands are comprised in what was originally a *ghatwali* tenure. The *ghatwal* held the land upon payment of quit rent of Rs. 2-10-9 to one Haradhan: he was also liable to render *ghatwali* service. In 1900, the lands were resumed by the Government and transferred to thee *zemindar*, the Maharaja of Burdwan, under the provisions of the Bengal Village Chaukidar's Act of 1870. On the 5th May 1901, the Maharaja settled the lands with the mortgagor. It was stated in this lease that a quit rent was payable in respect of these lands to Haradhan but the lessor assumed the liability for payment of this rent, and the engagement between the lessor and the lessee was to the effect that the lessee would pay to the lessor a consolidated rent of Rs. 12 7-6: of this sum Rs. 9-12-9 represents the value of the *ghatwali* service and Rs. 2-10-9 the amount of the quit rent. Subsequently, the lessee defaulted to pay rent. Thereupon the lessor sued him for arrears of rent and obtained a decree, in execution whereof the property was sold. It has been argued on behalf of the appellant that this decree was in essence a decree for money, because it was obtained by a co-sharer landlord, and that, consequently, the purchaser did not acquire the property with power to annul encumbrances. In our opinion, this position cannot possibly be supported.

Section 159 of the Bengal Tenancy Act provides that when a tenure is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as 'protected interests' but with power to annul the interests defined as 'encumbrances.' In order to determine whether an execution purchaser has acquired these rights, the test to be applied is two-fold namely, *first*, whether a tenure has been sold, and *secondly*, whether the decree in execution whereof the sale has taken place is a decree for arrears due in respect of that tenure. In the case before us, there is no question that the lessee held a tenure under the Maharaja of Burdwan, nor is there any controversy that the lessor obtained a decree for arrears due in respect of that tenure. It has been ingeniously argued, however, that Haradhan, who was entitled

to the quit rent was a joint landlord with the Maharaja of Burdwan. This contention is obviously fallacious. It has not been disputed that Haradhan was not a party to the contract between the Maharaja and his lessee, when the learned Vakil for the appellant was pressed to state whether Haradhan could have joined the Maharaja in the suit for rent, he felt constrained to answer the question in the negative. This shows conclusively that the tenure which has been sold, was held by the lessee under the Maharaja of Burdwan alone. If the lessee also held any tenure under Haradhan, that clearly constitutes a separate tenancy. The contract between the Maharaja and his lessee is distinct from and independent of the contract, if any, between Haradhan and the lessee. Consequently, in view of the principle recognised in the cases of *Haladar Saha* v. *Rhidhoy Sundri* (1), *Matungini Dassi* v. *Ram Das Mullick* (2), *Sailendra Nath Mitter* v. *Karali Charan Singh* (3) and *Bhabatarini Dasi* v. *Ekabbar Malita* (4), we must hold that what has been sold is a tenure within the meaning of section 159 and that it has been brought to sale in execution of a decree for arrears due in respect thereof. The purchaser has, consequently, acquired the property with power to annul the interests defined as incumbrances, and it has not been disputed that the purchaser has taken appropriate steps to annul the particular incumbrance sought to be enforced by the plaintiff.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 19 C. 593.
(2) 7 C. W. N. 93.
(3) 2 C. L. J. 534.
(4) 5 C. L. J. 235; 2 M. L. T. 155 (F. B.).

PUNJAB CHIEF COURT.

MATRIMONIAL REFERENCE No. 4 OF 1912.

November 28, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge,
Mr. Justice Robertson and
Mr. Justice Kensington.

BETTERIDGE—PETITIONER

versus

CURRY—RESPONDENT

AND

RUSHTON—CO-RESPONDENT.

Divorce Act (*IV of* 1869), *ss.* 18, 57—*Marriage contracted within six months of confirmation of decree of dissolution of former marriage—First husband living—Application for maintenance and custody of child of the marriage.*

The terms of section 57 of the Divorce Act are imperative, and there is no alternative to passing a decree of nullity where the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party, and the former husband or wife, as the case may be, is living at the time of the latter marriage.

Application for custody and maintenance of the child of the marriage must be by separate petition.

Case referred by the Divisional Judge of the Lahore Division, with his No. 984 of 23rd August 1912, for confirmation of the decree passed by him on 30th July 1912, by the Chief Court of the Punjab.

FACTS appear from the following judgment of the Divisional Judge, dated 30th July 1912:

The facts of this case are as follows:—The petitioner, George William Betteridge, first applied for dissolution of his marriage with the respondent Elizabeth Mary Betteridge, alleging her adultery with the co-respondent A. H. Rushton.

It is admitted, and there is no question, that the petitioner and the respondent went through a form of marriage on August 12th, 1902, before the Registrar of Marriages at Lucknow, the respondent having divorced her previous husband, one W. R. Curry.

In reply to the petition for a dissolution the respondent asserted that she had never been *legally* married to the present petitioner, the reason being that her marriage with the petitioner in Lucknow took place before the necessary six months had elapsed from the date in which the decree dissolving her former marriage (passed by the Judicial Commissioner in Sind on 15th October 1901) had been confirmed (on June 20th, 1902) by the High Court of Bombay.

This being the case, the first issue to be

decided was obviously whether respondent's marriage at Lucknow with the petitioner was a *legal* marriage or not.

It is perfectly clear from the certified copy of the order of the High Court of Bombay dated June 20th, 1902, that the marriage at Lucknow was not legal, and, indeed, the petitioner has himself now admitted this; and he has now joined in the prayer that his marriage with respondent be declared null and void. No separate petition was really required for this and it was the point to be decided first. Authority which I have consulted on this point is the ruling of Bargrave Deane, J., given in *S.* v. *S. R.* (1).

It is admitted that, at the time of the Lucknow marriage, respondent's former husband Curry was alive. There is, therefore, no question that the marriage at Lucknow was not a legal marriage, and since it was celebrated in India, this Court has the power under the Indian Divorce Act to declare it null and void. There is, therefore, in this case (as Bargrave Deane, J., has laid down) no question of adultery; and I may say at once that I fully believe that the petitioner and respondent were married at Lucknow in perfect good faith, but under a mistake as to the law; having been apparently mistakenly advised by Counsel.

In the course of these proceedings, this Court for reason given in the order on the record refused to allow the respondent alimony *pendente lite*.

In arguing before this Court at the end of the trial, Counsel on both sides have addressed me on three points, *viz.*, (a) custody of the child; (*b*) maintenance of the child: (*c*) costs. Mr. Beechey asking for costs against petitioner not only for the respondent, but for the co-respondent also. The question of maintenance had come up separately in connection with Criminal Revision No. 69 of 1912, which concerned a Magistrate's order directing the petitioner to pay Rs. 30 monthly for the maintenance of his child by the respondent, which child is still with its mother.

As regards custody:—both petitioner and respondent have applied for the custody of their child, Reginald, said to be aged about three years and nine months. I cannot, of course, accept the argument of petitioner's Counsel that the child Reginald is "legitimate." He is not. But, the marriage at Lucknow having been contracted in good faith, he is entitled under section 21 of the Indian Divorce Act to succeed in the same manner as legitimate children, to the estate of his father, who at the time of the marriage was competent to contract. For the respondent, Mr. Beechey has argued that the child being illegitimate, custody must perforce go to the mother. Counsel on both sides have cited a large amount of high authority on this point; but, as I shall show, this Court is at present powerless to pass any order as to custody except a mere *interim* order which would be of no use. I do not agree with Mr. Beechey's view that the mother is absolutely entitled under the law to have custody of the child. This is not an ordinary case at all; and a high authority, Sir R. Phillimore has laid down that "the first duty of the Court is to consider what is for the benefit of the children—that should be the paramount consideration with the Court" [*D'Alton* v. *D'Alton* (2)]. It is distinctly set forth in section 44 of the Indian Divorce Act that, *until the decree for nullity has been confirmed* by the High Court, the District Court cannot pass orders for the custody, maintenance, etc., of the children (that is, of course, excepting a mere *interim* order). It also appears that, after the High (or Chief) Court has confirmed such a decree of nullity, there has to be a special application by petition (presumably on a Rs. 20 stamp) to the District Court for custody. I cannot, therefore, make an order as to custody now. Whether the Chief Court can itself make such an order on these proceedings coming before it for confirmation, I do not know. If it can—then, much trouble and expense will be saved to the parties; and I would briefly recite the following facts which may bear upon that point.

The child is a male child. The father is in a good position, with an income of over Rs. 300 *per mensem* while the respondent, on her own statement seems to be earning a precarious livelihood by keeping a boarding-house and by borrowing from money-lenders. The father has been admittedly supporting the children of respondent's former marriage.

(1) (1912) P. 16 at p. 18; 81 L. J. P. 16; 106 L. T. 464.

(2) (1878) 4 P. D. 87 at p. 91; 47 L. J. P. 59.

BETTERIDGE *v.* CURRY.

The respondent, though she denied adultery with the co-respondent and the question had not to be gone into, has admittedly been living *during these proceedings* in the same house as the co-respondent under circumstances (as shown by her own admissions) which raise the greatest suspicion as to her relations with the co-respondent. It was for this reason that this Court refused her alimony *pendente lite*.

Maintenance:—This question, of course, depends on the decision as to custody of the child Reginald. If the child goes to the father, there will be no reason for continuing that order; if to the mother, then the question will have to be gone into. We must await the Chief Court's decision.

Costs:—The respondent should certainly have her costs from the petitioner since, whatever her conduct may have been, the responsibility for seeing that the marriage would be a legal one before he contracted it lay with the petitioner.

I decline to allow the co-respondent any costs from the petitioner. For all he knew to the contrary, the Lucknow marriage might have proved to be a legal marriage; and, if he had had the smallest sense of decent feeling he would not have been living in the same house with the respondent during these proceedings.

I accordingly proceed to pass the only decree which this Court is, at present, entitled to pass.

I grant the petitioner a decree as prayed declaring that his marriage with the respondent on the 12th August 1902 is hereby declared to be null and void and no legal marriage. Further, in accordance with section 21 of the Indian Divorce Act, I order that it be specified in this decree that the child Reginald Betteridge (begotten before this decree) shall be entitled to succeed, in the same manner as legitimate children, to the estate of his father, the petitioner George William Betteridge.

I make no order at present regarding the maintenance of the said child. He is with his mother, and the Magistrate's order is still in force.

The petitioner will bear his own and the respondent's costs in these proceedings. The co-respondent will bear his own costs.

Mr. *Obeidulla*, for the Petitioner.

Lala *Balwant Rai*, for the Respondent.

ORDER.—This case has come before us for confirmation of the decree for nullity of marriage made by the Divisional Judge of Lahore, exercising jurisdiction as District Judge under the Divorce Act. The District Judge found that the form of marriage was effected within six months of the confirmation by the Bombay High Court of a decree of a District Judge dissolving a marriage between the respondent and one Curry who was then her husband. This finding has not been contested and we are satisfied that the decree dissolving the respondent's marriage was confirmed on the 17th June 1902 and that the form of marriage between the petitioner and the respondent was effected on the 12th August 1902, the former husband of the respondent being then alive. The District Judge had, therefore, no alternative to passing a decree of nullity, the terms of section 57 of the Divorce Act being clear and imperative, but delivery of judgment has been delayed by the necessity for recording evidence that the respondent's former husband was alive at the date of her marriage to the petitioner.

The evidence of the petitioner now recorded and the certificate filed by him this day satisfy us that W. R. Curry, the former husband of the respondent, was alive after the date of that marriage.

We confirm the decree of nullity of the marriage between the petitioner and respondent.

Application for custody and maintenance of the child of the marriage must be by separate petition.

The Court below, undoubtedly, has jurisdiction in the matter.

The question whether this Court has jurisdiction will be decided when the necessity for decision arises. The respondent's Pleader has not filed a certificate of fees and she is, consequently, not entitled to costs of this Court.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 1916 OF 1911.

February 3, 1913.

Present:—Justice Sir Frederick Robertson, KT.

GOPAL DAS—PLAINTIFF—PETITIONER

versus

THE MUNICIPAL COMMITTEE OF LAHORE,—DEFENDANT—RESPONDENT.

Punjab Municipal Act (*XX of* 1891), *s.* 92 — *Punjab Municipal Act* (*III of* 1911), *ss.* 189, 193—Thara *new or old—Power of Committee to remove—Compensation—Repairs of* thara.

If no reply to a notice given to a Municipality under section 92 of Act XX of 1891, (sections 189 and 193 of Act III of 1911) for erecting, re-erecting or repairing a house is given within six weeks from the date of its service such silence amounts to an automatic sanction of the Municipality. Such sanction cannot be withdrawn afterwards.

A Municipal Committee is competent to remove a *thara* whether old or new, but in the former case it is necessary to give compensation before removal.

Badri Das v. *Municipal Committee, Delhi*, 90 P. R. 1898, followed.

The mere substitution of new bricks for old ones in a platform on the ground does not constitute any thing more than repairs to such platform.

Petition under section 70 (1) (*a*) of Act XVIII of 1834, as amended by Act XXV of 1899, for revision of the order of the Additional Divisional Judge of Lahore, dated the 5th day of May 1911, reversing that of the Munsif, 2nd class, Sharakpur, dated the 20th day of November 1909, decreeing plaintiff's claim.

Mr. *Nand Lal*, for the Petitioner.

Lala *Hari Chand*, for the Respondent.

JUDGMENT.—This case relates to a dispute between the petitioner, Gopal Das, and the Municipal Committee of Lahore in regard to a *thara* or small platform in front of Gopal Das' house.

Now it is quite clear that an application was made by Gopal Das to the Committee for permission to repair this *thara* which was clearly in existence before. On the 15th March 1905, he put in an application for permission to re-build the whole of his house; and on the 30th March he put in a further application saying that he proposed to pull down and re-build the house, but that as regards the *thara*, which had been in existence for a long time, he only proposed to repair it. Admittedly no reply to this application of the 30th March was received by the petitioner within six weeks of the application. It is, therefore, difficult to see how it can be denied, in view of the provisions of section 92 of the Municipal Act, that he was entitled to repair the *thara* quite apart from any question as to the re-building of the house as to which the subsequent orders were clear.

It is also, no doubt, proved that in a subsequent order, dated the 30th September 1905, he was forbidden to build any *thara*. The words are '*koi thara barhao manzur nahin hai*.' It is contended for the petitioner that the natural interpretation of these words is that no extension of the *thara* is permitted. For the respondent it is contended that the word '*barhao*' used is not a participle of the verb '*barhana*' but refers to certain projections for which permission had been asked and as to which permission was refused. This may be and possibly is correct inasmuch as across the map, which has been put in by the petitioner and is said to have been returned to him, we find written in red ink '*barhao na manzur hai*.' This, however, was long subsequent to the petition of 30th March, 1905. The house was re-built and the *thara* is said to have been re-built. But it is not alleged that it has been extended in any way and it is very difficult to say how far the re-building of a platform differs from its repair. During the absence of the petitioner the *thara* was removed. He accordingly brought a suit for injunction against the Municipal Committee to restrain them from interfering with him in respect of this *thara* and also for compensation for the removal of the *thara*. The suit for injunction has been dismissed and it is not a matter with which I can interfere on revision.

In accordance with the views expressed in *Badri Das* v. *Municipal Committee, Delhi* (1) the Committee are competent to remove this *thara* whether old or new, the only question being whether, if it was old, they are bound to pay compensation. Now it appears to me that it is impossible to say that such a small matter as a *thara* can be removed on the ground that it is a new structure when sanction to repair it has been automatically given. The question of re-building a house or a structure depends upon totally different grounds. It may be that the defendants have a clear right to refuse that on any ground that they consider

(1) 90 P. R. 1898.

sufficient. But the mere substitution of new bricks for old in a platform upon the ground does not appear to me to constitute anything more than repairs to such platform; and in this case it appears to me that automatic sanction had been given to these repairs.

The sole evidence on which it is assumed that a new *thara* has been substituted for an old one is the statement of one witness, Lala Chand Mal, who admits that he does not know whether the *thara* has been extended or not. And all the other evidence is to the fact that there has been no extension or increase. The most that can be said to have been done is to have substituted new bricks for old. It appears to me, therefore, that on the facts as found the Committee were not entitled to remove this *thara* without paying compensation to the petitioner. There has been no contest as to the amount of compensation payable and the amount claimed is Rs. 25, which must be accepted as the amount reasonably chargeable to the Municipal Committee. The plaintiff has failed in his main claim for an injunction, but he is entitled to compensation in my opinion. On the facts as found by the learned Divisional Judge, I consider that a decree for compensation should be given and I so far vary the decree of the learned Divisional Judge as to decree Rs. 25 compensation to the plaintiff. As he has failed to obtain an injunction, I order that each party shall bear their own costs throughout.

Petition partly allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 130 OF 1912.

February 28, 1913.

Present:—Mr. Justice Rafique.

SHEO RAM AND OTHERS—DEFENDANTS—APPLICANTS

versus

BADRI DAS-BIHARI LAL—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Limitation—Revision.

The question of limitation is a proper ground for revision under section 25 of the Provincial Small Cause Courts Act.

Sarman Lal v. *Khuban*, 16 A. 476; A. W. N. (1894) 183; *Sarman Lal* v. *Khuban*, 17 A. 422; A. W. N. (1895) 112; *Jamna Dat* v. *Bishnath Singh*, 3 Ind. Cas. 817; 6 A. L. J. 944, referred to.

Civil revision against the decision of the Judge of Small Cause Court of Cawnpore.

Mr. *A. P. Dube*, for the Applicants.

Mr. *Gulzari Lal*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 25 of Act IX of 1887 from the decree of the Judge of Small Cause Court at Cawnpore. The only point urged is that the claim in respect of Rs. 293-9-3 has been wrongly decreed, as the claim in respect of that item was barred prior to the institution of the suit. For the opposite party a preliminary objection is taken that the question of limitation is not a proper ground under section 25 of Act IX of 1887. In support of this objection reliance is placed on *Sarman Lal* v. *Khuban* (1) and *Sarman Lal* v. *Khuban* (2). For the applicant the case of *Jamna Dat* v. *Bishnath Singh* (3), is relied upon. It appears that in spite of the rulings of *Sarman Lal* v. *Khuban* (1) and *Sarman Lal* v. *Khuban* (2) this Court has entertained applications under section 25 of the Small Cause Courts Act, both on questions of fact and law including the question of limitation. I, therefore, disallow the preliminary objection.

As to the item of Rs. 298-9-3 objected to by the applicant it is clearly barred on the evidence of the plaintiff's *munib*, Daya Ram. The only way in which the opposite party could have successfully recovered this sum would have been if they had proved that the dealings between Sheo Prasad and the opposite party had been in the nature of a mutual, open and current account, in which there had been reciprocal demands between them. The evidence in the case does not show any such dealings between Sheo Prasad and the opposite party. On the contrary the evidence of Daya Ram is to the effect that loans from time to time were advanced to Sheo Prasad. The loans advanced to him were independent loans and cannot be said to have formed parts of a mutual, open and current account. I allow the application and modify the decree of the lower Court by decreeing the claim of the opposite party for Rs. 200-5-9 only. Proportionate amount of costs is allowed to both parties in all Courts.

Application allowed.

(1) 16 A. 476; A. W. N. (1894) 183.
(2) 17 A. 422; A. W. N. (1895) 112.
(3) 3 Ind. Cas. 817; 6 A. L. J. 944.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST APPEAL No. 1435 OF 1912.

March 18, 1913.

Present:—Justice Sir Frederick Robertson, KT.

Musammat DEOKI—OPPOSITE SIDE—APPELLANT

versus

BAKHT MAL—PETITIONER—RESPONDENT.

Guardians and Wards Act (*VIII of* 1890), *ss.* 7, 15—*Courts to judge the necessity of appointing guardian—No need of guardian when minor's mother is competent to manage her minor son's property.*

It is a mistake to assume that merely because an application is made a guardian must be appointed. The first thing to be done is to consider whether it is really necessary to appoint a guardian at all.

Where the mother of a minor son is managing the affairs of her son properly no guardian need be appointed.

First miscellaneous appeal from the order of the District Judge, Sialkot, dated the 28th June 1912, appointing the plaintiff as guardian of the property of the minors.

Pandit *Kishori Lal* for *Lala Mool Chand* and Lala *Devi Das*, for the Appellant.

Lala *Ram Lal* and Mian *Bijai Singh*, for the Respondent.

JUDGMENT.—This case is a good illustration of the misuse of the Guardians and Wards Act, which is so common in this Province. District Judges, too, often seem to assume that merely because an application is made, a guardian must be appointed. Now in this case the mother of the minors assisted by her brother, was managing the family affairs. The deceased husband's half brother who has had a quarrel with the widow's brother, comes in and applies to be made guardian. Now the first thing to be done is to consider whether it is really necessary to appoint a guardian at all. This point of view does not appear to have occurred to the District Judge. The mother has no interests adverse to the children and she seems to have a capable assistant in her brother.

I set aside the order appointing Bakht Mal guardian of the property and *Musammat* Deoki guardian of the person of the minors and direct the District Judge first to make proper inquiry; one of the necessary issues is:—

Are the minor's interests being properly looked after by the mother with the assistance of her brother?

Then if, it be *proved* that they are *not*, and not before, the District Judge should consider whether it is necessary and desirable to appoint guardians to person and property, and if so who, and on what conditions, should be appointed. Costs to be costs in the proceedings.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 627 OF 1912.

February 27, 1913.

Present—Justice Sir Henry Griffin, KT., and Mr. Justice Chamier.

DHANPAL SINGH—PLAINTIFF—APPELLANT

versus

BUDH SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (*XVI of* 1908), *s.* 50—*Registered and unregistered document--Priority—Auction purchase under the registered document does not extinguish the rights under the prior unregistered document.*

Certain property was subject to two mortgages, one by an unregistered deed and the other by a subsequent registered deed.

In execution of a decree obtained on the subsequent registered mortgage the right, title and interest of the mortgagor was purchased at an auction sale:

Held, that the earlier unregistered mortgage was not extinguished by such purchase. The debt secured under the unregistered mortgage was recoverable from the surplus money, if any, left after satisfying the registered mortgage.

Section 50 of the Registration Act does not mean that the unregistered mortgage is invalidated or the rights of the mortgagee thereunder are extinguished.

Second appeal from the decision of the District Judge of Agra.

Dr. *Satish Chandra Banerji* (with him Mr. *Benode Behari*), for the Appellant.

The Hon'ble Dr. *Sunder Lal*, for the Respondents.

JUDGMENT.—The plaintiff in the suit sued to recover principal and interest on an unregistered mortgage-deed dated 15th December 1887, to secure an advance of Rs. 95. The mortgage was executed by Budh Singh, defendant No. 1, in favour of the plaintiff's predecessor-in-title. Defendant No. 2, Sah Tejpal, held a registered mortgage also for Rs. 95 executed on the 5th of December 1892, hypothecating the same property. Tejpal brought a suit on his mortgage and obtained a decree in execution of which he purchased the property himself. The present suit was

resisted by Tejpal on the ground that he was purchaser in execution of a decree obtained on a document which by reason of registration took effect against the unregistered document held by the plaintiff. The Court of first instance gave the plaintiff a decree conditional on his paying half the amount due to Tejpal, defendant No. 2, under the mortgage-deed in the latter's favour. Tejpal, defendant No. 2, appealed to the lower Appellate Court. In his memorandum of appeal various grounds were taken. But the lower Appellate Court has decided the appeal on one ground only. Tejpal contended that as he was a purchaser at an auction sale held in execution of a decree on a mortgage having priority over the mortgage in favour of the plaintiff, the rights of the plaintiff were altogether extinguished. The lower Appellate Court upheld this contention and without considering the other pleas raised in the appeal decreed the appeal and dismissed the plaintiff's suit *in toto*. In second appeal it is contended that the view taken by the lower Appellate Court is wrong. Section 50 of the Registration Act provides that a registered document of the kind mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17 and clauses (*a*) and (*b*) of section 18 shall, if duly registered, take effect as regards the property comprised therein against an unregistered document relating to the same property. The defendant Tejpal relies on his purchase in execution of a dceree obtained by him on a registered mortgage. What he purchased at the auction sale was the right, title and interest of his mortgagor. The mortgage held by the plaintiff although not created by a registered document was not invalid merely by reason of the document not being registered. If a valid mortgage was created by that document, the debt secured was recoverable from the surplus, if any, left after the satisfaction of the registered mortgage held by Tejpal. As the only point decided by the lower Appellate Court was that the rights of the plaintiff were altogether extinguished, and as we are unable to agree with that view, we must allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court for decision of other questions raised in the appeal before that Court.

Costs of this appeal will be costs in the cause.

Appeal decreed; Cause remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 781 OF 1912.

March 5, 1913.

Present:—Mr. Justice Rattigan.

RAM BHEJA MAL—PLAINTIFF—APPELLANT

versus

MUHAMMAD AMIN—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (II of 1905), s. 13 cls. (1) and (5)—Rival pre-emptors—One having common entrance and the other co-sharer.

A co-sharer in a part of the property sold has a superior right of pre-emption, under section 13, clause *first*, of the Punjab Pre-emption Act, II of 1905 to the vendee whose claim can only fall under clause *fifthly* of that section.

Second appeal from the decree of the District Judge, Jhelum, dated the 8th February 1912, reversing that of the Munsif, first class, Pind Dadan Khan, dated the 28th November 1911, decreeing plaintiff's claim.

Mr. *Nand Lal*, for the Appellant.

Mr. *Brij Lal*, for the Respondent.

JUDGMENT.—This is a suit for pre-emption of certain urban immoveable property, and a decree was passed in favour of the plaintiff pre-emptor by the Munsif, first class, on the ground that the plaintiff was a co-sharer in the courtyard of the property in dispute. The vendee appealed to the District Judge on various grounds but these were not considered, as the learned Judge was of opinion that the plaintiff's claim must fail because a reference to the map on the file showed that the houses of both the vendee and the pre-emptor had a common entrance from the street with the vendor. A second appeal has been preferred from the decree of the District Judge and after hearing Counsel I have no doubt that the only course open to me is to remand the case to the District Judge under Order XLI, rule 23, Civil Procedure Code, for determination of the appeal before him.

The learned Judge has quite overlooked the fact that the plaintiff claims to be a co-sharer in the part of the property sold and that the second issue, which deals with that part of the case, was decided in his favour. If this finding is correct, the plaintiff would clearly have a superior right under section 13, clause *first*, of the Punjab Pre-emption Act to the vendee whose claim at best can fall only under clause *fifthly* of the said section. I would also point out that no question seems to have been raised before the Munsif as to this alleged common entrance, and that it is not self-evident from the plan itself that the pre-emptor and vendee have a common entrance to their houses with the vendor. This fact is denied before me by the plaintiff and he obviously is entitled to contest it by evidence, before it can be assumed that such an entrance actually exists. There are, of course, a number of other questions involved in the appeal before the District Judge and all these may have to be considered by him.

I accordingly accept the appeal and remand the case under the order and rule above referred to.

Costs will abide the event of the appeal and as the Court-fee stamp was of trifling value I need pass no order with regard to its refund.

Appeal accepted; Case remanded.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 388 OF 1911.
March 20, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.
BASANT BIHARI—PETITIONER—APPELLANT
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 2 - Judgment written after the Judge ceased to be the Judge —Pronouncement of judgment by successor, validity of.

A Judge may pronounce a judgment written but not pronounced by his predecessor. A judgment so pronounced is not vitiated by the mere fact that it was written after the Judge writing it had ceased to have jurisdiction in that particular locality.

First appeal from the decision of the District Judge of Allahabad, dated the 9th September 1911.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *Ryves*, for the Respondent.

JUDGMENT.—The appeal arises out of a suit under the Land Acquisition Act. The property in respect of which the claim arises is situate in Allahabad, not far from the Muir Central College, for which institution it was acquired. The appellant has been awarded the sum of Rs. 7,900. In his appeal he claims a further sum of Rs. 32,000. There can be no doubt that if the appellant was the absolute owner of the property in dispute, or even if he had a permanent interest therein subject only to the payment of Rs. 48-8 per annum to Government, he would be entitled to a considerably larger sum than has been awarded to him by the Court below. We have considered the evidence and we entirely agree with the Court below that the appellant has not shown that he had any permanent interest in the plot. In our opinion his tenure amounted to no more than a tenancy from year to year.

We have been referred to *Nabakumari Debi* v. *Behari Lal Sen* (1) and *Nanda Lal Goswami* v. *Atarmoni Dasee* (2) and the cases of *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (3) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (4). All these cases were decided upon their own facts and circumstances and are quite different from the present case.

In the view we take of the nature of the appellant's tenure, we cannot say that the compensation awarded him by the Court below was erroneous. It has been contended that the judgment of the Court below and the decree founded thereon is bad because the judgment was written by Mr. Tute after he had ceased to be the District Judge of Allahabad. The judgment, no doubt, was so written and it was delivered by his successor.

We think the mere fact that Mr. Tute had ceased to be the District Judge when he wrote the judgment is not sufficient to initi-

(1) 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397 (P. C); 34 I. A. 160.
(2) 35 C. 763; 12 C. W. N. 432.
(3) 32 C. 41; 8 C. W. N. 889; 31 I. A. 144 (P. C.).
(4) 32 C. 51; 8 C. W. N. 895; 31 I. A. 149 (P. C.).

ate the judgment. Order XX, rule 2, provides that a Judge may pronounce a judgment written but not pronounced by his predecessor. In the Full Bench case of *Satyendra Nath Roy Chaudhuri* v. *Kastura Kumari Ghatwalin* (5), the Calcutta High Court held that a judgment written ten months after the Judge had ceased to have jurisdiction in the particular division was good and fulfilled the conditions of the corresponding section of the Code of Civil Procedure then in force.

It has been further argued that the award is without jurisdiction because Government claimed an interest in the property as well as the appellant. We do not think that there is any force in this contention. It can hardly be said that if land was in the occupation of a lessee under a lease from Government for 50 years, ten years of which had expired when the property was wanted for some public purpose, the property could not be acquired upon payment of compensation to the lessee for his interest in the unexpired term. If this be so, there is no difference in principle in the present case. If the appellant's interest is that of a tenant from year to year, he is entitled to compensation for the period that could elapse before he could be turned out and also for reasonable compensation for the buildings which are situate on the land.

In our opinion the appeal fails, and we accordingly dismiss it with costs including in this Court fees on the higher scale.

Appeal dismissed.

(5) 35 C. 756 (F. B.); 4 M. L. T. 33; 7 C. L. J. 666; 12 C. W. N. 682.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 17 OF 1912.

October 27, 1912.

Present:—Justice Sir Dinshaw D. Davar, Kt.

HARAKHBAI—PLAINTIFF

versus

JAMNABAI AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3—Submission and award, whether can be recorded as an adjustment or compromise—Pending suit—Reference to arbitration without the intervention of the Court—Power of Court to inquire whether the award is proper.

Where a suit is referred by parties to arbitration and an award is made, the submission and the award may be recorded as an agreement, adjusting or compromising the suit, and a decree passed in terms of such award.

Prag Dass v. *Gudhardhari*, 26 B. 76; 3 Bom. L. R. 431, followed.

The addition of the words "where it is proved to the satisfaction of the Court" in Order XXIII, rule 3, give the Court power to inquire into a disputed compromise and to record it, if satisfied that it was properly arrived at.

The provisions of the second Schedule to the Civil Procedure Code do not contemplate a reference to arbitration by the parties to a pending suit without the intervention of the Court. But the words "any other law for the time being in force" in section 89, of the Code apply to Order XXIII, rule 3, and, therefore, where an award, made on reference to arbitration in a pending suit without the intervention of the Court, is disputed by a party, the Court should inquire whether the award, which is alleged to be an adjustment or compromise, was justly, legally and properly arrived at.

Mr. *Setalvad*, (with him Messrs. *Jinnah* and *Davar*), for the Plaintiff.

Mr. *Desai*, (with him Mr. *Bahadurji*), for Defendant No. 1.

Mr. *Joyakar*, for Defendant No. 2.

Mr. *Setalvad*, (with him Mr. *Robertson*), for Defendant No. 3.

JUDGMENT.—This is a suit by the plaintiff against her daughter in-law and others for the administration of the estate of her late husband Hirji Asoo and for various other consequential reliefs.

After several attempts to settle matters in dispute between them had failed, I was informed that the plaintiff and the first and the third defendants had referred matters to the arbitration of two friends of the family, and with the consent of the Advocate-General, who is the second defendant in the suit, the matter stood over pending the decision of the arbitrators. The first defendant assured the Court that as soon as her differences with the plaintiff were adjusted she would make arrangements in respect of charities with the Advocate-General which would be satisfactory to him.

On the 3rd of October 1912, when the suit was called on for hearing, I was informed that the arbitrators had made their award the day previous and Mr. Setalvad for the plaintiff asked me to allow the matter to stand over to enable him to consider the award published only the day previous. The hearing stood over accordingly and the case was called on again on the 11th of October,

when Mr. Desai for the first defendant asked me under Order XXIII, rule 3, to record the award as an adjustment of all differences as between the plaintiff and the first and the third defendants and to pass a decree in terms thereof. I was further informed that the first defendant had arranged terms in respect of charity which were satisfactory to the Advocate-General, and that the first and the second defendants were prepared to take a decree by consent so far as the charties were concerned.

Mr. Desai in support of his application relied on the case of *Prag Dass* v. *Gudhardari* (1). That case is a very clear authority for holding that where a suit is referred by parties to arbitration and an award is made, the submission and the award may be recorded as an agreement adjusting or compromising the suit and a decree passed in terms of such award. This case was decided under section 375 of the old Civil Procedure Code. That section is re-produced in the present Code in Order XXIII, rule 3, but with the additional words "where it is proved to the satisfaction of the Court." The addition of these words would seem to make it quite clear that the Court has power to inquire into a disputed compromise and record it, if satisfied, that the compromise was properly arrived at. If the matter had stood there, I should have found no difficulty in acceding to Mr. Desai's application, but Mr. Setalvad, who disputes the award, points to section 89 in the new Code and contends that the proper procedure to be adopted should be such as is laid down in the second Schedule to the Code. When I turn to the second Schedule I am faced with the difficulty that the provisions of that Schedule do not contemplate a reference to arbitration by the parties to a pending suit without the intervention of the Court. The first sixteen sections of the second Schedule clearly contemplate a reference to arbitration in a pending suit through the intervention of the Court. The rest of the sections except section 18 in that Schedule, contemplate an agreement to refer to arbitration and a reference to arbitration, when there is no suit pending between the parties. Section 18 provides for stay of a suit by a party to an agreement to refer to arbitration. The second Schedule to the Civil Procedure Code, therefore, does not apply to or contemplate a reference to arbitration by parties to a suit, which is pending, outside of the suit and without the intervention of the Court. What with the Arbitration Act of 1899, section 89 of the Civil Procedure Code, the second Schedule to the Code, and the High Court Rule relating to arbitration, the subject of what is a correct procedure to follow in cases of reference to arbitration seems to me to be involved in some confusion. Here, however, there is no question, that all parties to the suit, except the Advocate-General, referred all matters in dispute between them in the suit to arbitration and an award has been made. That award is now challenged and the question for me to decide is, what is the procedure to be followed in order to dispose of the question, whether the award is a valid and binding one and such as may be enforced between the parties by recording it and passing a decree thereon.

If I follow the procedure under the second Schedule to the Code, the award would have to be submitted in Chambers, the parties objecting would then have to file their objections and obtain either a Judge's summons or give a notice of motion to have the award set aside. Parties would have to make affidavits and it may be that in the end it might be necessary to take oral evidence on points in dispute between the parties. If, on the other hand, I regard this as an adjustment, I would still be bound to give the party objecting an opportunity of establishing that there are circumstances which would make it inequitable to enforce this adjustment against the party so objecting. Having regard to the fact that the second Schedule to the Civil Procedure Code does not contemplate a reference to arbitration in a pending suit without the intervention of the Court, it seems to me that the best method of dealing with this question would be to treat the words "any other law for the time being in force" in section 89 of the Civil Procedure Code as applicable to Order XXIII, rule 3, and to hold an investigation before me in Court, wherein the first defendant, who wishes to enforce this award, should proceed to prove to the satisfaction of the Court that the adjustment which she sets up was justly, legally and properly

(1) 26 B. 76; 3 Bom. L. R. 431.

arrived at. In its consequences, the result will not be in any way prejudicial to the interests of the plaintiff for in that investigation I will allow the plaintiff to urge all and every objection which she would be entitled to urge against the award, if the investigation was held under the provisions of the sections of the second Schedule to the Civil Procedure Code.

The suit will be set down for hearing on Tuesday, 22nd instant, when the 1st defendant will, in the first instance, proceed to satisfy the Court that the adjustment has been properly and justly obtained and the plaintiff will then be entitled to urge any ground that may be open to her to show that the award which is sought to be enforced against her as an adjustment ought not to be recorded and a decree passed in terms thereof.

Attorneys for the Plaintiff: Messrs. *Ardeshir, Hormusjee Dinshaw & Co.*

Attorneys for the Defendants: Messrs. *Shroff, Dinshaw and Dharamsey; Daphtary; Fereira and Divan; Little & Co.*

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO 1113 OF 1910.
December 9, 1912.
Present:—Mr. Justice Rattigan and
Mr. Justice Beadon.

DALIP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMRAO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149—Limitation Act (IX of 1908), s. 5—Limitation—Appeal—Court-fee filed after expiry of period of limitation.

The discretion allowed to Courts by section 149 of the Civil Procedure Code for permitting a deficiency in Court-fees to be made up at any time in the course of an appeal cannot be exercised in favour of an appellant unless he shows reasonable diligence in the prosecution of his appeal.

An appeal was filed on the 25th October 1909, and a Court-fee of Rs. 25 was paid. The appellant should have paid Rs. 625 which he had paid on his plaint. The deficiency was not made up till 25th October 1910:

Held, that the appeal must be dismissed as barred by limitation.

Karsondas Dharamsey v. *Bai Gungabai*, 30 B. 329 at p. 330; 7 Bom. L. R. 965, followed.

First appeal from the order of the District Judge, Delhi, dated the 25th May 1909, dismissing the claim.

Mr. *Sundar Das*, for the Appellants.

The Hon'ble Mr. *Shadi Lal* and Mr. *Santanam* and Lala *Girdhari Lal*, for the Respondents.

JUDGMENT.—Mr. Shadi Lal for the respondent raises a preliminary objection that this appeal is barred by limitation.

The memorandum of appeal was originally filed in this Court on the 25th October 1909, admittedly the last day on which it could be filed under the law of limitation. The memorandum then bore a Court-fee stamp of Rs. 25 whereas there can be no question that the appellant well knew that the proper Court fee was Rs. 625, that being the amount which he himself had paid on his plaint in the first Court. The memorandum was returned to the appellant by the Deputy Registrar in order that he should complete the Court-fee and we find that it was not re-filed until the 25th October 1910, *i.e.*, until after the lapse of one whole year from the time when it was originally returned to the appellant.

Obviously the appeal is barred by limitation unless the appellant can satisfy us that he had sufficient cause for not paying the full Court-fee until the last mentioned date. Section 149 of the present Code gives the Court a discretion to allow payment of Court-fee at any stage but that discretion cannot well be exercised in favour of an appellant unless he shows reasonable diligence in the prosecution of his appeal. In the present instance the delay is so inordinate that it would, we think, create a dangerous precedent to admit, that there was reasonable cause for it, especially as we are by no means satisfied that the appellant could not have paid in the deficiency in Court-fee at a very much earlier date. To grant him the extension for which he prays would be unjust and unfair to the respondent who had every reason to believe that an appeal which had not been preferred until more than 15 months after the date of the decree of the first Court was not going to be preferred at all. In this connection the *dictum* of the Chief Justice in *Karsondas Dharamsey* v. *Bai Gungabai* (1) should be borne in mind, and acting

(1) 30 B. 329 at p. 330; 7 Bom. L. R. 965.

upon it, we hold, that the appellant had no sufficient cause for the delay of which he has been guilty.

We, accordingly, accept the preliminary objection and dismiss the appeal as barred by limitation. Appellant will have to pay the costs of the respondent.

Appeal rejected.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER NO. 121 OF 1912.
February 18, 1913.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
JAI BEHARI LAL AND OTHERS—
DEFENDANTS—APPELLANTS
versus
SAHU PERSHADI LAL AND ANOTHER
PLAINTIFFS—RESPONDENTS.

Document—Execution—Attestation, proof of.

Three persons purported to attest a deed as witnesses, in a suit based upon the deed. One of the witnesses was dead, another denied having attested it and the third, who was illiterate, said that he could not remember. The plaintiff then produced another witness who deposed that one of the executants had himself written the document, and after the executants had signed it, the names of the two attesting witnesses were written with their permission on the document by the executants who had written the document:

Held, that this was sufficient to prove that the document had been duly executed and attested.

First appeal from an order of the Additional Judge of Moradabad, dated the 27th of May 1912.

Mr. *Gulzari Lal*, for the Appellants.

The Hon'ble Mr. *Moti Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale on a deed of simple mortgage purporting to have been executed by two brothers, Hargobind Prasad and Bhagat Behari Lal. The first Court dismissed the suit on the ground that execution had not been proved and *secondly*, that it had not been proved that the document had been duly attested. Of the three persons whose names had been entered in the bond as attesting witnesses one is dead, one denied having attested it and one, who is illiterate, said that he could not remember. Thereupon the plaintiff produced further evidence, namely a witness, Bansi Singh, who testified to the fact that Bhagat Behari

Lal had himself written out the document, that he and Hargobind Prasad had signed it and that then Bhagat Behari Lal with the permission of the two attesting witnesses, Riazuddin and Shadi had written their names upon the document as attesting witnesses. The Court of first instance rejected this evidence and held that due attestation of the document had not been proved. On appeal the lower Court held that execution was proved. It further accepted the evidence of Bansi Singh and held that due attestation was also proved and remanded the suit to the Court of first instance for decision on the merits. The defendants come to this Court. The sole point raised is that the plaintiff has failed to prove due attestation, and that even Bansi Singh's evidence does not show that the deed was executed in the presence of Riazuddin and Shadi. Reading that evidence it seems to us to bear the simple meaning that the writing of the document and signing and attesting it were all carried out at one and the same time. Not a single question was put to this witness to suggest that the entry of the names of Riazuddin and Shadi was made at any time other than the time of the execution of the document. We cannot, therefore, hold that the Court below had no evidence whereon to base its decision. The document was written out by one of the executants. It was duly registered and signed at the time of registration. The appeal fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT NO. 551 OF 1912.
September 27, 1912.
Present:—Mr. Justice Beaman.
DAULATRAM KUNDUNMAL—
PLAINTIFF
versus
NAGINDAS RANCHHODDAS SHROFF
—DEFENDANT.

Negotiable Instruments Act (XXVI of 1881), ss. 9, 118—Holder in due course—Consideration—Antecedent debt—Estoppel.

DAULATRAM *v.* NAGINDAS.

The mere existence of an antecedent debt is consideration within the meaning of section 118 of the Negotiable Instruments Act. Therefore, where a negotiable instrument of any sort is handed over by a debtor to his creditor in discharge of a pre-existing debt, the creditor becomes a holder in due course.

The holder of a bill of exchange, which is proved to have been obtained originally for unlawful consideration, must prove that he is a holder in due course and, therefore, in a better position than his transferor.

The mere neglect to answer a notice cannot make a good ground for estoppel.

Mr. *Wadia* (with him Mr. *Jinnah*), for the Plaintiff.

Mr. *Mirza*, (with him Mr. *Thanavala*), for the Defendant.

JUDGMENT.—The plaintiff sues, as holder in due course, to recover from the defendants the maker and the first holder of a promissory-note payable thirty days after sight, made on the 20th of March 1912. A decree has been already obtained against the first defendant, Ramkisson, who was the first holder. The plaintiff now sues the maker, Nagindas Ranchhoddas on his note.

The defence is that Ramkisson obtained the note for unlawful consideration and, therefore, it lies upon the plaintiff to prove that he gave consideration for it before he can enforce his remedies as a holder in due course.

The first question to be answered, then, is whether as between Nagindas Ranchhoddas and Ramkisson the latter extorted the note of the 20th of March from the former so that in law whatever consideration might be said to have been given for it was an unlawful consideration. Upon this point there is only the evidence of the defendant Nagindas himself. His story is that in consequence of a suit against him by one Nanalal decided in March 1912, he applied to the firm of Belasirai & Co., to whom he had given a great number of promissory-notes signed in blank, for the return of those notes. Ramkisson, representing the firm of Belasirai & Co., insisted as a condition of returning those signed blank notes that Nagindas should execute this promissory-note for Rs. 2,500 payable thirty days after date and a further note of hand for Rs. 1,200 (with which I have at present nothing to do) and should further give a letter of acknowledgment to the firm of Belasirai & Co., admitting his indebtedness of this promissory-note and three others of like amount and the note of hand for Rs. 1,200. Thus on the 20th of March 1912 the defendant Nagindas executed the promissory-note which is the subject-matter of this suit in favour of Belasirai & Co., and he also wrote the letter dated the 22nd of March, Exhibit No. 2 in this case. If this story be true, then first turning to the definition of "consideration" in the Contract Act, and next to what is defined to be "lawful consideration" and applying those definitions to section 118 of the Negotiable Instruments Act, the Court would have no doubt in holding that the defendant Nagindas had made good the first step of his defence; for the only consideration moving from Belasirai & Co., to the defendant Nagindas for this note would be the restoration of about Rs. 75,000 worth of promissory notes signed in blank; and that is really no lawful consideration at all since the firm of Belasirai & Co. had no right whatever to withhold those notes from the defendant, Nagindas. The question is whether the story told by Nagindas is true. It was strongly contended on behalf of the plaintiff that the letter Exhibit 2, dated the 22nd March 1912, merely sets forth a true statement of the actual indebtedness of Nagindas to the firm of Belasirai & Co. on that date. This argument starts from the allegation that in the previous December Nagindas or his representative Wamanrao Bhai Thakore had met the creditor-firm of Belasirai & Co. in the offices of Messrs. Mulla & Co. and settled the then existing indebtedness at about Rs. 21,000 in part discharge of which the defendant Nagindas had given a cheque of Rs. 10,000. This would leave just as much indebtedness over as is acknowledged in the letter of the 22nd March 1912. However plausible that argument at first sight may appear, it labours under one fatal defect. The amount due in 1911 includes the sum of Rs. 3,700 which certainly could not have been due until the 20th of March 1912. On the other hand every circumstance appears to me to point conclusively to the truth of Nagindas's story. It is almost incredible that with the result of the suit decided in March fresh in mind he should have immediately recommenced the same course of dealing which had there resulted so disastrously; and it is clear from the letter of the 22nd March to

which the plaintiff takes no exception, that the firm of Belasirai & Co., did restore to Nagindas roughly some Rs. 75,000 worth of promissory-notes for which Nagindas had received no value. It appears to me, therefore, antecedently probable in the highest degree that the firm of Belasirai & Co. exacted as the price of that restoration the sum of Rs. 3,700 which includes the *hundi* now in dispute. Of the remaining three *hundis* which Nagindas has to acknowledge under the letter of the 22nd of March, one only is now admitted as genuine. The reason why the other two were included may be conjectured to be that Belasirai & Co. had actually sold them and, therefore, required the defendant Nagindas to acknowledge their genuineness. However that may be, having regard to the previous history of Nagindas as revealed in the former case and not disputed here, to the termination of that case, and to the fact that this *hundi* was, undoubtedly, drawn almost immediately afterwards and that contemporaneously with it Nagindas received back almost all the other *hundies* in respect of which he had good reason to fear he might be defrauded, I have little hesitation in holding that the account he has given of this *hundi* and the manner in which he came to make it is true. That being so, it lies upon the plaintiff to prove that he is a holder in due course and is in a better position than his transferor who would have certainly not been able to recover the amount of the *hundi* (if my view be correct) from the defendant Nagindas. At the close of the plaintiff's case, his Counsel suggested that the defendant Nagindas was estopped from alleging against plaintiff that the *hundi* was obtained for unlawful consideration. This argument rests upon the assertion that on the 3rd April 1912 the plaintiff gave Nagindas notice that the firm of Belasirai & Co. had transferred this *hundi* to him. And since the defendant Nagindas did not at once inform the plaintiff in reply to that notice of all the circumstances in which the *hundi* had been extorted from him, he is now estopped from doing so. The short answer to that is that the alleged notice of April 3rd, 1912, is not proved. There is no evidence before me of its existence. Then, the plaintiff falls back upon his attorneys' letter of the 23rd of April, but I think that mere neglect to answer the attorneys' letter peremptorily enforcing a claim of this kind could never be made good ground for such an estoppel as that the plaintiff now wishes to raise against Nagindas.

There remains, therefore, the second part of the case to be considered, namely, whether the plaintiff without being aware of the taint affecting the *hundi* became a holder in due course. The plaintiff's case is that as a result of about two years' dealings with the firm of Belasirai & Co. that firm was indebted to him at the opening of the year 1912 to the extent of about Rs. 2,700. On the 5th of January 1912 the plaintiff further advanced to the firm of Belasirai & Co. Rs. 3,000 in cash. In February 1912, Belasirai & Co., re-paid Rs. 2,500 in cash; and on the 22nd of March 1912 paid in this *hundi* against their remaining indebtedness to the plaintiff of Rs. 3,200. I do not think that the defendant Nagindas has been able to show that there was no pre-existent indebtedness on the part of Belasirai & Co., to the plaintiff firm at the time the *hundi* was transferred to the plaintiff. Nagindas has certainly complained that the two additional entries which were allowed to go in in the course of the plaintiff's examination were never disclosed and although in general terms the plaintiff in his affidavit of documents does rely upon this *khata*, he refused right up to the trial to allow the defendant inspection of anything more than the mere transfer entry showing that when he became possessed of the *hundi* he credited Belasirai & Co., with Rs. 2,500 and debited the defendant Nagindas with that amount. I see no reason, however, to doubt the correctness of the plaintiff's sworn evidence supported by his book-entries, and, I must, therefore, hold that on the 22nd of March when this *hundi* was transferred to him by Belasirai & Co., Belasirai & Co. were overdrawn in the plaintiff's books to an amount larger than that of the note. The question, then, is of pure law, whether the mere existence of an antecedent debt is consideration within the meaning of section 118 of the Negotiable Instruments Act. In this connection I have gone over all the leading cases commencing with *Watson* v. *Russell* (1); *Belshaw* v. *Bush* (2);

(1) (1862) 3 B. & S. 34 at 40; 122 Eng. Rep. 14 affirmed in 5 B. & S. 968; 34 L. J. Q. B. 93; 11 L. T. 641; 13 W. R. 231.

(2) (1851) 11 C. B. 191; 22 L. J. C. P. 24; 17 Jur. 67; 87 R. R. 639.

De La Chaumette v. *Bank of England* (3); *Currie* v. *Misa* (4); [in appeal *Misa* v. *Currie* (5) where the decision of the House of Lords rested upon a totally different ground]; and *M'Lean* v. *Clydesdale Banking Company* (6). If this had been a cheque payable on demand instead of what it is, a bill payable thirty days after date, and if I had considered the questions still open, I think I should have found it impossible to escape the conclusion, supported by such cogent reasons, reached by the Chief Justice in his dissentient judgment in *Currie* v. *Misa* (4). Except for the theoretical interest of the discussion, however, it must have become early apparent that there is absolutely no divergence amongst the authorities or room for argument where the disputed instrument is, as it is in this case, a bill of exchange payable after date, for in the case of *Currie* v. *Misa* (4) Lord Coleridge grounded the whole of his reasonings upon the distinction which he thought ought to be carefully maintained between instruments payable on demand such as cheques, and instruments which had to mature before the money could be recovered. The reason for that becomes obvious when we turn to the discussion to be found in all these cases, of what amounts to consideration and as such improves the title of a holder of a negotiable instrument thus giving him rights superior in law to those of his transferor. It was always thought that there was a solid distinction between bills payable after date and bills or cheques payable on demand for the purposes of that discussion; because it is obvious that a creditor accepting in discharge of a pre-existing debt a bill which had not yet matured must by implication be taken to have contracted to forbear enforcing his remedy until the date of maturity had arrived. This distinction, however, did not commend itself to the majority of the Judges in the Exchequer who decided the case of *Currie* v. *Misa* (4). They appeared to have favoured the view that the true origin of consideration in all such cases was that the bill or cheque was a conditional dischrage of debt, the condition being that if the bill or cheque yielded nothing, the former debt revived. It would be easy in a merely theoretical argument to suggest considerations telling against the soundness of that view, but there can, I think, be no question that where an instrument is a bill payable after date and transferred before maturity, the law has been uniform and settled beyond all possibility of disturbance that the transfer of such an instrument in discharge of a pre-existing debt makes the creditor a holder in due course. The whole law expressed concisely in section 118 of the Negotiable Instruments Act may be found more amply and exactly stated by Blackburn, J., in the case of *M'Lean* v. *Clydesdale Banking Company* (6); and the effect of these decisions taken together appears to me to leave absolutely no doubt of the correctness of the proposition that where a negotiable instrument of any sort is handed over by a debtor to his creditor in discharge of a pre existing debt, the creditor becomes a holder in due course. It is only where, as in the case of *De La Chaumette* v. *Bank of England* (3), and other cases falling under the same principle, the transfer of the negotiable instrument is not for the purpose of extinguishing a pre-existing debt but can upon the facts be found to be given as between principal and agent merely for collection by the latter, that the rule will not apply. But then it becomes clear that the ground of it is cut away, for where a debtor hands a negotiable instrument to another to collect for him merely as his agent, even though he happened at that time to be indebted to that agent, there is no intention of giving the negotiable instrument as payment of the debt.

In the present case I may entertain my own suspicions as to the privity existing between the plaintiff and Ramkisson, I may even doubt whether when the note was given to the plaintiff on the 22nd of March he was as wholly ignorant of its character and the manner in which it had been procured as he professes to be, but that opens up an entirely new set of considerations; for were it so held upon the evidence, then the ground upon which the plaintiff's claim

(3) (1829) 9 B. & C. 208; 7 L. J. (o. s.) K. B. 179; 109 Eng. Rep. 78; 32 R. R. 643.
(4) (1875) L. R. 10 Ex. 153; 1 App. Cas. 554.
(5) (1876) 1 App. Cas. 554; 45 L. J. Ex. 414; 35 L. T. 414; 24 W. R. 1049.
(6) (1883) 9 App. Cas. 95; 50 L. T. 57.

could be resisted would not really be that the pre-existing debt was not good consideration but that as privy to the fraud he could be in no better position than the first fraud-feasor to take advantage of it. And I do not think that there is any evidence in this case which would warrant me in saying more than that I do entertain suspicions of this kind. In any event, it would be extremely difficult to obtain proof of them and there is really no proof on the record of this case.

I must, therefore, hold that on the facts proved before me (1) the promissory-note was obtained by Ramkisson from the defendant Nagindas for unlawful consideration; (2) the defendant Nagindas Ranchhoddas is not estopped from raising that defence; (3) plaintiff is a holder in due course, and, therefore, entitled to recover.

I must, therefore, now decree the plaintiff's claim against the defendant Nagindas Ranchhoddas with all costs.

Suit decreed.

Attorneys for the Plaintiff: Messrs. *Pestonji Rustim Kolah & Co.;* Messrs *Dikshit Dhunjishaw & Soonderdass.*

Attorneys for the Defendant: Messrs. *Mulji Khambatta and Thakordas.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1382 OF 1910.

September 3, 1912; February 24, 1913, March 14, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., Justice Sir Herbert Carnduff, KT., and Mr. Justice N. R. Chatterjea.

MANJURI BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AKKEL MAHMUD AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Eastern Bengal and Assam Tenancy Amendment Act (I of 1908 E. B. & A.), s. 61, cl. (3)—Under-raiyats, suits by, after amending Act—Cause of action arising before Amending Act—Applicability of special rule of limitation—Statutes, construction of—Statutes relating to procedure—Limitation Act (IX of 1908)—Retrospective action.

The special rule of limitation which was extended to under-*raiyats* in Eastern Bengal by the amendment in 1908 of the third Article in the third Schedule of the Bengal Tenancy Act, 1885, does not apply to suits instituted after the commencement of the Amending Act in respect of causes of action which arose before the Amending Act came into force. Section 61, clause (3), of the Eastern Bengal and Assam Tenancy Amendment Act of 1908 has no retrospective operation.

So *held* by Mookerjee and Chatterjea, JJ., Carnduff, J., dissenting.

Held, by Carnduff, J.,—A Limitation Act gives no right of action whatever and is a law relating to procedure and is an exception to the rule that statutes ought not to be given retroactive operation, because no one can be said to have a vested right in any particular form or mode of procedure.

Held, by Chatterjea, J.,—Statutes of Limitation or other statutes relating to procedure are to be construed retrospectively, but the principle that even such statutes should not be so construed where such a construction would cause hardship or injustice, is recognised in the majority of the decided cases on the subject. The rule, however, is not given effect to where the operation of the statute is postponed for some time after it is passed.

Held, by Mookerjee, J.—No statutes should be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct operation. The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the statute makes, has been disadvantageous to one of the parties. But the new procedure would presumably not apply where its application would prejudice rights established under the old.

Appeal from the decree of the District Judge of Rungpur, dated January 3rd, 1910, reversing that of the Second Munsif of Kurigram, dated April 28th, 1909.

Babu *Harendra Narain Mitra*, for the Appellants.

Babus *Mohini Mohan Chakravarti* and *Hem Chandra Mitra*, for the Respondents.

JUDGMENT.

CARNDUFF, J.—This appeal is preferred by the plaintiffs against a decree dismissing their suit for the recovery of possession on an under-*raiyati* holding in the District of Rungpore from the landlord and those with whom the lands comprised in the holding had been subsequently settled by the landlord. The decision of the lower Appellate Court proceeds on various grounds; but that with which alone I think it will be found necessary to deal, is the ground of limitation.

The appellants' possession admittedly came to an end in 1898; and their action, which was brought on the 25th August 1908, has been held to have been barred by the

special rule of two years' limitation prescribed by the third Article in the third Schedule to the Bengal Tenancy Act, 1885, as amended by section 61, clause (3), of the Eastern Bengal and Assam Tenancy (Amendment) Act, 1903; which came into force on the 10th June 1908. In support of the appeal on this point, it is contended, *first*, that the ouster was not by the landlord, whence it follows that the special rule of limitation is no bar, and *secondly*, that in any event the amendment of the law in 1908 cannot be applied retrospectively so as to bar the present suit.

As regards the first contention, the finding of fact arrived at by the Appellate Court below, is, I think, conclusive on second appeal; for that finding amounts to this, that the landlord, in collusion with the other respondents, put the latter in possession to the exclusion of the appellants. This is, in my opinion, sufficient to bring the case within the purview of the Tenancy Act.

In pressing the second contention the learned Vakil for the appellants has taken his stand primarily on the broad ground that the shorter period of limitation introduced in Eastern Bengal by the Amending Act of 1908 can be applied only to suits for dispossession occurring after the passing of that enactment. This argument may be disposed of at once by a reference to the cases of *Saraswati Dasi* v. *Horitarun Chuckerbutti* (1) and *Ramdhan Bhadra* v. *Ram Kumar Dey* (2), in both of which it was held by this Court that the special rule of limitation laid down by the Bengal Tenancy Act, 1885, as originally enacted in respect of suits instituted by occupancy-*raiyats* was not restricted to suits in which the cause of action arose after that enactment became law. Those decisions have, so far as I know, never been questioned, much less overruled; they are clearly binding on us; and I venture to say that I entirely agree with them.

But the cases referred to may, it is next argued, be distinguished because in them the dispossessions complained of had occurred only five months and eleven months, respectively, before the enactment of the more stringent rule of limitation. Consequently, in neither could it be said that the application of the new rule would have had the result of depriving the plaintiff of his right of action altogether: for he could very well have brought his action; had he so chosen, within the shorter period of two years prescribed. In other words, his remedy remained; and all that happened was that less time was left to him to move with a view to its enforcement. Regarded in this light, the new law of limitation was clearly a law relating to nothing but procedure, pure and simple, and there could be no possible objection to the adoption of the principle that enactments regulating mere procedure are, in a sense, retroactive. Here, on the other hand, the application of the amended rule of limitation put the plaintiffs out of Court at once, since the shorter period prescribed had expired long before the enactment prescribing it had come into force; and the further argument that, in these circumstances, the Act of 1908 did much more than alter the course of procedure in that its application had the effect of taking away the appellant's right of action, is certainly attractive and, perhaps, less readily met.

In support of this argument our attention has been invited to a number of reported cases, both English and Indian, and I have examined them and the authorities on the subject at length. But it is surprising to find how few are exactly in point, that is to say, how few deal with alterations in the law of limitation. There are, no doubt, numerous passages in the reports, and also in the text-books, which can be accepted and quoted to establish the proposition that retrospective effect should not be given to an Act so as to work injustice by taking away vested rights of action. But the precise question whether any person can be said to have a vested right to bring an action within a particular period is hardly touched; and that is the question on which turns the applicability to Statutes of Limitation of the broad proposition stated above. The cases which seem to me to be really relevant, and to which alone, therefore, I propose to refer, are the following.

The most helpful to the appellants of

(1) 16 C. 741.
(2) 17 C. 926.

the Indian cases is that of *Khusalbhai* v. *Kabhai* (3), which has, curiously enough, not been cited before us on their behalf. In it the plaintiffs applied, apparently in or about the month of August 1879, to have the legal representative of the original defendant who had died some six months earlier, substituted in his stead. But, on the 29th July 1879, Act XII of that year had been passed and brought into operation at once; and by it an Article was inserted in the Schedule to the Limitation Act of 1877 fixing sixty days from the death of a deceased defendant as the period of limitation for such an application. Under the new Article the plaintiff's application would, obviously, have been at once barred; and Melvill and Kemball, JJ., held that in these circumstances, regard being had also to the fact that there was no postponement of the operation of the Act, "to put a retrospective construction upon the Article would be to deprive the plaintiffs absolutely of the right which they previously had, and which all plaintiffs subsequently had, to revive their suit; and this would be an injustice which cannot be presumed to have been within the intention of the Legislature."

This case is on all fours with that before us; but we are not bound by the ruling in it, and, with all respect I doubt its soundness. In it the learned Judges refused to follow the earlier decision of their Court in *Reg.* v. *Dorabji Balabhai* (4), where it was held by West and Larpent, JJ., that "an Act of Limitation, being a law of procedure, governs all proceedings to which its terms are applicable from the moment of its enactment, except in so far as its operation is expressly excluded or postponed." They disposed of that emphatic decision with the remark that the rule laid down thereby "must admit of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively." They seem to me to have been influenced too much by a consideration of the hardship of the particular case before them; whereas Judges ought, as was said by Lord Campbell, L. C., in *The East India Company* v. *Oditchurn Paul* (5) "to take care for the general good of the community, that hard cases do not make bad law." The judgment speeks, no doubt, of the right "of which the plaintiff would have been deprived by the new enactment; but it does so loosely, and it fails to inquire into the precise nature of that right." It was a right to go to law; but the exercise of that right was subject always to the rules of procedure for the time being in force, and first and foremost amongst such rules are Statutes of Limitation. To these, above all things, suitors must have constant regard; and, if they delay in seeking to enforce their claims, the risk as it seems to me is theirs.

In *The Delhi and London Bank* v. *Orchard* (6), the Judicial Committee, no doubt, preferred that one of two constructions capable of being placed on the provisions of sections 20 and 21 of Act XIV of 1859, the first of the Limitation Acts passed in India; which avoided the imposition of a hardship such as that before us in the present case. But what their Lordships were there construing and applying was a saving clause framed for the protection of rights under subsisting judgments and decrees; whereas the initial, and to my mind, the fatal difficulty which the appellant is face to face with here, lies in the fact that there is not, when there might have been, any such saving clause to construe and apply. Their Lordships accepted the view of this Court that sections 20 and 21 of the Act of 1859, should be read together so as to enact that no process of execution should issue upon any judgments more than three years old, unless some proceeding should have been taken to enforce it or keep it in force within three years of the application for execution: provided "that process of execution in respect of a decree obtained before the passing of Act XIV of 1859 might be issued either within the time limited by that Act or within three years after its commencement, whichever should

(3) 6 B. 26.
(4) 11 B. H. C. R. 117.
(5) 5 M. I. A. 43 at p. 69; 18 Eng. Rep. 810.
(6) 4 I. A. 127; 3 C. 47.

first expire." And that in the language which has since been adopted by the Indian Legislature in this connection, as a reference to the last clause of section 2 of Act XV of 1877 and section 30 of Act IX of 1908 will show. Had there been no saving clause in Act XIV of 1859, the decision might have been different, and I think that it cannot be regarded as an authority on the point before us now.

The only other case which bears upon an Indian enactment relating to limitation and seems to be at all apposite, is that of *Chajmal Das* v. *Jagdamba Prasad* (7), and it appears to me to tell rather against the appellants, although it is, as will be shown, distinguishable to some extent. In it, the plaintiff-respondent, Jagdamba, had died on the 17th September 1885. Under the law, as it then stood, his legal representative had three years, that is to say, till the 17th September 1888 for applying to be brought on the record in his place, but the Civil Procedure Code Amendment Act, which came into force on the 1st July 1888, had reduced the period of limitation to six months. An application was made by one claiming to be Jagdamba's adopted son on the 24th July 1888, and it was held by Edge, C. J., and Straight and Mahmood, JJ., to be barred by the Act which had just been passed. There had, as a matter of fact, been an interval of over three months from the 23rd March to the 1st July between the passing and the commencement of the amending enactment; but that circumstance was not even mentioned by the learned Judges, who appear to have decided the case on general principles, pointing out that the terms of the enactment distinctly applied, and that there was no saving clause to protect applications with reference to rights and incidents that had accrued in connection with prior litigation.

Turning now to the English cases and putting on one side *obiter dicta* and generalisations, I can find none more in favour of the appellant's contention than *Doe Dem Evans* v. *Page* (8) which has the high authority of Lord Denman. In it Evans, the fictitious plaintiffs' lessor, under the old form of pleading, sued to eject the defendant, Page, who, it was alleged, had wrongfully taken possession after the death of the tenant-at-will, to whose tenancy the right of Evans was subject; and Page could, under the Statute of Limitation, bring his action in ejectment at any time within twenty years of the determination of the tenancy at-will. Prior to 1833 this meant that he could sue within twenty years of the tenant-at-will's death which had occurred in 1832; but by a Statute of 1833 it was enacted that a tenancy-at-will was, for the purposes of such an action, to be deemed to have determined on the expiration of one year after its commencement. In this instance, the tenancy-at-will had commenced in 1816; and, therefore, by virtue of the new Act, if it was to be applied, time had begun to run against Evans in 1817, and his action, which was not brought till after 1837, was time-barred: Lord Denman held that the Statute of 1833 could not be construed retrospectively, and he observed that "a different construction would cause the greatest hardship; for a person, who, as the law stood before the passing of the Act, was in ample time to bring his ejectment and recover property which, undoubtedly, was his, would, by the operation of the statute, be suddenly deprived of the means of asserting his right." But that very learned Judge based his decision primarily on the language of the statute, which was couched throughout in the future tense, and he held that the words used themselves precluded its application to a tenancy-at-will not in existence at the time when it was passed nor created subsequently. Moreover, the enactment which his Lordship was construing, was not a Limitation Act; and his ruling was cited in argument in *Cornill* v. *Hudson* (9), but, as will appear presently without effect.

In *Cornill* v. *Hudson* (9) it was held by Campbell, L. C. J., and Coleridge Wightman and Erle, JJ., that retrospective effect must be given to section 10 of the Marcantile Law Amendment Act, 1856 (19 and 20 Victoria c. 97), which came into force on the 29th July 1856 and altered the Statute of Limitations (21 Ja. 1, c. 16) by providing that a person imprisoned when his cause of action accrued should no longer have the benefit of computing the period of limitation,

(7) 11 A. 408.

(8) (1844) 5 Q. B. D. 767; D. & M. 601; 13 L. J. Q. B. 158; 8 Jur. 999; 114 Eng. Rep. 1439.

(9) (1857) 8 E. & B. 429; 27 L. J. Q. B. 8; 3 Jur. (N. S.) 1257; 6 W. R. 37; 112 R. R. 636; 120 Eng. Rep. 160.

prescribed by law from the determination of his imprisonment. The result was that the plaintiff, who, as the report indicates, was in prison in 1844, when his cause of action arose, and remained there for more than six years after that, was deprived of all remedy, because six years was the period of limitation prescribed, and he had been unable to bring his suit within that period. Lord Campbell observed that the plaintiff was clearly within the scope of the enactment of 1856 according to its grammatical and natural construction, and that it carried out what was the probable intention of the Legislature, namely to prevent the vexatious prolongations of rights of action, an intention in which his Lordships saw no injustice. And Erle, J., referred to *Thompson* v. *Waithman* (10) as being in exact analogy, adding that "the Legislature appears to have considered the Statutes of Limitations to be enactments in furtherance of justice," and had "intended to take away absolutely every impediment to the operation of these enactments in every case."

In the *Queen* v. *Leeds and Bradford Railway Company* (11) retrospective effect was likewise given to the Summary Jurisdiction Act of 1848 (11 and 12 Vict., c 43), which came into force on the 2nd October 1848 and enacted that awards under the Lands Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 18), must be applied for and obtained within six months from this time when the damage complained of was done. Here the damage had been done before the end of 1847; six months had elapsed before the passing of the Statute of 1848, and the claim based upon the award was nevertheless held barred, because the latter had not been obtained till 1850. No doubt, Lord Campbell, then referred to the circumstance that the coming into force of the Statute of 1848 had been suspended for six weeks after its enactment; and he remarked that, "if the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that they *might have* inferred an intention on the part of the Legislature not to give it a retrospective operation." But there is nothing definite in this observation, and it does not follow that the inference would have been made had there been no such interval as that alluded to. Everything, indeed, would have depended on the facts and circumstances connected with the particular act under consideration, and the conclusion might have been that the intention of the Legislature in 1848 was to put a stop, there and then, to all stale claims under the Statute of 1845.

Again in *The Ydun* (12) the Court of Appeal gave retrospective effect to the Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61), which fixed six months as the limit of time within which a public authority could be sued for damages in respect of neglect or default in the execution of its duties. In this case the damage complained of had been caused on the 13th September 1893, the statute, which was passed on the 5th December, 1893, came into force on the 1st January 1894, and the suit, which was against a port and harbour authority, was not brought till the 14th November 1894. In disposing of it and holding it time-barred Lord Justice A. L. Smith observed that "when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions." Here, no doubt, the bringing of the suit was not at once rendered impossible by the new Act, for the six months prescribed by it did not expire till the 13th March 1894, so that the plaintiff could have brought it in time. And it is true that the learned President, Sir Francis Jeune, had in the Court of first instance expressed himself as influenced to some extent by the fact that there was an interval of almost a month between the passing of the enactment and its coming into operation. But the principle in the main acted upon was the principle that Limitation Acts are mere laws of procedure, and that such laws have retrospective effect in the sense that they apply to all actions brought after they are placed in the statute book; and have come into force.

There remains another English case which relates to the criminal law, but is perhaps not the less relevant on that account; for the

(10) (1856) 3 Drew. 628; 26 L. J. Ch. 134; 2 Jur. (N. S.) 1080; 5 W. R. 30; 106 R. R. 471; 61 Eng. Rep. 1043.

(11) (1852) 21 L. J. M. C. 193; 16 Jur. 817; 118 Eng. Rep. 129; 18 Q. B. 343.

(12) (1899) P. 2 36; 68 L. J. P. 101; 81 L. T. 10; 15 T. L. R. 361; 8 Asp. M. C. 551.

view most favourable to the accused would surely have been taken in it, had that been possible. We refer to *R.* v. *Chandra Dharma* (13) in which the accused had been charged with having, on the 5th July 1904, committed an offence against the Criminal Law Amendment Act of 1885. At that time the law forbade any such prosecution after the lapse of three months from the date of the crime charged, and the accused would by that provision have been safe from any proceeding after the 15th October 1904. He was in fact not prosecuted till later; but, by an Amending Act, which came into force on the 1st October 1904, the period of limitation had been extended to six months: and the Court of Crown Cases Reserved held that he had lost the benefit of the former law of limitation. Lord Chief Justice Alverstone there lays it down without any qualification that a law of limitation is a law of procedure and must be given retrospective effect, and though Mr. Justice Channell added that it "would have been entirely different" if the time under the old Act had expired before the new Act came into force, that *obiter dictum* of the learned Judge was not noticed or endorsed by the other Judges, all of whom contented themselves with expressing their concurrence with the Lord Chief Justice.

The result of my consideration of the reported cases is that the preponderance of authority seems to me to be against the contention of the learned Vakil who has argued this appeal; and the general principles also are, I think, against him. A Limitation Act, of course, gives no right of action whatever; and as was remarked by the Chief Justice of the Common Pleas (Sir John Jervis) in *Ruckmaboyee* v. *Lulloobhoy Mottichund* (14), it has become almost an axiom of jurisprudence that such an enactment is a law relating to procedure. It is further well established that a law which merely regulates procedure is an exception to the rule that statutes ought not to be given retrospective operation, because no one can be said to have a vested right in any particular form or mode of procedure. A person's right of action is one thing: The means open to him for enforcing it are another, and the latter may be, and are, varied from time to time. Provisions as to the period within which a right of action must be enforced, if at all, do not create a right to bring an action within that time, they merely regulate the proceeding for enforcing the remedy, and, as I have already said, suitors must have regard to such as are for the time being in force, and, if they delay, they do so at their peril. *Prima facie*, then, the amending legislation of 1908 reducing the period of limitation in the case of suits by under-*raiyats* for the recovery of possession of their holdings applies to every such suit instituted on or after the 10th June of that year, no matter when the cause of action arose, unless it is clear that the Legislature intended, or cannot but have intended, to limit its application. For, after all, as Lord Campbell put it in *Cornill* v. *Hudson* (9), the cases show no more than this, that we are to find out the intention of the Legislature in each particular Act.

Now section 184 of the Bengal Tenancy Act, 1885, read with the third Article in the third Schedule thereto, as amended in 1908, provides that every suit to recover possession of land claimed by the plaintiff as an under-*raiyat* shall be dismissed if instituted after two years from the date of dispossession. The words used are clear, and there can be no doubt but that, according to their grammatical, natural and ordinary, construction, they embrace all suits of the kind described, instituted after the words became law, irrespectively of when the causes of action may have arisen. They stand unqualified by any saving in the Amending Act of 1908, and they are unaccompanied by any such transitory provision as is to be found in, for example, section 30 of the Indian Limitation Act of 1908, which provides that any suit for which the new period of limitation prescribed is shorter than that formerly prescribed, may be instituted within two years of the enactment of the new period or within the period formerly prescribed, whichever period first expires. What is the inference to be drawn from the circumstance that the local Legislature included no such provision in connection with this particular amendment? What is the inference to be drawn

(13) (1905) 2 K. B. 335; 74 L. J. K. B. 450; 69 J. P. 198; 53 W. R. 431; 92 L. T. 700; 27 T. L. R. 353.
(14) 5 M. I. A. 234 at p. 265; 18 Eng. Rep. 884.

from the fact that the only reported cases on the point—I refer again to *Saraswati Dasi* v. *Horitarun Chakrabutti* (1), and *Ramdhan Bhadra* v. *Ram Kumar Dey* (2), already cited—had decided that the two years' rule of limitation in question applied where the cause of action had preceded its enactment? What is the inference to be drawn from the fact that Western Bengal had already, through Bengal Act I of 1907, set the example of amending the third Article in the third Schedule? If the two years' rule of limitation was not to be applied at once, the only alternative was the continuance of the application of the 12 years' rule and what, in all the circumstances is the legitimate inference from this? To my mind, the answer must, in each instance, be that the intention cannot but have been to apply the new rule indiscriminately. Can it, indeed, be conceived that the Legislature, having made up its mind that ordinary *raiyats* and under-*raiyats* ought, like occupancy-*raiyats*, to be required to assert their rights to recover possession within the comparatively short period of two years, should have deliberately meant to postpone the operation of the amending legislation for something like ten years? I think not; and I find it much less difficult to believe that the Legislature meant to place ordinary *raiyats* and under-*raiyats* on the same footing in this connection as occupancy-*raiyats* without any delay whatsoever, even at the sacrifice of the interests of such of the two former classes as might have been sleeping on their rights. And, reverting once more to the question of hardship, it should be borne in mind that in this particular case there was ample warning and further, that, even where Acts of local Legislatures in India are enacted so as to come into force at once. The litigating public have practically always notice of what is contemplated. In this instance, the two years' rule of limitation had been extended to under-*raiyats* in Western Bengal in 1907; and that there would be, as soon as possible, a similar extension in Eastern Bengal was much more than probable. The Amending Bill for Eastern Bengal which became the Act with which we are now concerned was, in fact, published in the local official Gazette on the 7th November 1907, was introduced into the Local Legislative Council on the 27th idem, was referred to, and reported upon by, a Select Committee in the usual course, was passed by the Council on the 13th May 1908, and did not become operative until it was published in the local official Gazette, with the assent of the Governor-General, on the 10th June 1908. The present appellants, therefore, ran a great risk in delaying for over 10 years before enforcing their remedy, and it seems to me that they must suffer for it. I hold, then, agreeing with the learned District Judge in the Court of Appeal below, that the rule of special limitation extended to under-*raiyats* in Eastern Bengal by the amendment, with effect from the 10th June 1908, of the third Article in the third Schedule to the Benal Tenancy Act, 1885, applies to all suits of the kind there indicated, instituted on or after the said date, without regard to when the cause of action arose. That being so, this appeal ought, in my opinion, to be dismissed with costs.

N. CHATTERJEA.—This appeal arises out of a suit for declaration of title to and recovery of possession of the lands in dispute, which were held by the plaintiffs as under-*riayats*, against the landlord, and certain other persons with whom the lands had been subsequently settled by the landlord.

Various pleas were taken in defence, one of them being that the suit was barred by special law of limitation prescribed by Article 3, Schedule III of the Bengal Tenancy Act as amended by section 61 clause (3) of the Eastern Bengal and Assam Tenancy Amendment Act of 1908 which came into force on the 10th June 1908. The plaintiff's possession came to an end in 1898 and the suit was brought on the 25th August 1908 but they were minors and if the general law of limitation applied they would be in time.

The facts found by the lower Appellate Court constitute dispossession of the plaintiffs by the landlord, and the dispossession admittedly took place more than two years before the suit was instituted. The lower Appellate Court being of opinion that an alteration in the law of limitation in the absence of any express enactment to the contrary comes into operation as soon as the amending Act comes into force, in respect of all suits instituted after that date, regardless of the date on which the cause of action may have arisen held that the suit was barred by limitation. If the principle stated above is

applicable to the present case the suit has been properly dismissed and it will be unnecessary to consider the other questions raised in defence.

The general principles relating to retrospective operation of statutes are clear. The general rule is that Acts are prospective; not retrospective in their operation. See *Moon* v. *Durden* (15) and *Doolubdass Pittamberdas* v. *Ram Lal Thakoorseydass* (16). It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. To this rule, however, there are two exceptions (*i*) when Acts are expressly declared to be retrospective and (*ii*) when they only affect the procedure of the Court. As observed by Mellish, L. J. in *Republic of Costa Rica* v. *Erlanger* (17), no one has any vested interest in the course of procedure. Now statutes of limitation are generally regarded as Acts regulating procedure. See *Ruckmaboyee* v. *Lalloobhoy Motichund* (14). And as a general rule an Act of Limitation being a law of procedure governs all proceedings from the time of its enactment, except so far as its operation is expressly excluded or postponed. But the question is whether even such an enactment should be retrospectively construed so as altogether to deprive a plaintiff of the means of asserting his right and where such a construction would inflict such hardship or injustice as could not have been within the contemplation of the Legislature.

Where a statute does not come into force at once, but its operation is postponed for some time the hardships of a retrospective law may be considered to have been contemplated and provided for by the Legislature and such a postponement may induce the Courts to hold the statute to be retrospective.

In re Athlumney, Ex parte Wilson (18) Wright, J., observed that this exception seems never to have been suggested except in relation to statutes affecting procedure such as Statutes of Limitation and even in relation to them, it is questioned in *Moon* v. *Durden* (15).

That a Statute of Limitation should not be construed in such a way as would cause hardship or injustice was laid down by the Judicial Committee of the Privy Council in the case of *Delhi and London Bank* v. *Orchard* (6), where their Lordships in construing sections 20 and 21 of this Limitation Act, XIV of 1859 observed as follows: "It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab is correct, a judgment-creditor could not, after the three years have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed for a judgment which was in force in the Punjab at the time when the Act was extended to that Province, however diligent, he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature."

Before the Bengal Tenancy Act VIII of 1885 was passed suits to recover occupancy of any land, farm or tenure from which a *raiyat*, farmer or tenant had been illegally ejected were governed by the one year's rule of limitation as provided for by section 27, Act VIII of 1869 (B. C.), and it was held in various cases that section 27 referred only to possessory actions against the landlord and not to actions where the title of the tenant was in dispute, and to which the general limitation of 12 years was applicable. Article 3, Schedule III of Act VIII of 1885, introduced a change in the law of limitation only so far as occupancy-*raiyats* were concerned by prescribing a period of two years for a suit to recover possession of land claimed by an occupancy-*raiyat*. And it has been held that the Article contemplates suits to recover possession

(15) (1848) 2 Ex. 22 at p. 33; 12 Jur. 138; 76 R. R. 479.

(16) 7 M. P. C. C. 239; 5 M. I. A. 109; 15 Jur. 257; 18 Eng. Rep. 836; 13 Eng. Rep. 873.

(17) (1876) L. R. 3 Ch. D. 62 at p. 69; 45 L. J. Ch. 743.

(18) (1898) 2 Q. B. 547; 67 L. J. Q. B. 935; 79 L. T. 303; 47 W. R. 144; 5 Manson 322.

of land *claimed* by a plaintiff as an *occupancy ryot*, *i.e.*, where by the very nature of the action the *ryot* has to set out his title to the land claimed. Such suits by non-occupancy *ryots* and under-*raiyats*, however, continued to be governed by the 12 years' rule of limitation under the general Limitation Act.

The question whether Article 3, Schedule III, of the Bengal Tenancy Act (as originally enacted) has retrospective operation was raised in two cases in this Court. *Saraswati Dasi* v. *Horitarun Chuckerbutti* (1) and *Ramdhan Bhadra* v. *Ram Kumar Dey* (2). It was held that as there was no saving clause for suits in which the cause of action had arisen before that Act was passed, they were governed by the period of limitation prescribed by Article 3 of Schedule 3 of the Bengal Tenancy Act. But Act VIII of 1885 did not come into force at once. It received the assent of the Governor-General in Council on the 14th March 1885, but did not come into operation until the 1st November 1885. Moreover, the period of two years had not run out from the date of dispossession when the Bengal Tenancy Act came into force. The plaintiff in these two cases had more than a year after the passing of the new Act prescribing the shorter period of limitation within which to institute the suit. There is no hardship or injustice when the plaintiff whose cause of action is not barred when the period of limitation is altered by a new Act, and who has time even after the passing of the new Act will not institute the suit within the shorter time prescribed by the new Act.

These two cases, therefore, are not authorities upon the question whether retrospective operation should be given to a new enactment where the effect of that would be to deprive a person altogether of the right he had, and which was not barred under the old Act.

The retrospective operation of section 310 A of the Civil Procedure Code to proceedings in execution of a decree which had been passed before that section came into operation was considered by the Full Court in the case of *Jogodanund Singh* v. *Amrita Lal Sarkar* (19). Banerji, J., in delivering the judgment of the Court said that no new right was created in the judgment-debtor interfering with any vested right of the judgment-creditor, and as the sale took place after the new law came into operation, the auction-purchaser must be taken to have made his bid with full knowledge of the law, and it cannot be said that any vested right of his was affected by the provisions of that section, and *secondly*, that the section did not create any new substantive right in the judgment-debtor, and that it embodied in substance a rule of procedure. The learned Judge then observed as follows:—

"It being thus really a matter of procedure there can be no objection to its having effect immediately, even though it should affect past transactions and the mode of enforcement of vested rights, [see *James Gardner* v. *Lucas* (20) 'provided, of course' as Mellish, L. J., said in the case of the *Republic of Costa Rica* v. *Erlanger* (17), 'that no injustice is done.' And I have shown above that this condition is here fully satisfied". It will thus appear that the fact that no injustice would be done, was taken into consideration in giving a retrospective effect to the section.

In the Bombay High Court in the case of *Reg.* v. *Dorabji Balabhai* (4), an appeal against a judgment of acquittal was presented by Government six months after the date of the judgment. Section 272 of the Criminal Procedure Code was amended by Act XI of 1874 which prescribed that no appeal under that Act shall be presented more than six months after the date of the judgment complained of. It was held that the appeal was barred though the six months expired on the day the amending Act came into force. The learned Judges said: "But an Act of Limitation being a law of procedure governs all proceedings to which its terms are applicable from the moment of its enactment, except so far as its operation is expressly excluded or postponed." No question of hardship or injustice, however, could arise in a case like that, and as pointed out in the case of *Khusalbhai* v. *Kabhai* (3) the Court was there dealing with a statutory provision which was beneficial to the liberty of the subject.

(19) 22 C. 767 (F. B.).

(20) (1878) 3 App. Cas. 582 at p. 603.

In a later case in that Court, *In the matter of the petition of Ratansi Kalianji* (21), the question raised was whether a judgment-debtor imprisoned in satisfaction of decree against him under Act VIII of 1859, was entitled under Act X of 1877, to be released on the coming into operation of the later Act if he had then been imprisoned for more than six months but less than two years, and it was held by the majority of the Full Bench that he was not. The cases relating to questions of mere procedure whereby a retroactive force had been given to enactments were exhaustively reviewed by some of the learned Judges in that case. Westropp, C. J., in discussing the authorities on the point said: "But when such a construction even of Limitation Act would divest such a right, that construction will be avoided, as it lately was in *Sitaram Vasudeb* v. *Khanderav Balkrishna* (22) and this was so held in that and many other cases there mentioned, and although statutes of limitation are regarded as Acts regulating procedure: *H. H. Ruckmaboyee* v. *Lulloobhoy Mottichund* (14). That such a statute ought not, if possible, to be retrospectively construed, was so recently as the 14th May 1877 decided by the tribunal to which we especially owe allegiance" and reference was made to the case of *Delhi and London Bank* v. *Orchard* (6) noticed above. The opinion of Westropp, C. J., in the above case was cited with approval by this Court in *Behary Lal* v. *Goberdhun Lal* (23).

In a still later case in the Bombay Court, *Khusal Bhai* v. *Kabhai* (3), the question of retrospective operation of Statutes of Limitation was directly raised. In that case an application for substitution of the legal representatives of a deceased defendant was made within six months of his death under Act X of 1877. The amending Act XII of 1879 received the assent of the Governor-General on the 28th July 1879, when the defendant was dead six months. That Act amended section 368 of the Civil Procedure Code (Act X of 1877) and added section 171 B to the Limitation Act (Act XV of 1877). The effect of the amendments was to require a plaintiff to apply within 60 days of the defendant's death to have his legal representative made a defendant. The Act came into operation at once, and if section 171B had retrospective operation, the application for substitution would certainly have been barred but it was held that the provisions of that section should not be given retrospective effect, and that the application was not time-barred. Referring to the rule laid down in *Reg.* v. *Dorabji* (4), the learned Judges said that it was somewhat too broadly stated in that case. They held that the general rule must admit of the qualification that when the retrospective application of a Statute of Limitation would destroy vested rights or inflict such hardship or injustice as could not have been within the contemplation of Legislature, then the statute is not, any more than any other law to be construed retrospectively, and after referring to the case of *London and Delhi Bank* v. *Orchard* (6) said: "Similarly in the present case, we think that Article 171B, Schedule II, of Act XV of 1877, ought not, if possible, to be retrospectively construed. When that Article was introduced into the Statute of Limitation by Act XII of 1879, the deceased defendant had been dead for six months and it was, therefore, impossible for the plaintiffs to comply with the requirements of the Article, namely that an application to have the representative of a deceased defendant made a defendant should be presented within 60 days from the date of defendant's death. Consequently to put a retrospective construction upon the Article would be to deprive the plaintiffs absolutely of the right which they previously had, and which all plaintiffs subsequently had, to revive their suit; and this would be an injustice which cannot be presumed to have been within the intention of the Legislature. Another consideration, tending to the same conclusion, is that there was no postponement of the operation of Act XII of 1879 but the Act came into force at the moment at which it received the assent of the Governor-General. The plaintiffs, therefore, and others similarly situated had no such notice as might have enabled them to anticipate the divestiture of their right of revival. This is a consideration which has weighed much with Courts in England and in this country when dealing with similar questions," and referred to a

(21) 2 B. 148 (F. B.).
(22) 1 B. 286.
(23) 9 C. 446; 12 C. L. R. 431.

number of English and Indian decisions.

In that case, the principle, that questions of hardship and injustice and the fact that the operation of the enactment was not postponed are to be considered in dealing with the question of retrospective operation of Statutes of Limitation, was distinctly recognised.

In the Allahabad High Court in the case of *Chajmal Das* v. *Jagdamba Prasad* (7) the plaintiff-respondent died on the 17th September 1885. Application for substitution of the legal representative of the deceased which was made on the 24th July 1888 would have been in time under the Civil Procedure Code (Act XIV of 1882) as it stood at the time of the death of the respondent. The Code, however, was amended by Act VII of 1888 which came into force on the 1st July 1888 and which provided six months' limitation for such an application. The Court held that the amending Act had retrospective operation and the application was barred. But the case may be distinguished on the same ground as the cases in 16 and 17 Calcutta series referred to above as the Act did not come into operation at once and the appellant had sufficient time for making the application for substitution, even after the amending Act came into operation though these circumstances were not noticed in the judgment of the Court. Turning to the English cases we also find that the principle that in giving a retrospective operation to a Statute of Limitation where there is no postponement of its operation, the hardship or injustice it would cause should be taken into consideration, is recognised in many of the cases.

Thus in *Towler* v. *Chatterton* (24) an action was brought in 1829 for a debt which was at that time more than six years standing, but the plaintiff relied upon an oral promise to pay the debt made by the defendant in February 1823. By 9 Geo. 4, c. 14, which was passed on the 9th May 1828, but which was to commence and take effect on the 1st January 1829 it was enacted that in an action of debt, an acknowledgment or promise in order to take any case out of the operation of the Statute of Limitation, 21 Ja. 1, c. 16 must be in writing to be signed by the party chargeable thereby. It was held that the Act had retrospective operation but reliance was placed upon the fact that hardship was obviated by declaring that the Act should not take effect till the 1st January following thereby giving all persons in possession of such parol promises seven months and more in which to bring their action founded on such promises if they should be so minded and referring to the case of *Gilmore* v. *Shuter* (25), which was pressed upon the Court to show that an Act of Parliament, *viz.*, the statute of frauds, should not have a retrospective operation, the learned Judge Park, J., said that that case could not govern the case before them because "the statute under review prevents all the mischief which the Judges in the case in Jones contemplated by giving due notice that this law should have no operation till the 1st January, nearly eight months after its enactment."

In *Doe Dem Evans* v. *Page* (8), it was held that section 7 of the Limitation Act 3 and 4 W. 4, c. 27, which enacted that the right of action where any person "shall be in possession of land as tenant-at-will shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year from its commencement, was not retrospective and did not apply where the tenancy-at-will ceased before the statute and that in such a case the limitation runs from the time when the tenancy determines without the intervention of the Act. No doubt, the words of the 7th section "shall be in possession" etc., in terms were only applicable to the case of a future or at most of an existing tenancy-at-will and not to the case of a tenancy-at-will which had been determined, and was not existing when the Act was passed, but Lord Denman, C. J., observed: "A different construction, even if the words permitted it, would cause the greatest hardship; for a person, who, as the law stood before the passing of the Act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would, by the operation of the statute, be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable

(24) (1829) 6 Bing. 258; 31 R. R. 411; 8 L. J. C. P. (o. s.) 30; 130 Eng. Rep. 1280.

(25) (1679) Jones's Rep. 108; 1 Lev. 227; 2 Modern 310; 2 Show. 17; 1 Ventr. 330.

persons who would be otherwise affected by it, to assert their rights." In the *Queen* v. *Leeds and Bradford Railway Company* (11), retrospective effect was given to Statute 11 and 12 Vict. c. 43 which enacted that awards under 8 and 9 Vict. c. 18 must be obtained within six months from the time the damage complained of was done. The damage complained of occurred in 1847, and six months had expired before the Act was passed and the order of the justices was not obtained until 1850. The statute, however, did not come into operation until six weeks after it was passed. In holding that retrospective operation should be given to the statute Lord Campbell, C. J., referred to that fact and said: "If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation, but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the tribunal. . . . . A certain time was allowed before the Act was to come into operation and that removes all difficulty." Wightman, J., who also was of the same opinion, referring to the argument based upon hardship occasioned by the suddenness with which the Act operated said: "But here the Legislature has expressly provided six weeks as a reasonable time within which a party might proceed and the case, therefore, is clearly within the distinction pointed out in the decided cases. *Towler* v. *Chatterton* (24) seems to me precisely in point." Erle, J., and Crompton, J., concurred.

In the case of *Cornill* v. *Hudson* (9), retrospective operation was given to section 10 of the Mercantile Law Amendment Act 1856, (19 and 20 Vict. c. 97) which enacted that a party who shall be entitled to bring an action limited by the Statutes of Limitations therein mentioned shall not be entitled to any time beyond the period so limited by reason of his having been abroad or imprisoned at the time when the cause of action accrued. The plaintiff in that case was in prison when his cause of action arose and the period of six years provided by section 10 of the Act expired before he was released from prison. Lord Campbell, C. J., after stating that the decided cases merely showed that the proper way of construing an Act of Parliament is to try and find out the intention of the Legislature said: "Now, I act on that principle and it appears to me that it was the intention of the Legislature to prevent actions being brought for past as well as future transactions. Does this construction tend to any absurdity? If it does, that would be strongly against such a construction. But I can see no such consequences. It appears to me to be strongly in furtherance of justice that persons residing abroad should not be able to keep an action hanging over a person for an unlimited period of time. And as to the other class, *viz.*, persons in prison, it is an exceedingly rare occurrence now for a person to be long in prison except for crime. It might also be in the contemplation of the Legislature that it sometimes does happen that a person remains in prison for the very purpose of keeping a right of action alive. I do not, therefore, see any absurdity or injustice in holding that the Legislature intended that this should be the construction to be put upon this enactment, being, as it is, the construction which the language fairly and legitimately deserves." Under the Statute of Limitation 21 Ja. c. 16, section 7, the period of six years was to run from a time which was indefinite and the judgment proceeded upon the ground that the intention of the Legislature was to make section 10 of the Amending Act retrospective and that there was no injustice in holding it to be so.

The case of *Wright* v. *Hale* (26) dealt with a statute relating to costs. 23 and 24 Vic. c. 26, section 34, provided that when the plaintiff in any action for an alleged wrong recovers by the verdict of the Jury less than £ 5 he shall not be entitled to any costs if the Judge certifies to deprive him of them. It was held in that case that there is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in the Courts of Justice, that rules as to costs to be awarded in an action were of the latter description,

(26) (1860) 6 H. & N. 227; 30 L. J. Ex. 40; 6 Jur. (N. S.) 1212; 3 L. T. 444; 9 W. R. 157; 123 R. R. 477.

and that the Act enabled a Judge to certify in an action commenced before the passing of it. But Pollock, C. B., pointed out that the plaintiff had in that case an opportunity of discontinuing the suit, that the Act was passed on the 28th August and contained a provision that it should come into operation on the 10th October, and the certificate to be given by the Judge was an Act to be done at the trial which was after the passing of the Act so that they were not giving to the Act any retrospective operation and the wrong supposed to be done by an *ex post facto* law did not arise.

In *The Ydun* (12) where an action was brought against a port and harbour authority more than six months after coming into force of the Public Authorities Protection Act (56 and 57 Vict. c. 61) which provided that an action in respect of any alleged neglect or default in the execution of any public duty or authority must be commenced within six months of the act, neglect, or default complained of, it was held by the Court of Appeal that the Act had retrospective operation. A. L. Smith, L.J , said: "The rule applicable to cases of this sort is well stated by Wilde, B, in *Wright* v. *Hale* (23), namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only" and Vaughan Williams, J, said that "there was abundant authority that the presumption against a retrospective construction had no application to enactments which affect only the procedure and practice of Courts."

Statute 56 and 57 Vict. c. 61 was passed on the 5th December 1893 but came into force on the 1st January 1894, so that the operation of the Act was postponed for sometime. The damage complained of was caused on the 13th September 1893, the action, therefore, could have been brought before the Act came into force and Sir Francis Jeune in the Court of first instance relied to some extent upon that fact but in the Court of Appeal no argument appears to have been based upon it and the learned Judges do not appear to have referred to it in the judgment.

In the recent case of *R.* v. *Chandra Dharma* (13) the period of limitation (three months) under the old Act had not expired when the new Act which prescribed a period of six months for prosecution of an offence (committed against the Criminal Law Amendment Act of 1885) came into force, and it was held that the Act had retrospective effect, and that the defendant had lost the benefit of the former law of limitation Lord Alverstone, C. J., based his judgment on the ground that a law of limitation is a law of procedure and must be given a retrospective operation and the other learned Judges concurred with the Lord Chief Justice. Channel, J., however, added that it would have been entirely different if the time under the old Act had expired before the new Act came into operation. In that case only the period of limitation was extended for an unbarred cause of action which accrued before the new Act came into operation. The defendant had not acquired any right to treat the proceeding as barred before the amending Act came into force and the result was not to give such an *ex post facto* construction to that enactment, as would have taken away from the defendant a right already acquired under the former Act. It is true that when once time has commenced to run under a law of limitation it cannot be stopped but that rule is dependent on the continuance in force of that enactment under which time has been running and if before the time has run out under the Act the new Act extends the period of limitation the defendant cannot complain of it. The result of the authorities appears to be that Statutes of Limitation or other statutes relating to procedure are to be construed retrospectively, but the principle that even such statutes should not be so construed where such a construction would cause hardship or injustice is recognised in the majority of the decided cases on the subject. The principle is recognized in *Delhi and London Bank* v. *Orchard* (6), *Jagadanunda Singh* v. *Amrita Lal Sircar* (19), *Behary Lal* v. *Goberdhan Lal* (23); *In the matter of the petition of Ratansi Kalianji* (21); *Khusalbhai* v. *Kabhai* (3), *Republic of Costa Rica* v. *Erlanger* (17), *Queen* v. *Leed and Bradford Railway Company* (11), and *Evans* v. *Page* (8), though

not acted upon in all of them for other reasons.

The rule, however, is not given effect to where the operation of the statute is postponed for sometime after it is passed as in *Towler* v. *Chatterton* (24), *Queen* v. *Leeds and Bradford Railway Company* (11). The above principles were not recognized in (1) *Cornill* v. *Hudson* (9), *The Ydun* (12), *R.* v. *Chandra Dharma* (13), *Wright* v. *Hale* (26), *Reg.* v. *Dorabji* (4). But in the first case the period from which limitation was to run under the old Act was indefinite and the intention of the Legislature was clearly to give a retrospective operation to the amending Act, in the second case the operation of the new Act was postponed for some time and that fact was relied on by the first Court though not by the Court of Appeal, in the third there was merely an extension of the period of limitation for an unbarred cause of action, in the fourth no retrospective operation was in fact given and in the last case the statute dealt with the liberty of the subject. In *Saraswati Dasi* v. *Horitarun Chuckerbutti* (1), *Ramdhan Bhadra* v. *Ram Kumar Dey* (2) and *Chhajmal Das* v. *Jagadamba Prasad* (7) the statutes did not come into force at once and the plaintiff had sufficient time even after the passing of the statutes to institute the suits though the period was reduced by the new or amending Act and the result of giving a retrospective operation was thus not to deprive the plaintiff of his remedy altogether.

But principles of construction must give way to the intention of the Legislature if it is expressed clearly and we are therefore to see whether that is done in the present case. No doubt, section 184 of the Bengal Tenancy Act read with Article 3, Schedule III, of that Act as amended in 1908, provides that a suit to recover possession of land claimed by the plaintiff as a *raiyat* or an under-*raiyat* shall be instituted within two years of the date of dispossession, but having regard to the fact that the operation of the amending Act was not postponed for even a short time, the question is whether the Legislature intended that the Act should apply not only to causes of action which accrued after the Act was passed, but also to existing causes of action in respect of which a suit would have been in time under the old law. The amending Act having come into force at once, a person who was dispossessed more than two years before the Act was passed could not possibly bring his action within the period fixed by the amending Act and the question is whether it was intended to make the Act applicable to such cases. Article 3, Schedule II', of Act VIII of 1885, as it stood before the amendment, applied to occupancy-*raiyats* only, and it was held in the two cases noticed above that the two years' rule of limitation was applicable to causes of action which accrued before the Act was passed. It is true occupancy-*raiyats* have higher rights than non-occupancy-*raiyats* or under-*raiyats* and it may be said that if the Legislature intended that the limitation of two years shall be applicable to suits by occupancy-*raiyats*, regardless of whether they were dispossessed before or after the passing of the Act, there was no reason to think that the Legislature did not intend to give a retrospective operation to the amending Act which placed non occupancy-*raiyats* and under-*raiyats* on the same footing as occupancy-*raiyats*.

The question of limitation with regard to occupancy-*raiyats* is no longer of any practical importance more than 12 years having passed since the passing of the Act But as already pointed out, although Act VIII of 1885 received the assent of the Governor-General in Council on the 14th March 1885 it was provided in section 1 (2) that it shall come into force on such date as the Local Government with the previous sanction of the Governor General in Council may by notification in the Local Official Gazette appoint in this behalf, and the Local Government by a notification dated the 4th September 1885 published in the Calcutta Gazette of the 9th September 1885, declared that the Act was to come into force on the 1st November 1885. The Act, therefore, did not come into force at once, and an occupancy-*raiyat* who had been dispossessed more than two years before the passing of the Act, could, therefore, have brought his suit after the passing of the Act and before it came into operation, with respect to such a cause of action. Consequently, even if Act VIII of 1885 (as it stood before the amendment) be held to be retrospective, the result would

be not to deprive the plaintiff of the means of asserting his rights altogether, though the period within which he could have brought his action was shortened. On the other hand, the amending Act of 1908 came into force at once and there was no saving clause nor postponement of its operation. It is true the rights of under-*raiyats* are not a very substantial character. But non-occupancy *raiyats* are placed on the same footing as under-*raiyats* so far as limitation is concerned. Non-occupancy-*raiyats* are a very large class of *raiyats* in this country and there are various provisions in the Bengal Tenancy Act for the benefit of such *raiyats*. Before the passing of the amending Act a non-occupancy-*raiyats* had a period of 12 years within which to institute a suit against his landlord to recover possession where his title was in dispute, just as he had against any other person. Was it the intention of the Legislature without any warning and without postponing the operation of the Act, at once to cut down the period for instituting suits by non-occupancy *raiyats* dispossessed by their landlords, from twelve years to two and thus deprive altogether a very large class of tenants dispossessed two years before the Act was passed of the remedy they had before the Act? Various provisions were made in the Act for protecting such *raiyats* from contracting themselves out of their rights by entering into contracts with their landlords and I find it difficult to hold that the Legislature intended to give a retrospective operation to Article 3 and thus suddenly deprive a class of tenants whom it was so anxious to protect against their landlords, of any means to recover possession of lands of which they had been dispossessed two years before the Act was passed. I do not think any argument can be based upon the fact that before an Act is passed, the matter is before the Legislature and is discussed for some time before it is passed. Although every person is presumed to know the law after it is passed, there can be no presumption that he knows the proceedings or debates in Council before the law is passed, and I do not think it would be reasonable to expect that a non-occupancy *raiyat* has notice of any kind at all of an impending change in the period of limitation while the matter is being discussed in the Legislative Council.

If, therefore, the intention of the Legislature was not to give a retrospective operation to Article 3 Schedule 3, so far as non-occupancy *raiyats* are concerned, as I think it had not, there is no reason to hold that it should have retrospective effect with regard to suits by under-*raiyats*, who are governed by the same Article and the result of which would be suddenly to deprive them of the means of asserting their rights, where they had been dispossessed by their landlords and were in ample time under the old Act to bring their actions for recovery of their property.

It may be said that the Legislature by the amending Act of 1908 while putting non-occupancy *raiyats* and under-*raiyats* on the same footing as occupancy-*raiyats* could not have intended to postpone the operation of the Act for 10 years in cases where the dispossession occurred before the passing of the Act, but it must be remembered that suits by non-occupancy *raiyats* and under-*raiyats* continued to be governed by the 12 years' rule of limitation for about 23 years, *i.e.*, from 1885 to 1908 while similar suits by occupancy-*raiyats* were governed for the same period by the two years' rule of limitation provided by Article 3, Schedule III of Act VIII of 1885.

The question is a difficult one, but after a careful consideration of the question I am of opinion that section 61 of the amending Act should not be retrospectively construed and that the suit is not barred by the special period of limitation prescribed in Article 3, Schedule III of the Bengal Tenancy Act.

In the above view, it will be necessary to consider the other questions raised in the case.

As we differ in opinion on the point of law, whether the special rule of limitation extended to under-*raiyats* in Eastern Bengal by the amendment in 1908 of the third Article in the third Schedule to the Bengal Tenancy Act, 1885, applies to all suits of the kind there indicated instituted after the commencement of the amending Act without regard to where the cause of action arose, the case must be laid before the Chief Justice that the point in question

may be referred to a third Judge under section 98 of the Code of Civil Procedure, 1903.

JENKINS, C. J.—(*26th August* 1912).—The learned Judges composing the Bench which heard the above appeal having differed in opinion on a point of law, and having stated the point of law on which they differ, let the said appeal be heard under sections 98 and 108, Civil Procedure Code, by the Hon'ble Mr. Justice Mookerjee on that point only.

MOOKERJEE, J.—This is a reference under section 98 of the Civil Procedure Code of 1908, and the point of law upon which the learned Judges who heard the case in the first instance have differed has been formulated in the following terms:—

"Whether the special rule of limitation extended to under-*ryots* in Eastern Bengal by the amendment in 1908 of the third Article in the third Schedule to the Bengal Tenancy Act, 1885, applies to all suits of the kind there indicated instituted after the commencement of the amending Act without regard to when the cause of action arose."

Mr. Justice Carnduff was of opinion that the question ought to be answered in the affirmative, while Mr. Justice Chatterjee was of opinion that the question ought to be answered in the negative. To determine the question in controversy, it is necessary to explain how the point arises for decision.

The third Article of the third Schedule of the Bengal Tenancy Act, 1885, provides that a suit to recover possession of land claimed by the plaintiff as an occupancy-*ryot* shall be instituted within two years from the date of dispossession. Section 184, sub-section 1, of the Bengal Tenancy Act, provides that a suit of this description, instituted after the period of limitation so prescribed, shall be dismissed, although limitation has not been pleaded. Section 185, sub-section 2, of the Bengal Tenancy Act, further makes applicable to such a suit the provisions of section 28 of the Indian Limitation Act, whereby, at the determination of the period limited to any person for instituting a suit for possession of any property, the right to such property is declared to be extinguished. In the case of *Bhagaban Chander Shaha* v. *Jaggeshar Ghose* (27), which was decided on the 25th August 1898, it was ruled by this Court that the third Article of the third Schedule of the Bengal Tenancy Act was in terms applicable only to suits by occupancy-*ryots* and did not govern suits by under-*ryots*. It was held in substance that in so far as under-*ryots* were concerned, a suit for possession was governed by Article 142 of the second Schedule of the Indian Limitation Act, which requires that a suit for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed, must be brought within twelve years of the date of dispossession. In the case now before the Court, the plaintiffs, who are under-*ryots*, were dispossessed in 1898, and they were consequently entitled to institute a suit for recovery of possession within 1910. The present action was commenced on the 25th August 1908; *prima facie*, therefore, the suit is not barred by limitation. But on the 10th June 1908, the third Article of the third Schedule of the Bengal Tenancy Act, 1885, was amended by section 61, clause (3) of the Eastern Bengal and Assam Tenancy Amendment Act, 1908. The effect of this amendment was to substitute the words "a *ryot* or an under-*ryot*" for the words "an occupancy *ryot*" in the third Article. To put the matter briefly, on the 10th June 1908, the Legislature enacted that a suit to recover possession of the land claimed by the plaintiff as an under-*ryot*, must be instituted within two years from the date of dispossession. The consequence was that the general rule of law as embodied in Article 142 of the second Schedule of the Indian Limitation Act was repealed by implication to the extent that it ceased to be applicable to suits for recovery of possession of land by under-*ryots*. The plaintiffs-appellants contend that the new rule of limitation applicable to under-*ryots* as embodied in section 61, clause 3, of the Eastern Bengal and Assam Tenancy Amendment Act, 1908, is not applicable to causes of action which arose before the commencement of the Act. The defendants-respondents contend that the new rule of limitation applies to all suits instituted after the commencement of the Act, independently of the date when the cause of action arose. The question appears to have been elaborately argued before the learned Judges who heard

(27) 2 C. W. N. cccxviii *Short Notes.*

the appeal in the first instance, and reference was made to a large number of judicial decisions which are analysed and examined in their recorded opinions. The matter has been re-argued before me with great care on both sides, but my attention has not been drawn to any judicial decision which is conclusive upon the precise question raised; it is necessary, therefore, to examine the matter as one of principle.

It is well settled, as observed by Mr. Justice Willes in *Phillips* v. *Eyre* (28), that retrospective laws are *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated, ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. The maxim is familiar to every student of jurisprudence, *nova constitutio futuris forman imponere debet non præteritis*, a new law ought to be prospective, not retrospective, in its operation. Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature. A luminous exposition of this fundamental doctrine will be found in the judgment of Kent, C. J., in *Dash* v. *Vankleeck* (29). The learned Chief Justice pointed out that the maxim of Papinian, *nemo potest mutare consilium suum in alterius in juriam* (Digest, 50, 17, 75) was familiar to Roman Jurists and had been accepted as a fundamental principle of English Law by Bracton, Coke and Bacon. A similar exposition will be found in the judgment of Mr. Justice Story in *Society for the Propagation of the Gospel* v. *Wheeler* (30). It must, consequently, be now deemed indisputably settled that every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed, must be deemed retrospective in its operation. *In re Pulborough School Board Election*, *Bourke* v. *Nutt* (31). It is also firmly settled that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction, and this involves the subordinate rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. [*Lauri* v *Renad* (32), *Reid* v. *Reid* (33), *In re Norman* (34), and *Allhusen* v. *Brooking* (35)]. As Baron Parke observed in *Moon* v. *Duroden* (15), followed in *Pitambardas* v. *Thakursidas* (16), the rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice and has been acted upon in many cases, amongst which may be mentioned *Edmunds* v. *Lawley* (36), *Moore* v. *Phillips* (37), *Midland Railway Company* v. *Pye* (38), *Marsh* v. *Higgins* (39), *Chappel* v. *Purday* (40), *Hitchcock* v. *Way* (41), *Padon* v. *Bartlett* (42), *Young* v. *Hughes* (43), *Barton Regis Union* v. *Liverpool Overseers* (44), *Hough* v. *Windus* (45), *Turnbull* v. *Forman* (46). This principle is so well recognised that it has been repeatedly laid down that in the absence of clear words to that effect, a statute will not be construed as taking away a vested right

(28) (1870) L. R. 6 Q. B. 1 at p. 23; 10 B. & S. 1004; 40 L. J. Q. B. 28; 22 L. T. 869; 17 W. R. 375.
(29) (1811) 7 Johnson 477 at p. 502.
(30) (1814) 2 Gallison 105; 22 Fed. Cas. 756.
(31) (1894) 1 Q. B. 725 at p. 737; 63 L. J. Q. B. 497; 9 R. 395; 70 L. T. 639; 42 W. R. 388; 58 J. P. 592; 1 Manson 172.
(32) (1892) 3 Ch. 402; 67 L. T. 275; 40 W. R. 679; 61 L. J. Ch. 679.
(33) (1886) 31 Ch. D. 102; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 333.
(34) (1893) 2 Q. B. 369; 63 L. J. Q. B. 34; 4 R. 584; 69 L. T. 675.
(35) (1883) 26 Ch. D. 564; 53 L. J. Ch. 520; 51 L. T. 57; 32 W. R. 657.
(36) (1840) 6 M. & W. 285.
(37) (1841) 7 M. & W. 536.
(38) (1861) 10 C. B. (N. S.) 179; 30 L. J. C. P. 314; 4 L. T. (N. S.) 510; 9 W. R. 658; 128 R. R. 666.
(39) (1850) 9 C. B. 551; 1 L. M. & P. 253; 19 L. J. C. P. 297; 82 R. R. 436.
(40) (1843) 12 M. & W. 303; 67 R. R. 357; 1 Dowl. & L. 458; 13 L. J. Ex. 7.
(41) (1837) 6 A. & E. 943; 2 N. & P. 72; W. W. & D. 491; 6 L. J. (N. S.) K. B. 215; 45 R. R. 653; 112 Eng. Rep. 360.
(42) (1835) 3 A. & E. 884; 5 N. & M. 384; 1 H. & W. 286; 111 Eng. Rep. 648.
(43) (1859) 4 H. & N. 76; 28 L. J. Ex. 161; 118 R. R. 337.
(44) (1878) 3 Q. B. D. 295; 47 L. J. M. C. 62; 47 L. T. 713; 26 W. R. 282.
(45) (1884) 12 Q. B. D. 229; 53 L. J. Q. 165; 50 L. T. 312; 32 W. R. 452; 1 Morrell 1.
(46) (1885) 15 Q. B. D. 234; 54 L. J. Q. 489; 53 L. T. 128; 33 W. R. 768; 49 J. P. 708.

of action acquired before it was passed. *Larpent* v. *Bibby* (47), *Waugh* v. *Middleton* (48), *Williams* v. *Smith* (49), *Jackson* v. *Woolley* (50), *Wright* v. *Greenroyd* (51), *Knight* v. *Lee* (52), *Smithies* v. *National Association of Plasterers* (53).

In the application of the principle that the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature the question frequently arises whether the statute does in fact take away a vested right. From this point of view, we have to bear in mind the well settled doctrine that no suitor has a vested interest in the course of procedure or a right to complain, if during his litigation, the procedure is changed, provided that no injustice be done. *Republic of Costa Rica* v. *Erlanger* (17); *Turnbull* v. *Forman* (46). Hence, as observed by Lord Blackburn in *Gardner* v. *Lucas* (20) alterations in the form of procedure are always retrospective, unless there be some good reason to the contrary, as in *Pinhorn* v. *Souster* (54). This principle has been repeatedly recognised and applied. *Colonial Sugar Refining Company* v. *Irving* (55); *A. G.* v. *Sillem* (56); *Wright* v. *Hale* (26); *Kimbray* v. *Draper* (57), *Curtis* v. *Stovin* (58); *The Ydun* (12), *R.* v. *Chandra Dharma* (13). On this principle Statutes of Limitation have been construed as affecting existing claims where an interval of time was allowed for their enforcement. *Pardo* v. *Bingham* (59); *Cornill* v. *Hudson* (9), *R.* v. *Leeds Railway and Company* (11) the case last mentioned follows the authority of *Towler* v. *Chatterton* (24) which was commented upon by Baron Rolfe in *Moon* v. *Durden* (15) and by Mr. Justice Cresswell in *Marsh* v. *Higgins* (39).

We thus start with two fundamental principles in view. In the first place, no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. *West* v. *Gwynne* (60); *Smith* v. *Callander* (61) *Young* v. *Adams* (62); and even in construing a section, which is to a certain extent retrospective, the maxim must be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain. *Main* v. *Stark* (63); *Reynolds* v. *Att. Gen. for Nova Scotia* (64). In the second place, the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. *Wright* v. *Hale* (26), *The Ydun* (12), *Cornill* v. *Hudson* (9) *Pardo* v. *Bingham* (59) but, the new procedure would be presumably inapplicable where its application would prejudice rights established under the old. *Ex parte Phœnix Bessemer Steel Company* (65). We shall now proceed to examine which of these two principles is applicable to the case before us.

In the present case, the Eastern Bengal and Assam Tenancy Amendment Act of 1908 became law on the 10th June 1908 and came into operation on that very date. It is contended on the one hand that the Legislature could never have intended the new provision of limitation to apply to causes of action which had accrued before the new statute became law, because the effect would be to

(47) (1855) 5 H. L. C. 481; 24 L. J. Q. B. 301; 101 R. R. 252; 10 Eng. Rep. 988.

(48) (1853) 8 Ex. 352; 22 L. J. Ex. 109; 20 L. T. (o. s.) 262; 91 R. R. 533.

(49) (1859) 4 H. & N. 559; 28 L. J. Ex. 286; 6 Jur. (N. S.) 1107; 7 W. R. 503; 118 R. R. 611.

(50) (1858) 8 E. & B. 784 at p. 787; 27 L. J. Q. B. 448; 4 Jur. (N. S.) 656; 6 W. R. 686; 120 Eng. Rep. 292; 112 R. R. 777.

(51) (1861) 1 B. & S. 758; 31 L. J. Q. B. 4; 8 Jur. (N. S.) 98; 5 L. T. 347; 121 Eng. Rep. 896; 124 R. R. 735

(52) (1893) 1 Q. B. 41; 62 L. J. Q. B. 28; 5 R. 54; 67 L. T. 688; 41 W. R. 125.

(53) (1909) 1 K. B. 310; 78 L. J. K. B. 259; 100 L. T. 172; 25 T. L. R. 205.

(54) (1852) 8 Ex. 138; 21 L. J. Ex. 336; 16 Jur. (N. S.) 1001; 91 R. R. 397.

(55) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(56) (1864) 10 H. L. C. 704; 4 N. R. 29; 10 Jur. (N. S.) 446; 10 L. T. 434; 12 W. R. 541; 33 L. J. Ex. 209; 11 Eng. Rep. 1200.

(57) (1868) 3 Q. B. 160; 37 L. J. Q. B. 80; 18 L. T. 540; 16 W. R. 539.

(58) (1889) 22 Q. B. D. 513; 58 L. J. Q. B. 174; 60 L. T. 772; 37 W. R. 315.

(59) (1869) 4 Ch. Ap. 735; 39 L. J. Ch. 170; 20 L T. 464; 17 W. R. 419.

(60) (1911) 2 Ch. 1 at p. 15; 80 L. J. Ch. 578; 104 T. T. 759 55 S. J. 519; 27 T. L. R. 444.

(61) (1901) App. Cas. 297; 70 L. J. P. C. 53; 84 L. T. 801.

(62) (1898) App. Cas. 469; 67 L. J. P. C. 75; 78 L. J. 506; 14 T. L. R. 373.

(63) (1890) 15 App. Cas. 384 at p. 388; 59 L. J. P. C. 68; 63 L. T. 10.

(64) (1896) App. Cas. 240; 65 L. J. P. C. 16; 74 L. T. 108.

(65) (1876) 45 L. J. Ch. 11.

extinguish forthwith all causes of action in existence and enforceable in a Court of Justice at the time when the statute came into operation. It is argued, on the other hand, that the language of the statute is explicit and covers all causes of action whether antecedent or subsequent to the commencement of the statute. To determine which of these contentions is well-founded, we must remember that the statute as amended provides that the suit to recover possession of land claimed by the plaintiff as an under-*ryot* must be brought within two years from the date of dispossession. To hold that this amended provision applies to suits in respect of dispossession which has taken place more than two years before the enactment of the new law, is to maintain the position that the Legislature intended the litigant to accomplish what is impossible in the nature of things for him to do, in other words, to prescribe that his rights are forthwith extinguished, without previous notice and without opportunity afforded to him to escape the operation of the new law. To put the matter briefly, if this view is to be supported, we must hold that the Legislature acted in a most unreasonable manner, *i.e.*, that the Legislature intended to penalise all under-*ryots* who had been dispossessed by their landlords more than two years before the commencement of the new statute, merely because they had waited to enforce their rights in a Court of Justice within the period of limitation allowed at that time by the Legislature. There is, in my opinion, considerable force in the contention that the Legislature may be deemed to act as a body of reasonable men and that the presumption is that they did not intend to inflict needless and unjustifiable hardship upon a large body of innocent litigants. As Lord Campbell, C. J., observed in *Cornill* v. *Hudson* (9) the proper way to construe an Act of Parliament is to try and find out the intention of the Legislature; if there is any room for doubt, we must assume that the Legislature did not intend to give the statute a retrospective operation, where such retrospective operation upon pre-existing causes of action would result in hardship to the litigant. In my opinion, the cardinal and fundamental point in the case before me is that the Eastern Bengal and Assam Tenancy Amendment Act of 1903 came into operation the very moment it became law, consequently, if it were taken to effect pre-existing causes of action, the effect could be absolutely to bar at once all actions where the cause of action had accrued more than the limited time before the statute was passed. In a case of this description, the Statute of Limitation ceases to be a statute of mere procedure and operates to the destruction of existing and enforceble rights. This point of view is well-illustrated by a remarkable judgment of the Supreme Court of the United States in the case of *Sohn* v. *Waterson* (66). In that case, the plaintiff, a citizen of Ohio, commenced an action in August 1870 against the defendant, a citizen of Kansas, to recover the amount of a judgment-debt under a judgment obtained by him in 1854. The defendant pleaded the Statute of Limitations, passed in 1859, more than four years after the judgment had been obtained, which provided that all actions founded on judgments were to be commenced within two years next after the cause or right of action had accrued and not after. The plaintiff contended that this statute could not apply to causes of action which had accrued more than two years before its passage, because such literal interpretation would cut them off and defeat them altogether. Mr. Justice Bradley, who delivered the unanimous opinion of the nine Judges of the Supreme Court of the United States, held that the statute could not be so interpretated as to effect and destroy forthwith pre-existing causes of action. The learned Judge referred at the outset to the principle enunciated in *United States* v. *Hoth* (67), namely, that words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot otherwise be satisfied, and in *Harvey* v. *Tyler* (68), namely, that all statutes are to be considered prospective, unless the language is expressed to the contrary or there is a necessary implication to that effect. The learned Judge then went on to make the following observations: "A Statute of Limitation may, undoubtedly, have effect upon actions which have already accrued

(66) (1873) 17 Wallace 596; 21 Law. Ed. 737.
(67) (1806) 3 Cranch. 399 at p. 413; 2 Law. Ed. 479.
(68) (1864) 2 Wallace 328 at p. 347; 17 Law. Ed. 871 at p. 875.

as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the Act, and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It would be presumed that such was not the intention of the Legislature. Such an intent would be unconstitutional. To avoid such a result and to give the statute a construction that will enable it to stand, Courts have given it a prospective operation." Upon a review of the decisions of the American Courts, as Mr. Justice Bradley points out, it appears that in cases of this description, the Courts have adopted one or other of three different modes of interpretation, *viz.*, *first* to make the statute apply only to causes of action arising after its passage; *secondly*, to apply the statute to such existing causes of action only, as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires, the Court to determine what is reasonable time for this purpose and *thirdly*, to apply the new period of limitation to all suits instituted after the commencement of the statute, the period to run from the date when the statute came into operation. It is plain that the language of the statute must determine the particular canon of construction applicable to the case before the Court; the first of these rules was adopted in *Murray* v. *Gibson* (69) and the third in *Ross* v. *Duval* (70), *Lewis* v. *Lewis* (71) and *Sohn* v. *Waterson* (66). Where the statute uses the expression "cause of action" and fixes the period of limitation with reference thereto, the problem, in the words of Chief Justice Taney in *Lewis* v. *Lewis* (71) may be deemed to be "from what time is the limitation to be calculated" and the answer may well be given in the language of that learned Judge, the time must commence when the cause of action is first subjected to the operation of the statute by which the period for the enforcement of such cause of action has been prescribed. But whatever controversy there may be as to the particular mode of interpretation to be adopted, there is a singular uniformity of judicial opinion that statutes coming into operation immediately they become law and declaring generaliy that an action must be brought within a limited time after accruing, will not be construed retrospectively so as to bar causes of action which accrued more than the limited time before the statute was passed, [*Friedman* v. *Mac Gown* (72); *Browning* v. *Browning* (73).] On the other hand, where a new Statute of Limitation reduces the time previously allowed for commencement of the suit but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage: [*Terry* v. *Anderson* (74); *Kosh Konong* v. *Burton* (75); *Vance* v. *Vance* (76) and *In re Brown* (77).] The distinction to which I have adverted and which is so emphatically brought out and developed in the decisions of the Supreme Court of the United States has been indicated from time to time in judicial decisions both in England and India. Amongst decisions in England, may be mentioned *Gilmour* v. *Shuter Jones* (25); *Towler* v. *Chatterton* (24); *Deo Dem Evans* v. *Page* (8); *Queen* v. *Leeds and Bradford Railway Co.* (11); *Cornill* v. *Hudson* (9); *Wright* v. *Hale* (26), *R.* v. *Chandra Dharma* (13). Amongst decisions in Indian cases, may be mentioned *Delhi and London Bank* v. *Orchard* (6), *In re Rattansi Kalianji* (21); *Sitaram* v. *Khanderav* (22); *Ruckmoboyee* v. *Lallubhoy* (14) and *Khusalbhoy* v. *Kabhai* (3). It is suggested, however, that

(69) (1853) 15 Howard 421; 14 Law. Ed. 755.
(70) (1839) 13 Peter 45 at p. 62; 10 Law. Ed. 51.
(71) (1849) 7 Howard 776; 12 Law. Ed. 909.

(72) (1898) 1 Pennewill 443; 42 Atlantic 725.
(73) (1886) 3 New Mexico 471; 9 Pacific 684.
(74) (1877) 95 U. S. 633; 5 Otto 628; 24 Law. Ed. 365.
(75) (1881) 104 U. S. 675; 14 Otto 668; 26 Law. Ed. 886.
(76) (1882) 108 U. S. 521; Reporter's Ed. 514; 27 Law. Ed. 808.
(77) (1889) 135 U. S. 705; Reporter's Ed. 662; 34 Law. Ed. 304.

this distinction was not recognised in two cases under the Bengal Tenancy Act, *viz.*, *Saraswati* v. *Horitarun* (1) and *Ramlhan* v. *Ramkumar* (2). In my opinion, the cases mentioned are clearly distinguishable. The Bengal Tenancy Act, as is well known, came into operation many months after, it had become law, and the question of the applicability of rules of limitation contained in that statute stands on an obviously different footing. But it is urged that the two cases mentioned do not at all advert to the fundamental distinction I have explained; the obvious answer is that it was not necessary to do so; at any rate, the mere fact that reference is not made in these cases to the principle now in controversy does not show that the principle itself is not well-founded on reason and good sense. In this connection, we cannot afford to forget that, as Lord Mansfield said in *Fisher* v. *Prince* (78), the reason and spirit of cases make law, not the letter of particular precedents; and as Lord Halsbury said in *Quinn* v. *Leathem* (79), every judgment must be read as applicable to the particular facts proved or assumed to be proved. Since the generality of the expressions which may be found there, must be deemed governed and qualified by the particular facts of that case. These observations apply equally to the cases of *Reg.* v. *Dorabji* (4) and *Chajmal* v. *Jagdamba* (7). I further desire emphatically to repudiate the suggestion that the Court is in any way bound by isolated *dicta* in English cases not directly in point; the crucial test to be applied is, are these *dicta* consistent with the principle of justice, equity and good consience? Here it is useful to bear in mind the weighty observations of one of the foremost jurists of the present generation, *viz.*, that "blind following of English precedents according to the letter can only have the effect of reducing the estimation of the common law by intelligent Indians to the level of its more technical and less fruitful portions and making those portions appear if possible more inscrutable to Indian than they do to English lay suitors" (Sir Frederick Pollock on the Genius of the Common Law page 92). No doubt, we find it frequently asserted in judicial decisions that a Statute of Limitation embodies merely a rule of procedure; but this statement is only generally and not universally true. The essence of the matter is that when a new Statute of Limitation which shortens the period for institution of suits and comes into force the moment it becomes law is sought to be made retrospectively applicable to causes of action which have accrued earlier than the length of time prescribed, it ceases to be a statute of mere procedure and serves to destroy pre-existing and enforceable rights. Under circumstances like these, the Court, when invited to hold that the new statute has retrospective operation, will struggle against the acceptance of such an interpretation, unless there is the clearest indication that the Legislature intended to destroy existing rights without notice and thus to penalise innocent litigants. There is no force in the suggestion that such litigants may be expected to watch the proceedings of legislative assemblies and take steps in advance for self-protection lest the Legislature should pass a new law and take away existing rights. No doubt, "all men are presumed cognisant of the law," but knowledge of the law is imputed to every person, only because, as Lord Ellenborough observed in *Bilbie* v. *Lumley* (80), there is no saying to what extent the excuse of ignorance might be carried if the presumption were not applied. No authority, however, has been shown to me in support of the position that persons are not only presumed to know the law but are also expected at their peril to anticipate the possible action of Legislative assemblies.

After the most anxious consideration of the arguments which have been addressed to me I have arrived at the conclusion that the special rule of limitation extended to under-*ryots* in Eastern Bengal by the amendment in 1905 of the third Article in the third Schedule of the Bengal Tenancy Act, 1885, does not apply to suits instituted after the commencement of the amending Act in respect of causes of action which arose before the amending Act came into force, and I agree with Mr. Justice Chatterjee that section 61, clause 3, of the Eastern Bengal and Assam Tenancy Amendment Act of 1908 has not retrospective operation.

(78) (1763) 3 Bur. 1363; 97 Eng. Rep. 876.
(79) (1901) A. C. 495; 70 L. J. P. C. 76; 66 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.

(80) (1802) 2 East 469; 6 R. R. 479; 102 Eng. Rep. 448.

MEGHU RAI *v.* RAMKHELAWAN RAI.

Let the case be returned to the Division Bench for disposal.

CARNDUFF AND CHATTERJEE, JJ.—(*14th March* 1913.)—The only other question raised in the appeal is whether there was an abandonment of the holding by the plaintiffs and how far the plaintiffs, who were minors, are bound by it. But the learned District Judge found that the plaintiffs were dispossessed by their landlord in collusion with the other respondents. The question of special limitation under the Bengal Tenancy Act can only arise, and was raised, on the finding that there was dispossession, and we discussed the question of limitation on that footing. The plaintiffs having been dispossessed, the question of abandonment does not arise, and in fact the finding as to dispossession negatives the case of abandonment.

The suit not being barred by the special limitation provided by the Bengal Tenancy Act, and having been instituted within 12 years of the dispossession, the plaintiffs are entitled to a decree for possession. The decree of the lower Appellate Court is accordingly set aside and that of the Court of first instance restored.

Each party will bear his own costs of this Court and of the lower Appellate Court. In the result the appellants will be allowed their costs in the Court of first instance.

Decree set aside.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 56 OF 1912.

March 17, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MEGHU RAI—DEFENDANT—APPELLANT

versus

RAM KHELAWAN RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Alienation by widow—Declaratory suit by remoter reversioner while nearer reversioner is alive.

The plaintiffs sued for a declaration that an alienation made by a Hindu widow was not binding on them. There was no allegation in the plaint that the plaintiffs were suing as distant reversioners, the nearer reversioners having done something to prevent them from bringing the suit. As a matter of fact, the plaintiffs had sued as next reversioners but were proved to be remote:

Held, that the suit could not be maintained.

Letters Patent Appeal from the following decision:—

BANERJI, J.—This was a suit brought by the reversioners to the estate of Ram Saran Rai, to set aside the mortgage made by his widow, *Musammat* Mata Kuar, in favour of the second defendant. It has been found by the lower Appellate Court that Ram Saran Rai left a son, who pre-deceased him, that the defendant *Musammat* Taluqa Kunwar, who has some minor children, is his daughter and that the defendant Mohendar Rai is Ram Saran Rai's grandson by another daughter who has died. The plaintiffs are admittedly the reversioners who would come in after sons of Ram Saran Rai's daughters. It has been found that the mortgage in question was without justifying necessity. The Court of first instance decreed the claim but the lower Appellate Court has dismissed it on the ground that between the plaintiff and *Musammat* Mata Kunwar, who made the alienation, there intervene Talqua Kunwar, her sons, and the defendant Mohendar Rai. It was alleged in the plaint that the persons who were nearer reversioners than the plaintiffs were in collusion with *Musammat* Mata Kunwar and the transferees from her. If this is so the plaintiffs are entitled to maintain the suit as held in *Rani Anand Kunwar* v. *The Court of Wards* (1). The Court below did not frame any issue on the question of collusion. As there are materials on the record which would enable this Court to come to a finding on the point I have not deemed it necessary to refer an issue to the lower Appellate Court. *Musammat* Taluqa Kunwar, the daughter of Ram Saran Rai, in her written statement, supports the mortgage and so does *Musammat* Mata Kunwar, who is the guardian of Mohendar Rai. They live with Mata Kunwar, so that the persons who are nearer reversioners than the plaintiffs are in collusion with the first two defendants. That being so, the plaintiffs are entitled to a declaration that the mortgage made by the first defendant will not affect their reversionary rights. I accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

(1) 6 C. 764 (P. C.); 8 C. L. R. 381; 8 I. A. 14.

MUKTAR AHMAD v. SUNDAR KOER.

Mr. *Wallach*, (with him The Hon'ble Dr. *Sunder Lal*, Messrs. *Gobind Prashad* and *Benode Behari*), for the Appellant.

Mr. *M. L. Agarwala* (with him Mr. *Gokul Prashad*), for the respondents.

JUDGMENT.—This appeal arises out of the following circumstances:—The plaintiffs sued alleging that they were the reversioners to a property which had been alienated by way of mortgage by one *Musammat* Mata Kuar, the widow of Ram Saran Rai, and mother of one Jagmohan. The claim was that the mortgage made by *Musammat* Mata Kuar should be declared not to be binding upon the plaintiffs as reversioners. There was no allegation in the plaint that the plaintiffs were suing as distant reversioners, the nearer reversioners having done something to prevent them from bringing the suit. No such allegation was necessary, because, as already mentioned, the claim of the plaintiffs was that they were the next reversioners. This contention was based upon the allegation that Jagmohan survived his father, Ram Saran Rai. The lower Appellate Court found that the plaintiffs' allegation that Jagmohan survived Ram Saran Rai was not only false but was supported by fabricated evidence. The learned District Judge gives very cogent reasons for this finding and in any event we are bound by it in second appeal. The result of this finding and a further finding of the lower Appellate Court is that even the nearest of the plaintiffs can only succeed to the estate if four males and one female die in his life-time. The learned District Judge dismissed, and we think rightly dismissed the plaintiffs' suit on these findings. The learned Judge of this Court seeing an allegation in the plaint that there had been collusion between the transferree and the defendants Nos. 3 and 4 raised the issue whether or not the defendants Nos. 3 and 4 had done something which rendered them unfit to protect the estate and having come to a finding upon this issue in favour of the plaintiffs decreed the plaintiffs' suit. We doubt very much that the plaintiffs would ever have brought the present suit at all if they had to do so in the capacity of reversioners who had four males and a female in front of them, and certainly suits for a declaration by remote reversioners are not to be encouraged. The learned Judge of this Court seems to have overlooked the fact that there were reversioners nearer than the plaintiffs who were not even parties to the suit at all, and other nearer reversioners were minors. Had the plaintiffs brought the present suit upon the allegation that they were the distant reversioners, and brought the suit as such, we would not be disposed to interfere with the decision of the learned Judge of this Court merely on the ground that there was no specific allegation in the plaint that the nearer reversioners had precluded themselves from bringing the suit but we think under the circumstances of the present case and after the finding of the Court against the plaintiffs as to their being the next reversioners to the property it was not right to read into the plaint an allegation that they were bringing the suit as distant reversioners because the nearer reversioners had either precluded themselves from bringing this suit or had refused to do so. We think that the present appeal ought to be allowed. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court. The appellant will have his costs of both the hearings in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 162 OF 1911 AND APPLICATION NO. 7065 OF 1912.

May 9, 1913.

Present:—Mr. Justice N. Chatterjea and and Mr. Justice Walmsley.

Syed MUKTAR AHMAD—PLAINTIFF—APPELLANT

versus

Rani SUNDAR KOER—DEFENDANT—RESPONDENT.

Lease—Implied covenant for quiet enjoyment—Disturbance of possession of lessee by owner of paramount title—Liability of lessor for damages to lessee—Transfer of Property Act (IV of 1882), s. 108, cls. (a) and (c)—"Interruption," "material defect with reference to intended use," meaning of.

The word "interruption" in clause (c) of section 108 of the Transfer of Property Act includes disturbance of possession by a person with a paramount title; by that clause, the lessee is protected against interruption by whomsoever it is occasioned, and where the interruption is caused by the paramount owner of the

property and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

Mrs. Benjamin Donzellee v. *Girdharee Singh*, 23 W. R. 121 and *Tayawa* v. *Gurshidappa*, 25 B. 269; 2 Bom. L. R. 1070, relied upon.

The words "material defect in the property with reference to its intended use" in clause (*a*) of section 108 have reference to the nature and condition of the property demised, and a defect in the lessor's title, is not included within the meaning of the words.

Haji Essa Sulleman v. *Dayabhai*, 20 B. 522, referred to.

On the death of the defendant's husband she took possession of his estate and granted a lease to the plaintiff on receipt of a *salami*. Subsequently, her husband's brother instituted a suit against her for a declaration that on the death of the defendant's husband he, the husband's brother, became the rightful owner and that she had no title. The suit was decreed and the plaintiff was dispossessed of the property leased to him by the defendant, by the defendant's husband's brother. This suit was thereupon brought for a refund of the *salami* and damages:

Held, that clause (*c*) of section 108, and not clause (*a*), of the Transfer of Property Act was applicable to the case and that the defendant was liable for damages for the interruption of the plaintiff's possession.

Appeal from the decree of the District Judge of Gaya, dated December 8th, 1910, modifying that of the Sub-Judge of that District, dated July 25th, 1910.

Mr. *Sultan Ahmed* and *Moulvi Mahomed Mustafa Khan*, for the Appellant.

Babus *Mohendra Nath Roy*, *Jyotish Chandra Ghose* for Babu *Chandra Sekhar Prasad Singh*, for the Respondent.

JUDGMENT.—Rani Sundar Koer, the defendant-respondent, is the widow of Rajah Ramesswar Prosad of Muksudpur. On the death of her husband she set up a Will and obtained Letters of Administration and got her name registered in the Collectorate as proprietress of the estate left by her husband. While in possession of the estate, she executed a *zar-peshgi theca* lease in favour of the plaintiff and defendants Nos. 3 to 5 on receipt of Rs. 2,250 on the 16th of January 1904. It appears that on the 30th November 1903 (?) one Babu Chandreswar Prosad, the brother of the Rajah, instituted a suit against the Rani for the declaration that, on the death of the Rajah, he became the rightful owner of the Raj and that the Rani has no title to it. He obtained a decree in that suit and that decree was confirmed on appeal by the High Court. It appears that the Rani preferred an appeal to the Privy Council but afterwards the appeal was compromised between the Rani and Babu Chandreswar Prosad and the appeal was withdrawn by the former. The plaintiff, remained in possession of *zar-peshgi* property till *Bysack* 1314 when he was dispossessed by Babu Chandreswar Prosad. He thereupon brought the present suit for recovery of Rs. 984-6 that being his share of the *zar-peshgi* money (the interest of the plaintiff and the defendants Nos. 3 to 5 in the *zar-peshgi* money being separate and the latter having settled their dispute with the defendant) and for damages for the loss sustained by him in consequence of his being dispossessed of the *theca* property. The Court of first instance gave her a decree for a refund of Rs. 984-6 the amount of the *zar-peshgi* money in his share and Rs. 3,031-4-0, as the profit for 7 years of which he had been deprived. On appeal the learned District Judge confirmed the decree in so far as it related to the refund of the *zar-peshgi* money but held that he was not entitled to any damages for the interruption of his possession by Babu Chandrsei Prosad. The plaintiff has appealed to this Court.

Now section 108, clause (*c*), of the Transfer of Property Act provides that in the absence of a contract or local usage to the contrary, the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. We think the clause is wide enough to include disturbance of possession by a person with a paramount title. Even before the Transfer of Property Act it was held that in the absence of an express agreement to the contrary a landlord is under an implied obligation to indemnify the tenant against ouster or disturbance in his possession by his own acts or by acts of those who claim under or have paramount right to him but not against the wrongful acts of strangers. [See *Mrs. Beniamin Donzelle* v. *Girdharee Singh* (1)]. After the passing of the Act it was held in the case of *Tayawa* v. *Gurshidappa* (2), that the words "without interruption" in section 103, clause (*c*), of the Transfer of Property Act, IV of 1882, give a lessee in India the same rights as he would have under what is known

(1) 23 W. R. 121.
(2) 25 B. 269; 2 Bom. L. R. 1070.

in England as a covenant for quiet enjoyment in an unqualified form, in other words, the lessee is protected against interruption by whomsoever it is occasioned, and that where the interruption is caused by the paramount owner of the property and not by a stranger, the lessor is bound to remove the interruption and if he fails to do so, he must indemnify the lessee. Here, there is nothing in the contract, namely, the *zar-peshgi* lease against this covenant for quiet enjoyment. The plaintiff was dispossessed by the owner of the property, that is, by a person owning a paramount title and if clause (*c*) of section 108 is applicable to the case, we think the lessor, Rani Sundar Koer, is liable to indemnify the plaintiff for the loss sustained by him under the implied covenant for quiet enjoyment under section 108 clause (*c*). The learned District Judge, however, was of opinion that section 108, clause (*a*), was applicable to the case. That clause runs thus:—

"The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover." Section 55, sub-section (1), clause (*a*), also provides that the seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover. It will be seen that section 55, clause (*a*), is similar in terms to section 108, clause (*a*), with only this difference that the words "with reference to its intended use" which occur in the latter section do not find any place in the former. It has been held that "material defect in the property" includes a defect in title under section 55, sub-section (1), clause (*a*), [vide *Haji Essa Sulleman* v. *Dayabhai Parmanandas* (3).] The learned Judges in that case, however, were of opinion that the expression "with reference to its intended use" in section 108, clause (*a*), is obviously inserted to exclude defects in the title of the lessor being disclosed to the lessee. It seems to us that the words "material defect in the property with reference to its intended use" have reference to the nature and condition of the property demised. The position of the lessor in this respect is similar to that of the bailor who, too, is bound to disclose to the bailee faults in the goods bailed of which the bailor is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks and if he does not make such disclosure he is responsible for damages arising to the bailee directly from such fault (*vide* section 50 of the Indian Contract Act). We are inclined to hold that a defect in the lessor's title is not a "material defect in the property with reference to its intended use" within the meaning of section 108, clause (*a*). But assuming that it is, the question arises whether the learned District Judge is right in holding that section 108, clause (*a*), is applicable to the case. The learned Judge says as follows:—

"This lease was granted on the 16th January 1904. At that time Babu Chandra Sheo Prosad had already instituted his suit claiming the whole Raj. This Raj is for the most part situated in the Gaya District and the lessee is a native of Manpur which is a suburb of the town of Gaya. It was common knowledge in Gaya that Babu Chandrawar Prosad claimed the Muksudpur Raj adversely to Rani Sundar Koer and had opposed the grant of Letters of Administration to her and the registration of her name in the Collector's registers and the fact that he had filed a Civil suit although this was filed at Patna and not at Gaya was a piece of knowledge which was accessible to every one including the plaintiff in this case. I hold, therefore, that this defect in the Rani's title was one which the plaintiff could have with ordinary care discovered. The lessee, therefore, must be deemed to have taken this lease subject to this patent defect in the Rani's title. That being so, the implied covenant for quiet possession was only for quiet possession so long as the Rani's title continued".

It appears, however, that in her written statement the defendant did not plead that the plaintiff had any notice, actual or constructive of any litigation that was pending in which her title had been challenged or that there were circumstances to show that the plaintiff could have with ordinary care discovered the defect in her title. No issue was framed upon the point and there is absolutely no evidence even that the litigation referred to was a matter of common

(3) 20 B. 522.

knowledge in Gaya. The plaintiff was a native of Manpur, a suburb of town of Gaya. The suit was instituted at Patna and not at Gaya and we are told that the *zar-peshgi* lease was executed by the Rani in favour of the plaintiff before any summons had been served upon her. It was, no doubt, for the lower Appellate Court which dealt with facts to say, having regard to the circumstances of the case whether the plaintiff had any constructive notice and whether the defect in the Rani's title was one which the plaintiff could have with ordinary care discoverd. It might possibly be an answer to the claim for damages that the lease was taken as a speculation and that plaintiff intended to take the risk of the result of litigation; but such a case would require to be very clearly proved. We have already pointed out that the question whether the plaintiff had any notice of any defect in the Rani's title or even of any litigation in which the title was challenged was not raised in the written statement nor in the issues and there is absolutely no evidence in support of the finding of the learned Judge. No ground was taken in the grounds of appeal to the lower Appellate Court that the plaintiff had any sort of constructive notice of any defect in the Rani's title. On the contrary, in the sixth ground of appeal to the lower Appellate Court the defendant stated: "The Subordinate Judge was wrong in holding that she had no right to grant the *patta* to the plaintiff." Under these circumstances we think that the learned Judge's finding that the defect in the Rani's title was one which the plaintiff could have with ordinary care discovered cannot be sustained and that he ought not to have decided the case upon a ground which was not set up in the pleadings, in respect to which no evidence had been adduced, and, which the plaintiff had no opportunity of meeting. We are, accordingly, of opinion that section 108, clause (*a*), is inapplicable to the present case and that the defendant is liable for damages for the interruption of the plaintiff's possession under the provisions of section 108, clause (*c*). The question of the amount of damages, however, has not been gone into by the lower Appellate Court. The case should, therefore, go back to that Court for assessment of the amount of damages. It is, accordingly, ordered that the decree of the lower Appellate Court in so far as it directs that the plaintiff is entitled to a refund of the *zar-peshgi* money will stand and that the decree in so far as it disallows damages be set aside and the case remanded to that Court. That Court will assess the amount of damages and pass a decree accordingly. The decree of the lower Appellate Court in so far as it holds that the plaintiff must pay the costs of the Court of first instance awarded to Babu Chandereswar Prasad will stand.

The respondents will pay three gold *mohurs* as the costs of this appeal to the appellant and the costs of the lower Courts as between the plaintiff and the defendent No. 1 will abide the result.

The present respondents having been substituted in the place of the Rani who died, the decree will of course be against the assets of the Rani in their hands.

No separate order is necessary to be passed on the application of Mayan Godwar Koer.

Appeal partly allowed; Case remanded.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 89 OF 1912.

March 17, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

RAHMAT ALI—DEFENDANT—APPELLANT

versus

MOHAMMAD MAZHAR HASAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Right to redeem—"Other intangible thing"—Transfer without registration, whether valid.

The right to redeem a mortgage comes within the meaning of the expression "other intangible thing" in the second clause of section 54 of the Transfer of Property Act, and as such cannot be transferred without registration.

Letters Patent Appeal against the following decision of Mr. Justice Banerji.

This appeal arises out of a suit for redemption of a mortgage made by one Maula Baksh on the 10th of March 1872 in favour of one Rahmat Ali. It has been found that the mortgage was in fact

made and that Rahmat Ali transferred the mortgagee rights to Ewaz Ali who is now represented by the defendants Nos. 1-11, of whom only one, namely defendant No. 1, is the appellant in this case. Maula Baksh died leaving his widow, *Musammat* Allah Dia, and a daughter, *Musammat* Tamizan, and also two sons, Saadat Ali and Rahmat Ali. The widow and the daughter are respectively the defendants Nos. 12 and 13, and the legal representatives of the sons are the defendants Nos. 16—20. The plaintiff is a transferee of the equity of redemption from the widow and the daughter, and as such he sues to redeem the mortgage.

It was contended in the Courts below that the plaintiff was not entitled to maintain the suit inasmuch as the widow and the daughter of Maula Baksh were not solely entitled to the equity of redemption. The plaintiff, no doubt, alleged in those Courts that Maula Baksh had transferred his equity of redemption to his wife and daughter and that consequently they alone represented the entire equity of redemption. I do not think it was necessary, for the purposes of this case, to consider whether any transfer was made by Maula Baksh in favour of his wife and his daughter. Even if no transfer was made these two persons were some of the heirs of Maula Baksh and as such inherited a part of the equity of redemption. They have assigned their rights to the plaintiff. Therefore leaving the alleged transfer by Maula Baksh wholly out of the consideration the plaintiff has acquired at least a part of the equity of redemption and as such is entitled to sue to redeem the mortgage. He stands in the shoes of some of the persons who after the death of Maula Baksh must be deemed to have been the mortgagors. There can be no doubt that one of several mortgagors may redeem the whole mortgage making the other persons, interested in the equity of redemption, parties to the suit. If the plaintiff in this suit has acquired only a part of the equity of redemption he is entitled to maintain the suit as he has made the persons interested in the other part defendants to the suit. The heirs of the mortgagees are liable to surrender the mortgaged property to the plaintiff on receipt of the mortgage money. It will be a question between the plaintiff and the representatives of Maula Baksh whether the latter have an interest in the property which the plaintiff seeks to redeem but as between the defendants mortgagees and the plaintiff there can be no doubt that the latter is entitled to redeem. On this ground alone the decree of the Court below is correct. I accordingly dismiss the appeal with costs. I extend the time for payment for a period of two months from this date if the mortgage money has not already been paid.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Surendra Nath Sen*), for the Appellant.

The Hon'ble Mr. *Abdul Raoof*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed to redeem a mortgage dated 10th March 1872. The Court of first instance decreed the plaintiff's claim in part. The lower Appellate Court modified that decree and allowed the plaintiff to redeem the entire mortgage. On second appeal to this Court the decision of the lower Appellate Court was confirmed. The facts appear very fully in the judgment of the lower Appellate Court. The mortgage is proved to have been made by one Maula Baksh in favour of Raunaq Ali. The mortgage was usufructuary. Maula Baksh left a widow, a daughter and two sons. The mortgagee transferred his rights to one Ewaz Ali. The sons of Maula Baksh were at first no parties to the suit. The plaintiff's allegation was that Maula Baksh had transferred all his rights in the mortgaged property to his widow and his daughter and that the widow and daughter had transferred the rights, so acquired by them, to him. Had the plaintiff been able to establish that he had so acquired the rights of Maula Baksh, he would, no doubt, be entitled to redeem the entire property. To prove his title, however, he had to prove by secondary evidence the execution of two deeds from Maula Baksh to his widow and daughter. It was admitted that these documents had never been registered. The appellants contended in the lower Appellate Court and in the second appeal to this Court and also in the present appeal, that the interest of Maula Baksh could not be transferred to his widow and his daughter except by a duly registered deed. We think that this contention is well founded. We have already mentioned that the mortgage in favour of Raunaq Ali was usufructuary. All that Maula Baksh had left in him after the

mortgage had been executed was the right to redeem this mortgage. The right, in our opinion, came within the meaning of the expression "other intangible thing" in the second clause of section 54 of the Transfer of Property Act. In our opinion it certainly was not "tangible immoveable property" within the meaning of those expressions in the Transfer of Property Act, possession of which could be given to the transferee. In our opinion, therefore, the plaintiff failed to prove that he had acquired any of the rights of the widow and daughter of Maula Baksh except such rights as they acquired as some of the heirs of Maula Baksh. This would also seem to have been the view of the learned Judge of this Court but he considered that it was unnecessary to go into this particular question, holding, as he did, that the plaintiff had acquired some part of the equity of redemption in the property and was, therefore, entitled to redeem the whole mortgage on behalf of himself and the other persons entitled.

We think the learned Judge overlooked the fact that the appellants had acquired the interest of the sons of Maula Baksh. It is true that this interest was so acquired by the appellants after the suit. But the sons of Maula Baksh were not originally parties. They were necessary parties on the assumption that Maula Baksh had not transferred his interest to his wife and daughter. The sons were then made parties but meantime the appellants had acquired their interest.

We think for these reasons the appeal should be allowed. The judgment of the first Court is correct but the decree has been wrongly drawn up. The general form has been used without due attention to the necessary change of words to be used in the case of a usufructuary mortgage. The office in drawing up the decree will correct this error.

We allow the appeal, set aside the decree of this Court and also of the lower Appellate Court and restore the decree of the Court of first instance after the error to which we have called attention has been corrected. The appellants will have the costs of both hearings to this Court and also in the lower Appellate Court.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 611 OF 1912.

November 23, 1912.

Present:—Mr. Justice Beaman.

VISRAM VASUDEO THAKOOR—PLAINTIFF

versus

TABAJI BALAJI WAGH AND OTHERS—DEFENDANTS.

Limitation Act (IX of 1908)—Assignment of debt after expiry of period prescribed—Court closed—Suit by assignee not barred if filed on the day Court re-opens.

Where the period prescribed for a suit to recover a debt expires during a Court vacation, and before the re-opening of the Court the debt is assigned, a suit by the assignee for the recovery of the debt filed on the day the Court re-opens, is within time.

Bai Hemkore v. *Masamalli*, 26 B. 782; 4 Bom. L. R. 608, distinguished and doubted.

Mr. *Kemp*, (with him Mr. *Jinnah*), for the Plaintiff.

Mr. *Taraporevalla*, (with him Mr. *Wadia*), for Defendants Nos. 1 and 2.

JUDGMENT.—This is a suit upon a *Khata* executed by defendants Nos. 1 and 2 to defendant No. 3, Sitabai, on the 20th of May 1909 and duly assigned by Sitabai to the plaintiff on the 5th of June 1912.

The first defence raised was that the suit was time-barred. I overruled that *in limine* but I should like to add a word or two in this judgment. The defendants relied upon the case of *Bai Hemkore* v. *Masamalli* (1). I think the facts of that case can be distinguished but the principle upon which it appears to have been decided might certainly lend itself to the kind of argument raised upon it by the defendant's Counsel. Were I satisfied that the decision really governed this case I should, of course, have been bound by it but I should have still felt it my duty to express, with all deference, my own doubt whether that case was rightly decided. The facts were briefly that the defendant gave an acknowledgment of indebtedness to the plaintiff within the meaning of section 19 of the Limitation Act in every respect, but that in the opinion of the Court it was not given before the expiration of the period prescribed etc. The period prescribed in Schedule I ended during a Court vacation. The acknowledgment was given after the expiration of that period but before the

(1) 26 B. 782; 4 Bom. L. R. 608.

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Court re-opened, and their Lordships held that the plaintiff was not saved by the provisions of section 4 of the Limitation Act and the acknowledgment was, therefore, not given before the expiration of the prescribed period. Section 3 of the Limitation Act appears advisedly to make the whole of Schedule I subject to the provisions of sections 4 to 25 of the Act and section 4 provides that where the period prescribed in Schedule I ends on any day on which the Court is closed, the suit shall still be in time if filed upon the first day thereafter on which the Court is re-opened. The effect of sections 3 and 4, therefore, upon the period prescribed in Schedule I seems to me clearly to extend those periods in the special circumstances contemplated by section 4. Omitting the technical words, it comes to this, that where say a three years period ends within a Court vacation the plaintiff may bring his suit not within three years but within three years and so much of the Court vacation as exceeds that period. Thus in the case decided the plaintiff might still have brought his suit without being barred by limitation after the day on which the acknowledgment was signed. So that it appears to me very hard to say that the acknowledgment was not made before the expiration of the period prescribed by limitation for that really means the period within which a plaintiff may file his suit. And the reason of the thing seems to me still more clearly all the same way. An acknowledgment extends the period of limitation presumably because in consideration thereof the debtor obtains more time. In the actual case for example the plaintiff may have informed the defendant that unless he was immediately paid he would be compelled under the law of limitation to file his suit on the first day the Court re-opened; and the defendant may well be thought to have suggested that as this would cause him great inconvenience he would acknowledge the debt; so that the plaintiff need not be compelled to launch his claim at so early a date. On that footing the plaintiff consents not to file his suit when the Court re-opens. He believes, and has every reason to believe, I think, that the acknowledgment enlarges his right to sue and that he can, therefore, safely give his debtor more time in which to pay. Such considerations as well as the actual language of the law certainly do raise a very grave doubt in my mind whether the case was rightly decided. Here, however, the facts are different. The debt was assigned during this Court's vacation after the period prescribed in Schedule I had expired. There can, however, be no question but that the assignor might have filed this suit on the day the Courts re-opened, and it seems to me beyond all question that the plaintiff took under the assignment all rights of that kind belonging to the assignor.

The next question is whether this Court has jurisdiction. That depends upon a finding of fact whether or not the *khata*, Exhibit D in this case, was executed at Talegaon as the defendants allege or in Bombay as alleged by the plaintiff. In my opinion the evidence is overwhelming and conclusive in favour of the defendants. No less than six witnesses the two defendants, the Pleader Darab, Sitabai's agent, Laxman, the bond-writer Vishnu Medhi and the attestant Vithoba, swear most emphatically that the transaction took place at Talegaon on the evening of the 20th of May. On the other side there is really no evidence except that of Sitabai herself and the admitted fact that part of the *khata*, Exhibit D, was not written in Talegaon. The defendants do not know where it was written and are quite prepared to admit that it may have been written in Bombay. Sitabai herself admits that she left Bombay by the midnight train on the 20th and was in Talegaon the following day. This she could hardly deny in view of the registered sale-deeds which the defendants have adduced in support of their contentions. Every probability, too, appears to be in favour of the defendants. They are Talegaon men. Sitabai and her husband had considerable money dealings in Talegaon; and Sitabai admits that she had employed one of the defendants at any rate to collect her outstandings there. It is much more probable, I think, that Sitabai should have entered into this transaction (waving for a moment its true nature) in Talegaon then that both the defenddants should have run down to Bombay and got back to Talegaon in the very limited time which must be allowed if the plaintiff's story be true, for there is not only this mass of oral evidence, but the defendants have been able to produce documentary evidence (see Exhibits 6 and 10) showing most conclu-

sively that defendant No. 2, Shivram, must have been in Talegaon for a great part at any rate of the 19th and 20th of May. It is true that these documents do not absolutely exclude the possibility of Shivram having been in Bombay for a few hours on the morning of the 20th. But the cumulative effect of the documents and the facts connected with them is to make that so improbable as to verge very closely upon impossibility. I ought perhaps to have mentioned that according to the plaintiff the *khata* was executed on the 20th of May and certain acknowledgments were made in it on the 31st of May. These acknowledgments are admittedly in the handwriting of defendant No. 2 and he is again in a position to bring forward documentary evidence which makes it extremely improbable, if not actually impossible, that he could have written those entries in Bombay. Even, apart from this unusually strong documentary evidence, I should have found it extremely difficult to dispose, in plaintiff's favour, of the evidence of the Pleader Darab. There is really nothing to show why this man, who appears to occupy a respectable position, should have come here to perjure himself deliberately for the defendant's sake. He is quite positive that when the *khata*, Exhibit D, was brought by Sitabai to Talegaon on the evening of the 20th of May it was not completed. Only that part of it which in these proceedings is always referred to as the body of the document was then written. Darab was called in by defendant No 2 to advise upon its execution and he swears that he advised the defendants not to complete it until Sitabai for her part had executed an agreement explaining the true nature of the transaction. As it is common ground that the document, Exhibit D, was executed on the 20th of May it follows from this evidence, if the evidence be true, that the document must have been executed in Talegaon and not in Bombay, for the time spoken of by Darab was late in the evening of the 20th of May, and if by then the document was still unexecuted it is utterly impossible that it could have been executed elsewhere than in Talegaon. I think it unnecessary to critcise in detail the evidence of the other witnesses. I see no reason myself to doubt the truth of it as a whole, and I certainly see no reason whatever to doubt the complete truth of Darab's evidence. I have shown that if that is true, even standing alone it settles the question. I think very few questions of fact tried in this Court, so far as my experience goes could be answered with so much confidence. The evidence is abundant: on the whole, it is unusually good and it is absolutely convincing. I must, therefore, find that no part of this cause of action arose in Bombay and this Court has no jurisdiction to try the suit.

There are various other defences but I do not desire to make any comment upon them as that might prejudice the plaintiff's cause, should he be advised that he is still in a position to sue the defendant in a Court of competent jurisdiction.

The plaintiff's suit must be dismissed with all costs.

Suit dismissed.

Attorneys for the Plaintiff: Messrs *Little & Co.*

Attorneys for the Defendants: Messrs. *Smetham, Byrne and Noble.*

PRIVY COUNCIL.

APPEAL FROM THE BRITISH SUPREME COURT FOR CHINA AT SHANGHAI.

APPEAL No. 18 OF 1912.

November 14, 1912.

Present:—Lord Macnaghten, Lord Mersey and Lord Moulton.

NOEL CHARLES MINCHIN HOME—APPELLANT

versus

JOHN CHARLES EDWARD DOUGLAS—RESPONDENT.

Contract—Barrister agreeing not to practise for a certain time—Agreement valid—Breach—Injunction—Barristers carrying on business in partnership.

Where two branches of the legal profession (Barrister and Solicitor) are amalgamated in a particular place, a person who carries on both branches and is a legal practitioner in that place, may enter into an agreement not to practise for a reasonable time.

In case of breach of such an agreement without justification or excuse an injunction will be granted.

There is no objection to the Barristers carrying on business in partnership in such a place.

Appeal from a judgment of the Supreme Court for China dated June 5th, 1912.

FACTS.—Both the appellant and the respondent were called to the Bar of England

NOEL CHARLES MINCHIN HOME *v.* JOHN CHARLES EDWARD DOUGLAS.

and were subsequently admitted to practise and practised as duly qualified legal practitioners at Shanghai under the provisions of China Orders in Council, 1904 1910 by His Britannic Majesty's Supreme Court for China. In 1907 they agreed to carry on the practice of law in partnership together. In 1908 the appellant desired to return to England and executed a deed by which he agreed not to practise at Shanghai for a period of five years in return for Tls. 12,000 renouncing all his rights in the said partnership. In 1911 the appellant re-commenced to practise law in Shanghai in breach of the aforesaid agreement of 1908. The respondent issued his writ against appellant in October 1911, claiming an injunction to restrain him from practising as a legal practitioner at Shanghai for two years from 1911. The defence was that the said agreement was modified by a contemporaneous oral agreement by which the appellant was left free to practise there in accordance with the etiquette of the English Bar. It was also claimed that as the point in dispute involved a disciplinary question affecting the parties to the suit in their professional conduct as members of the Bar of England, the Court had no jurisdiction to entertain the respondent's action. The judgment of the Court was delivered on June 5th, 1912.

It was held that the right to practise depended on admission to practise and not on possession of certain qualifications by virtue of the China Order in Council 1904. The Solicitors were allowed the same rights as the Barristers and in fact since 1865 by which the Court was established consequent to the Treaty of Tientsin partnership between Barristers and Solicitors had been common and the propriety of the arrangement fully recognised by the Court. Barristers came to China to join these firms on salaries and on agreements in the same way as do Solicitors. The Court had jurisdiction to entertain an action which dealt with partnerships of the kind in the same way as an English Court would entertain such an action in the case of two Solicitors. It granted an injunction against the appellant restraining him from practice as claimed, against which an appeal was brought to the Board.

The appellant in person contended that the Court had no jurisdiction. The conduct of the respondent was such that the case was not one in which a Court of equity would have granted an injunction. His own conduct, on the other hand, was not unreasonable. There was an oral agreement between the parties that he could practise in spite of the agreement in conformity with the etiquette of the Bar.

Mr. *Neville*, for the Respondent, contended that by the law and custom of the Supreme Court of Shanghai agreements between Barristers and Solicitors were lawful and enforceable. The appellant broke his agreement which was perfectly legal with reference to the status of legal practitioners in Shanghai as regulated and defined by the said Orders in Council and the Rules of the Supreme Court.

JUDGMENT.

LORD MACNAGHTEN.—Their Lordships are of opinion that there is no ground for this appeal.

Mr. Home entered into an agreement, express and unambiguous, that he would not practise in Shanghai for a certain time. In spite of that he did practise there. The Court was right in granting an injunction. It was as plain a case as could be.

The defence was three-foid. *First*, the appellant said there was no jurisdiction to restrain him from breaking his engagement because he is an English Barrister. But the agreement itself begins by stating that Mr. Douglas and he had been in practice in a way in which no English Barrister would have been permitted to practise. They carried on business in partnership. There is nothing in the question of jurisdiction. In Shanghai the two branches of the profession, which are distinct in this country, apparently are amalgamated. There is no reason why a person who carries on both branches and is a legal practitioner in Shanghai should not enter into an agreement not to practise for a reasonable time.

The next objection was that there was some oral agreement. There is no evidence of that. There is a definite agreement in writing which must govern the rights of the parties.

Then it was said that the terms on which Mr. Douglas has carried on his business since the agreement are not strictly in accordance with professional etiquette, on some rules which their Lordships do not understand, and that, therefore, the appellant who agreed not to do a certain thing, is excused

from breaking his agreement, and is entitled to do so.

Their Lordships think that Mr. Home's conduct was without justification or excuse; and they will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Appellant in person.

Solicitors for the Respondent: Messrs. *Radcliffes & Hood.*

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 86 AND 87 OF 1911.

March 11, 1913.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

SIVATHA MUTHU ASARI *alias* SAVARI MUTHU ASARI—APPELLANT

versus

Reverend J. N. H. MESGUITA—

—RESPONDENT.

Landlord and tenant—Lease for building purposes—No presumption of permanent tenancy—Instrument of lease—Construction of forfeiture clause.

Where there is an instrument defining the terms of a tenancy, the fact that the tenancy is one for building purposes, that a substantial building has been erected on the same and that the property has descended from father to son or has been sub-let or alienated need not be taken into consideration in determining whether the tenancy was a permanent tenancy. There is no presumption of a permanent tenancy where land is let for building purposes and the tenant is not entitled to the value of buildings on ejectment.

If a clause imposing conditions is so wide as to include conditions the violation of which may not entail a forfeiture which would be enforced by the Courts the clause should not be disregarded in its entirety but should be given effect to so far as it can be.

Appeals under section 15 of the Letters Patent against the judgment of the Honorable Mr. Justice Abdur Rahim, in S. A. Nos. 1035 and 1036 of 1910 on the file of the High Court preferred against that of the District Court of Trichinopoly, in A. S. Nos. 254 and 265 of 1909, preferred against that of the District Munsif of Trichinopoly, in O. S. No. 281 of 1908.

Mr. *K. R. Subramania Sastri*, for the Appellant.

Mr. *D. Chamier*, for the Respondent.

JUDGMENT.—The first question is whether the appellant is entitled to hold the land in perpetuity. We are of opinion that the terms of the instrument (Exhibit B) show beyond any doubt that a permanent tenancy was not in the contemplation of the parties to that instrument. Mr. Subramania Sastri cited various authorities to show that when a house-site is let for building purposes there is a presumption of permanent tenancy. When land is let for building purposes, and the tenant is not entitled on ejectment to receive the value of the building from the landlord there is a presumption against tenancy from year to year, as it would be unreasonable to presume that a tenant would agree to construct a substantial building if the landlord could determine his tenancy on a few months' notice. This presumption would be strengthened if the property had descended from father to son; if the tenant had alienated or sub-let the same. But where there is an instrument defining the terms of the tenancy, and it shows, there is no permanent tenancy, these circumstances need not be taken into consideration.

The next question is whether the appellant has violated one of the conditions of the lease and the plaintiff is, therefore, entitled to recover possession. It is contended by Mr. Subramania Sastri that a forfeiture is incurred only if the tenant in addition to violating any of the covenants set forth in Exhibit B also disobeys any other orders of the Swamiar. We agree with Mr. Justice Sundara Aiyar that the clause is not clear at all. But we have no hesitation in coming to the conclusion that what the parties really intended was that, even if the tenant disobeyed the other orders of the Swamiar, he should quit the land. This is the construction accepted by both the lower Courts and Mr. Justice Abdur Rahim. Mr. Sundara Aiyar does not accept the other construction, but decides the case on this view. It is then contended that this condition is vague and is not enforceable, and the case of *Doe dem Wyndham* v. *Carew* (1) is relied upon. In that case the condition was disregarded as being unintelligible. Here the condition is clear enough. It in terms applies to

(1) 114 Eng. Rep. 124; 2 Q. B. 317; 1 G. & D. 640; 11 L. J. Q. B. 5; 6 Jur. 457.

any order that may be issued by the Swamiar. Whether the disobedience to any unreasonable or absurd order be enforced by a Court of law is a different question. The facts found by the Judge show, in our opinion, that the order of the Swamiar had reference to the holding and was reasonable, and that the appellant was bound to obey the same under Exhibit B.

The appellant demolished an old building which was on the land and sought the plaintiff's permission to erect a new and more permanent one. The plaintiff would not consent to the erection of a costly building unless a fresh document was executed by the defendant including not only the conditions of Exhibit B but another condition that the defendant must remove the building at any time, if the plaintiff required the site. The defendant was unwilling to accept the new condition, and disregarding the plaintiff's orders proceeded to take advantage of the plaintiff's absence elsewhere and erected the present building for which he claims Rs. 4,500. The Judge finds that the new condition is reasonable and we agree with him.

No authority has been cited before us to show that, if a clause imposing conditions is so wide as to include conditions, the violation of which may not entail a forfeiture which would be enforced by the Courts, the clause should be disregarded in its entirety and should not be given effect to so far as it can be. The appeal is dismissed with costs.

The decree for possession will stand.

As regards the mandatory injunction the plaintiff consents that the order for the mandatory injunction should be discharged and that the defendant should have the option of removing the building within six months from this date.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 12 OF 1912.

April 11, 1912.

Present:—Mr. Rafique, A. J. C.

Rani CHANDERPAL KUNWAR—PLAINTIFF—APPLICANT

versus

DUNIA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Payment of interest as such—There must be something to indicate intention—Mere appropriation to interest by creditor, no such indication.

Under section 20 of the Limitation Act the payment of interest will save limitation when the payment is made as such, that is to say, when the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditors of these payments to interest is not such an indication.

Mohammad Abdulla Khan v. *Bank Instalment Company Limited*, 3 Ind. Cas. 379; 31 A 495; 6 A.L. J. 611, followed.

Maharaja of Benares v. *Har Narain Singh*, 28 A. 25; A. W. N. (1905) 167; 2 A. L. J. 585, distinguished.

Application under section 25, Act IX of 1887, for revision of the order of the Munsif of Kheri (exercising Small Cause Court Jurisdiction) dated the 26th October 1911.

Mr. *A. P. Basu*, for the Applicant.

ORDER.—This is an application in revision, under section 25, Act IX of 1887, praying that the decree of the Munsif of Kheri, dated 26th October 1911, be set aside. It appears that the plaintiff-applicant instituted a suit in the Court of the Munsif of Kheri for the recovery of Rs. 69-1-6, on the basis of a bond alleged to have been given on the 5th May 1907 by the respondents. The claim was resisted in the Court below on the ground, among others, of limitation. The suit was admittedly brought after the lapse of three years from the date of the bond. The applicant pleaded that her claim was within time, because of certain payments alleged to have been made by the respondents within limitation. The learned Munsif held that the claim was barred by limitation, even if the payments set up by the applicant be taken to have been made by the respondents, because there was no evidence in the case that the respondents had made these payments towards interest. It is contended, on behalf of the applicant, that the lower Court has misconstrued the case-law on the subject. It is said that if the pay-

ment is made by a debtor, and no intention is expressed at the time of payment as to whether the payment is made towards the interest or the principal, it will be presumed that the payment is made towards interest first, and if any balance is left over it is to be credited towards the principal. In support of this argument the learned Pleader for the applicant cites *Maharaja of Benares* v. *Har Narain Singh* (1). I think that the view of the law taken by the learned Munsif is correct. It is one thing to allow the creditor to appropriate the money paid to him in the absence of any instructions from the debtor towards interest, and it is another thing to say that such payment would save limitation.

It has been authoritatively laid down that "under section 20 of the Limitation Act the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditors of these payments to interest is not such an indication" —Vide *Mohammad Abdullah Khan* v. *Bank Instalment Company Ltd.* (2). There is no evidence in this case that the alleged payments were made by the respondents towards interest.

I, therefore, decline to admit this application and reject it.

Application rejected.

(1) 28 A. 25; A. W. N. (1905) 167; 2 A. L. J. 585.
(2) 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.
APPEALS NOS. 86 AND 87 OF 1912.
May 5, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kunwar BRIJRAJ SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Kunwar SHEODAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Ancestral property, partition of, by father, with the consent of co-parceners—Consent of a co-parcener binds his sons—Construction of document.

A Hindu father has no right to make a partition by Will of ancestral property of the family among its various members without their consent.

When consent is given to such an arrangement, it would bind not only the members giving it but also their sons, as such members would be representing in the transaction their respective branches of the family.

Where a document makes partition of the family property in fact, and such partition is acted upon by all parties for a long time without any dispute or misunderstanding as to their respective rights under it, the mere fact that the document is called a Will, would not invalidate the partition.

Provision was made in a document of the foregoing nature to the effect that in case of mismanagement or bad character of the sons, amongst whom the father had divided the family property, the document would be canceiled:

Held, that this was merely a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all.

Consolidated appeals from two judgments and decrees dated May 17th, 1910, of the High Court partly affirming and partly reversing a judgment and decree of the Court of the Additional Subordinate Judge at Aligarh, dated September 30th, 1907.

FACTS.—One Rao Balwant Singh had three sons, *viz.*, Rao Sultan Singh, Rao Karan Singh and Kunwar Sheodan Singh. On November 26th, 1895. Rao Balwant Singh wished to sever his connection with this world and go on pilgrimage. He executed what he called his Will dividing a certain portion of the ancestral property among his three sons. He gave a larger share to his eldest son whom he said he placed on the *gaddi* according to the family custom. He gave a certain other property to his wife for life with the stipulation that the wife of his eldest son, Rao Sultan Singh, would become the owner thereof on the death of her mother-in-law. Certain other property to his three grandsons, the sons of three sons respectively. He also stated therein that if he found any mis-management or the character of any one bad he would cancel the Will and resume possession of the property in question. In 1905 some five years after the death of both Rao Sultan Singh and Rao Balwant Singh, the remaining two sons of Rao Balwant Singh, Rao Karan Singh and Kunwar Sheodan Singh, together with their sons brought a suit against the son of Rao Sultan Singh, Kunwar Brijraj Singh, and his widow, claiming partition of all ancestral property which they alleged was undivided. The document, executed in 1895 they said, was of no effect

as Rao Balwant Singh did not renounce the world, nor did he go on pilgrimage. They further alleged that the said document was never acted upon, nor was Rao Balwant Singh empowered to divide the ancestral property into unequal shares. The Subordinate Judge of Aligarh held that Rao Balwant Singh did make a final disposition of the village property with the consent of his sons, but not of moveables which he ordered to be divided according to law. On appeal by both parties the High Court decided that the document in question of 1895 was a Will as it was on unstamped paper which ought not to have been admitted in view of the prohibition contained in section 34 of the Indian Stamp Act I of 1879 without payment of stamp duty and penalty. The family custom of giving larger share to the eldest son was not proved. It, therefore, ordered the division of the immoveable as well as moveable property according to law. The appellants then appealed to the Privy Council which decided that the immoveables were already partitioned by virtue of the document executed in 1895 and that the moveables be divided according to law.

Messrs. *De Gruyther*, *K. C.*, and *Dube*, for the Appellants, contended that the entire family property was partitioned in 1895 according to the custom of the family as well as the Hindu Law. The respondents were estopped from questioning it after consenting to it and acting upon it for over 12 years.

Reference was made to *Musammat Parbati* v. *Chaudhri Naunihal Singh*(1), *Ram Pershad Singh* v. *Lakhpati Koer* (2) and also to *Raghubir Singh* v. *Moti Kunwar* (3), which lay down that in case of partition the conduct of the parties is binding on them. *Cf. Appovier* v. *Ram Subta Aiyan* (4).

Messrs. *Gray* and *Lowndes*, on behalf of Respondents, contended that there was no question of consent throughout the document, nor did any one suggest that it was a family arrangement.

Even in Bengal a father could not divide unequally even his own self acquired property amongst his son, let alone a family which was governed by the *Mitakshara* School of law. The partition was not valid, nor was Balwant Singh entitled to effect it. There was no acquiescence on the part of the respondents in the said arrangement as a final partition of the properties in dispute.

Reference was made to Mayne's Hindu Law (7th Edition) page 659.

Mr. *De Gruyther* replied.

JUDGMENT.

LORD MOULTON.—This is a suit brought by two brothers, Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as plaintiffs their respective sons, Kunwar Shibraj Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother, Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the life-time of the father of the plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the

(1) 3 Ind. Cas. 195; 36 I. A. 71 at p. 75; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 983; 10 C. L. J. 121; 11 Bom. L. R. 878; 31 A. 412; 19 M. L. J. 517.

(2) 30 I. A. 1; 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103.

(3) 17 Ind. Cas. 766; 35 A. 41; 13 M. L. T. 162; (1913) M. W. N. 127; 11 A. L. J. 146; 17 C. W. N. 453; 17 C. L. J. 306.

(4) 11 M. I. A. 75; 8 W. R. 1 (P. C.); 20 Eng. Rep. 30.

arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made.

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the Court of first instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th November 1895, he drew up and executed a document (which he calls a Will) setting out a division of the family property among the members of the family, reserving nothing for himself. This is the family arrangement set up by the defendants.

Their Lordships incline to the view that the term "Will," as applied to this document, was a complete misnomer. It is manifest that it differed from a Will in the crucial characteristic that it was intended to speak from the date at which it was written, and not from a future date, *viz.*, the death of the writer. It was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 *fasli*" (September 1895). "I have no other heir having a right besides those mentioned in this Will. I have, therefore, executed this Will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and, therefore, Rao Balwant Singh, although head of the family, had no right to make a partition by Will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs, Rao Karan Singh and Kunwar Sheodan Singh, to this family arrangement. If they accepted it their acceptance would bind not only them but also their sons, who are the remaining plaintiffs as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and before setting out the specific shares which each was to receive, the document reads thus:—

"My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present while in a sound state of body and mind and of my own free will and accord divided the property among my sons, heirs as follows."

There follows a specific division of the villages by name among the three sons. It then gives certain *sir* lands and other property to his wife for life, and proceeds to provide that at her death the *sir* lands (with the exception of that in the village of Badri) shall go to the wife of the eldest son according to the custom of the family. The *sir* land in the village of Badri is to go to the wife of the plaintiff, Kunwar Sheodan Singh, "because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh," the other plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grandsons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on 26th November 1895. Early in 1896 the plaintiffs and their brother, Rao Sultan Singh severally apply for mutation of names in respect of the villages allotted to them by their father in

the document. It will suffice to refer to one of these applications, all of which *mutatis mutandis* are substantially identical. For this purpose the application of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated 25th February 1896, and reads as follows:—

"Application for mutation of names in respect of 20 *biswas* of the *zemindari* property of the village of Nagla Tula Ram.

"The applicant begs to state as follows:—The applicant's father, Rao Balwant Singh, partitioned his property among his heirs under a registered Will dated 26th November 1895 and in accordance with the partition the 20 *biswas* of the villages of Bajripur and Nagla Tula Ram and 20 *biswas* of Khumanpur, a hamlet of Jirauli Mahal Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the *khewat*. Separate applications have been filed in respect of the remaining villages. The applicant's elder brother, Rao Sultan Singh, has filed the original Will in a case relating to the village of Sahaoli. It is also a proof in this case."

It will be well to follow up the proceeding thus initiated. On March 19th, 1896, we have the Tahsildar's record of the hearing of the application and the order made thereon. It reads as follows:—

"Application for mutation of names in respect of 20 *biswas* of the village of Nagla Tula Ram, Pargana Akrabad, according to partition of the property.

"Kunwar Karan Singh, applicant *v.* Rao Balwant Singh.

"Under a Will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a *rais* of Sahaoli, divided his *zemindari* property among his sons. The 20 *biswas* property of the village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of any one else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The *patwari* of the village says that Kunwar Karan Singh made collections and assessments for *kharif* of 1303 *Fasli*. As a transfer in possession has taken place and no objection has been raised, the name of Rao Balwant Singh be expunged in respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the Pargana Officer for approval. A fee of Rs. 7 is deposited and the treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called Will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the *patwari* of the village testifies to the applicant having made collections in 1303 *Fasli* (September 1895), thus confirming the truth of the statement in the so-called Will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

There is another set of transactions of a different date, which add strong confirmation to the defendants' case. Rao Sultan Singh died on March 30th, 1901, and his father, Rao Balwant Singh, died a few days later on April 7th, 1901. Thereupon there ensued a situation such that the conduct of the parties must evidence almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao Balwant Singh held his portion separately. The importance of the situation is emphasised by the fact that the main grievance of the plaintiffs is that the share of the eldest

brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the defendant's contention. We find that application was made in July 1901 by the widow of Rao Sultan Singh on behalf of her son, Rao Brijraj Singh, for mutation of names with regard to the property held by her late husband. The following is the record:—

"Amendment of *khewat*,

"Rao Brijraj Singh, minor, under the guardianship of *Musammat* Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh.

"Village of Sumera *alias* Bijaigarh, Pargana Akrabad, 17th July 1901".

"To-day this case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as Holding No. 2 measuring 280 *bighas* stands recorded in papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a Will. Rao Sultan Singh is dead and his heir is Rao Brijraj Singh, whose name be entered. The *patwari* bears testimony to possession and other sharers have taken no objection. It is ordered:—

That the name of Rao Balwant Singh be expunged in respect of Holding No. 2 and the name of Rao Brijraj Singh be entered in papers and that the Sadar Munsarim do comply with the order".

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows:—

"Present: Haji Mohammad Mukhdum Husain, Settlement Deputy Collector at Aligarh.

"17th July, 1901.

"Rao Brijraj Singh, minor, under the guardianship of *Musammat* Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

"Village of Kumera (?) *alias* Pijaigarh.

"Statement of Kunwar Karan Singh.

"My father's name is Rao Balwant Singh: age, thirtythree years: occupation, *zemindari*: residence, Sahaoli, Pargana Akrabad.

Statement.

"Two hundred and eighty *bighas* entered as Holding No. 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a Will, fallen to the share of my brother Rao Sultan Singh. Rao Sultan Singh is dead, and now his son, Brijraj Singh, is the owner. His name should be recorded and I have nothing to do with it.

"Signature of Kunwar Karan Singh".

And on the same day the statement of the other plaintiff, Kunwar Sheodan Singh:—

"Rao Brijraj Singh, minor, under the guardianship of *Musammat* Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh, Village of Sumera *alias* Bijaigarh, Pargana Akrabad.

"Statement of Kunwar Sheodan Singh, a *rais* of Sahaoli.

"Statement.

"My statement is the same as has been made by my brother Kunwar Karan Singh.

"(Sd.) Kunwar Sheodan Singh".

It is not necessary to go into the details of the mutation of names with respect to the *sir* lands. They support the contention of the defendants in substantially the same way as that which has been already given with respect to the village property.

It is now necessary to examine the evidence put forward by the plaintiffs in answer to the case of the defendants; based, as it is, on the unbroken evidence of ten years' conduct of all parties. In the first place the plaintiff, Kunwar Karan Singh, does not give evidence at all, so that his acts as shown by the records remain undenied and unexplained. The plaintiff, Kunwar Sheodan Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to, nor does he give any explanation why he took no action until the year 1905, *i e.*, four years after the death of his father and brother and ten years after he had taken possession of his apportioned share. It is not too much to say that he did not attempt to show that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and lets it be seen that it

was the Pleaders whom he consulted that suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the defendant's case entirely unshaken.

The testimony mainly relied upon for the plaintiffs is that of Chiranji Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1303 *Fasli* (September 1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence for the plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the defendants, and he admitted that they were in his own handwriting, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a statement in his own handwriting that Brijraj Singh is the proprietor and similarly the items of expenditure relate to him alone. These books demonstrate the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books at all. The learned Judge of first instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

The claim of the plaintiffs in this action evidently arose from the suggestion of the Pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a Will. It is obvious that such a partition could not have been made by Balwant Singh by Will strictly so-called. But, as has been already pointed out, the document is much more than a Will (if indeed it is in any sense a Will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Everyone treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a Will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in præsenti* by reference to a provision to be found in this document. It reads as follows:—

"If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this Will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating *in præsenti*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. It is certainly quite in-

sufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of first instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the moveable property. As to this the family arrangement is absolutely silent. The plaintiffs are, therefore, entitled to their share of these movables as inherited property.

It will be seen, therefore, that their Lordships are of opinion that the judgment of the learned Judge of first instance was right on all points. Both plaintiffs and defendants appealed from his decision to the High Court. That Court allowed the plaintiffs' appeal and dismissed that of the defendants. The defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise His Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the decree of the Subordinate Judge restored and that the order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the defendants' appeal to His Majesty in Council, and the defendants must pay the costs of their unsuccessful appeal.

Solicitors for the Appellants: Messrs. *Ranken, Ford, Ford* and *Oharter.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers* and *Nevill.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1248 OF 1912.

February 28, 1913.

Present:—Mr. Justice Davar.

SARDAR NOWROJI PUDUMJI—PLAINTIFF

versus

PUTLIBAI—DEFENDANT.

Succession Act (X of 1865), s. 111—Will—Construction—Not to be strict and technical—Restriction on inheritance—Time not mentioned for the occurrence of uncertain event—Reference to other Wills for constructions useless.

A Parsee Will provided

(*i*) that the daughter of *P*, the testator, when sho attained majority and got possession of her portion of the legacy, was to be a sort of *ex officio* joint executrix with the then existing executors;

(*ii*) that in the event of the son of the testator coming and meeting the testator there without marrying, or if married, without any lineal heir, his share should revert equally to his surviving sisters or other heirs:

Held, that *P.* having attained majority and become entitled to be paid or given possession of a very substantial portion of the property bequeathed to her, was entitled to be co-executrix, and was so entitled without waiting for the possession of the whole of the legacy.

That section 111 of the Succession Act applied and the restriction sought to be placed on the son's inheritance by the testator was nugatory and ought not to be given effect to.

In construing a Will made in India by a native of India it is unnecessary to put a very strict or technical construction on every word or phrase. What the Court has to do is to ascertain the true intention of the testator from the whole clause.

To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills in reported cases is for the most part an unprofitable exercise.

Mr. *Davar*, for the Plaintiff.

Mr. *Inverarity*, (with him Mr. *Setalvad*), for Defendant No. 1.

Mr. *Desai*, for Defendants Nos. 2 and 4.

Mr. *Bahadurji*, for Defendant No. 3.

JUDGMENT.—The plaintiffs are the executors of the Will of their deceased brother, Sorabji Pudumji, who died on the 11th of January 1910. On the 10th of December 1898, twelve years before his death, Sorabji executed his Will. That Will was made not long after the death of his wife; and this misfortune seems to have had a most distressing effect upon his mind. He was a man of intelligence and education, having been for many years a Judicial Officer of high standing in the service of Government. The provisions

of his Will at first sight appear to be very complicated and in some instances are inconsistent with each other. It seems to me that the extreme distress of mind consequent on the death of his wife is solely responsible for the rather tangled document which he has left behind him in which he makes testamentary dispositions of his property amongst his four children who are defendants herein. After the execution of his Will, the testator acquired both moveable and immoveable property and in some instances altered the character of his investments. Instead, however, of making a fresh Will or a codicil, he from time to time made marginal notes and alterations on his original Will. Such notes and alterations being unattested could not be admitted to Probate, and the Will admitted to Probate is the Will, as he originally made it twelve years before his death. The testator has left three daughters and a son; and he has given directions and made dispositions in his Will which presented difficulties to the executors, who have taken out this originating summons, wherein they have submitted several questions for the Court's consideration and directions. The summons was adjourned by me into Court and all parties have been fully heard on all questions raised in the suit.

In order to avoid any possible misunderstanding as to the construction I put on the various clauses of the Will, I have thought it desirable to write a judgment, giving my reasons for the interpretation and construction of the various clauses of the Will, before formally answering the questions which are submitted to the Court in the summons. In the third clause of the Will, the testator says:—

"My dear daughter Putlibai, when she attains her majority and gets possession of her portion of the legacy, to be a sort of *ex officio* joint executrix with the then existing pair."

The plaintiffs ask whether defendant No. 1, Putlibai, is entitled to be co-executrix with them and, if so, when? In construing the Will of a Parsee, drawn by himself, it appears to me to be unnecessary to put a very strict or technical construction on every word or phrase, which go to make up any particular direction in that Will. What the Court has to do is to ascertain the true intention of the testator from the whole clause. The whole Will is distinguished by the use of diffuse language and expressions loosely strung together throughout. It appears to me that the testator intended that his eldest child Putlibai should have a voice in the management and disposition of his estate, when she attained majority and became entitled to the payment of her legacy. As she has now attained majority and become entitled to be paid or given possession of a very substantial portion of the property bequeathed to her by the testator, I am of opinion that she is entitled to be co-executrix with the plaintiffs and that she is so entitled now without waiting for the possession of the whole of her legacy. The plaintiffs do not actively object to her being associated with them in the administration of her father's estate, but it was stated to me that there was apprehension of possible conflict, judging from the attitude adopted by her in correspondence. Putlibai is married to a Solicitor of this Court, in whose discretion and good sense I have great confidence. She is herself a member of one of the most respectable Parsee families, and I have no doubt is well brought up with proper notions of respect towards her elders; and I have every reason to believe that in the discharge of the duties with which she will be entrusted, her conduct towards the plaintiffs will be all that is expected of a young lady in her position in life.

An important question of law is raised by the provisions of clause 17 of the Will in respect of the bequests made to the testator's son, Nusserwanji. In that clause the testator says:—

"In the event of Nasli coming and meeting us there without marrying or, if married, without any lineal heir, his share shall revert equally to his surviving sisters or their heirs."

On behalf of the daughters, it was argued that the restriction imposed on the son's inheritance was good, and reliance was placed on what is stated in an English case; *Corbett* v. *Corbett* (1).

In construing a Will made in India by a native of India—and the Parsees are as much natives of the country as the Hindus and Muhammadans of India—it is most

(1888) 14 P. D. 7; 58 L. J. P. 17; 60 L. T. 74; 37 W. R. 114.

important for Judges to keep in mind and always remember the extremely weighty words of Lord Macnaghten in *Norendro Nath Sircar* v. *Kamalbasini Dasi* (2). In referring to the judgment of the Subordinate Judge in the case which was then before their Lordships of the Privy Council, at page 26 he says:—

"His judgment, with much display of learning and research, is a good example of the practice which Lord Herschell condemns and the mischief which the Indian Succession Act, 1865, seems designed to prevent. To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills is, for the most part, an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on Wills which cumber our English Law Reports in order to understand and interpret Wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, seems *almost absurd*. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments."

In construing the restrictions sought to be placed on Nusserwanji's inheritance by clause 17 of the Will, I must first have regard to the testator's explicit directions in clause 15, wherein he says: "Nasli is to have his legacy free of any restrictions." That applies to what is given to him under clause 14. The restrictions, therefore, which are sought to be placed by clause 17 would refer to everything else given to him by other clauses of the Will. It seems to me that that could not have been the real intention of the testator, having regard to the whole scheme of the distribution of his property as is evidenced by his Will, but quite apart from all other consideration, the Court is bound in construing a Parsee Will by the provisions of the Indian Succession Act. Section 111 of that Act provides that where a legacy is given, if a specified uncertain event shall happen and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

It was conceded in the end that section 111 of the Succession Act did govern this particular question under consideration, and it was then attempted to prove that the restriction placed on Nusserwanji's inheritance was good, as in the Will time *was* mentioned for the occurrence of that uncertain event contemplated by the testator. It was argued that the construction of this clause in the Will meant that the testator provided that the restriction should take effect on Nusserwanji's death if Nusserwanji died *after* the testator, and that, therefore, time in this instance was mentioned. In other words, it was contended that the testator having fixed the time of his son's death taking place after his own demise, this section had no applicability. This argument, however ingenious, is most unconvincing. The uncertain event contemplated by the Will is Nusserwanji dying without marrying or, if married, without leaving any lineal heir. No time whatever is fixed or mentioned for the happening of this event; and the mere fact that the testator contemplated, that in the ordinary course of nature his son would survive him and die after him, does not justify the Court in concluding that the testator has fixed or mentioned in the Will the time for the occurrence of that event. Illustration (*b*) to the section clearly demonstrates what is contemplated by that section, and the Privy Council case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2) is a conclusive authority in holding that the restriction, sought to be placed on Nusserwanji's inheritance by the testator by clause 17 of his Will, is nugatory and ought not to be given effect to. It was held in that case that in provisions of this kind the period of distribution is the death of the testator and the gift to the sons became indefeasible at that date according to the true construction of section 111 of Act X of 1865.

Under these circumstances, I am clearly of opinion that the restriction imposed by the first sentence in clause 17 of the Will is now nugatory and Nusserwanji takes the whole of his inheritance absolutely.

I will now proceed to formally answer the questions contained in the summons.

(2) 23 I. A. 18; 23 C. 563.

POHUMAL *v.* NAROOMAL.

On the first question I hold that Putlibai is entitled to be a co-executrix with the plaintiff and that she is so entitled now.

My answer to the 15th question is in the affirmative. The third defendant takes an absolute interest in all property bequeathed to him under the Will.

As the questions involved in the suit are many and as it is possible that my answers may require further elucidations or discussion or further questions requiring directions may arise, I reserve liberty to all the parties to apply, when necessary.

All costs of all parties to the suit including costs of all adjournments taxed as between attorney and client to come out of the estate of the testator.

Attorneys for the Plaintiffs: Messrs. *Kangi* and *Scyani*.

Attorneys for the Defendants: Messrs. *Nadirshaw* and *Darashaw; Payne & Co.*; *Pestonji, Rustomji, Kolah & Co.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 51 OF 1911.

October 2, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

POHUMAL RUPOMAL—APPELLANT

versus

NAROOMAL WATUMAL—RESPONDENT.

Hindu Law—Marriage expenses of a co-parcener—Marriage a samskar—*Expenses—Necessity.*

According to the Hindu Law marriage is a *samskar* and hence the marriage of every co-parcener is a family necessity. The texts referring to the marriage of brothers should be construed as illustrative of the general rule and not as excluding other co-parceners.

Jairam v. *Nathu Shamji*, 31 B. 54; 8 Bom. L. R. 632, is to be regarded as overruled by *Sundrabai* v. *Shivnarayan*, 32 B. 81; 9 Bom. L. R. 1366; 8 M. L. T. 44; *Mahadeva Pandia* v. *Rama Narayan*, 13 M. L. J. 75; *Devalapalli Kameswara Sastri* v. *Polavarapu Veeracharlu*, 8 Ind. Cas. 195; 20 M. L. J. 855; 9 M. L. T. 26; 34 M. 422, *Bhagirathi* v. *Jokhu Ram Upadia*, 6 Ind. Cas. 465; 7 A. L. J. 667; 32 A. 575, referred to.

Appeal from the decision of the Additional Judicial Commissioner of Sind.

Mr. *Hirdaram Mewaram*, for the Appellant.

Mr. *Rupchand Billaram*, for the Respondent.

JUDGMENT.—The parties belonged to a joint family related thus:—

WATUMAL,

Naroomal. | Rupomal=Tillibai,

Pohumal.

Watumal died in 1903 and Rupomal had pre-deceased him. Plaintiff Narumal sued his nephew Pohumal for partition. He alleged that there was a previous partition in 1907 in which all the moveable property had been divided and that the family house alone was excluded from that partition. He prayed for partition of the family house alone and further prayed that if the partial partition of 1907 was not proved a decree for partition of all the property should be made. Defendant Pohumal denied the partition in 1907, claimed that defendant's earnings as a weighman were joint family property and also that the family house had been mortgaged by his mother and guardian Tillibai in 1910 for Rs. 1,800 to defray the expenses of his marriage and that that mortgage was binding on the plaintiff.

The lower Court held that the partition in 1907 was not proved: that plaintiff's earnings as a weighman were his self-acquisition; and that the mortgage of 1910 was not binding on the plaintiff.

The defendant appeals raising two points (1) as to the earnings of the plaintiff as a weighman and (2) as to the mortgage for Rs. 1,800.

The first point has not been pressed and we agree with the finding of the lower Court, that these earnings were plaintiff's self-acquisitions.

The second point, however, raises question of Hindu Law. The lower Court held following the case of *Jairam* v. *Nathu Shamji* (1) that brother's sons are not entitled to have the expenses of their marriage ceremonies reserved at a partition between their father and uncles. The decision is based on the opinion of the Pandit reported at page 256 of Strange's Hindu Law. The verse from the

(1) 31 B. 54; 8 Bom. L. R. 632.

Mitakshara which the Pandit appears to have followed is Chapter I, section VII, Clause 4:—"By brethren who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." The Pandit seems to have supposed that because there was no express mention here of brother's sons it followed that the expenses of their initiation could not be charged to the family estate. I see no reason for putting this restricted interpretation upon the text or for regarding it as exhaustive. Mr. Rupchand suggests that the principle of equality should be followed and that the brother's sons should not receive their marriage expenses for their father had already received his. This principle, however, offends against the doctrine of non-accountability in respect of past dealings. The marriage expenses of the brother are for the benefit of the whole co-parcenary and are not to be treated as a debit to that brother's share, when ascertained. The corresponding texts of Narada and Yajnavalkya (see Colebrook, pages 296 and 298), lay down that it is the duty of initiated brothers to perform the ceremonies for uninitiated brothers at the charge of the paternal estate. If a similarly narrow construction were given to these texts it would lead to this anomalous result that where all the brothers were uninitiated the expenses could not properly be incurred at the charge of the joint estate.

It is now settled law that marriage is a *samskar* and that it is the last of the ceremonies of initiation. The Bombay High Court decided this in the case of *Sundrabai* v. *Shivnarayan* (2) and the Madras High Court has been converted to the same view; see *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (3). If marriage is a *samskar* the marriage of every co-parcener is a family necessity and the texts that refer to brothers should be construed as illustrative of the general rule and not as excluding other co-parceners. For if it is the religious duty of each and every co-parcener who enters the life of a *grihasthi* or house-holder to get married then it is the duty of the manager of the family to make provision for every such marriage and the legitimate expenses of such marriages would be a family necessity justifying an alienation of the joint property. Any other conclusion would lead to this curious result that in a co-parcenary like the present of an uncle and a nephew the nephew could not do, that which the Hindu Law enjoins him to do, without breaking up the joint family.

Two recent cases support this conclusion. The first is *Mahadeva Pandia* v. *Rama Narayan* (4) which is referred to in *Devulapalli Kameshar Sastry* v. *Palavarapur Veeracharlu* (3) as a case in which on partition between uncle and nephews the cost of the marriages of two nephews was deducted as a legitimate charge on the family funds. The other case is that of *Bhagirathi* v. *Jokhu Ram Upadia* (5) where a mortgage by an uncle and nephew to defray the expenses of a second marriage by the nephew was held to be a legitimate charge on the joint estate and binding on the nephew's son. We regard the case of *Jairam* v. *Nathu Shamji* (1) as overruled by the case of *Sundrabai* v. *Shivanarayana* (2) and have no difficulty in coming to the conclusion that plaintiff was bound to make provision for the marriage of the defendant Pohumal.

Mr. Rupchand contends that there was a partition of interest in 1907 which included the family house, but this was not the case made in paragraph 3 of his plaint and we agree with finding of the lower Court that there has been no prior partition.

We, therefore, refer to the lower Court the following issue for trial.

1. What, were the legitimate expenses incurred on the marriage of the defendant, Pohumal.

It will be open to the plaintiff to raise the 5th issue framed by the lower Court with reference to the sum of Rs. 420.

Finding and evidence on these issues to be certified within two months.

Suit remanded.

(2) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44.
(3) 8 Ind. Cas. 195; 34 M. 422; 20 M. L. J. 855; 9 M. L. T. 26.
(4) 13 M. L. J. 75.
(5) 6 Ind. Cas. 465; 32 A. 575; 7 A. L. J. 667.

ABDUL HAMID KHAN *v.* MEHR JAN.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 684 OF 1909.
November 28, 1912.
Present:—Mr. Justice Kensington and
Mr. Justice Shah Din.
Sardar ABDUL HAMID KHAN AND OTHERS
—DEFENDANTS—APPELLANTS
versus
Musammat MEHR JAN OR MARJAN—
PLAINTIFF—RESPONDENT.

Muhammadan Law—Invalid marriage—Right of maintenance of wife after death of husband.

Under Muhammadan Law, an invalid marriage does not entitle the wife to be maintained out of the estate of her deceased husband.

First appeal from the decree of the District Judge, Rawalpindi, dated the 15th March 1909, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Petitioner.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—This is a first appeal from the decree passed by the District Judge of Rawalpindi in a suit brought by the plaintiff-respondent, *Musammat* Mehr Jan, against the defendants-appellants, Sardar Abdul Hamid Khan and others, for a declaration that out of Rs. 4,00,000 left by the late Sardar Muhammad Ibrahim Khan, the plaintiff was entitled to receive Rs. 12,500 or, in the alternative, to receive suitable maintenance out of the estate of the deceased. The plaintiff alleged that she had been lawfully married to Sardar Muhammad Ibrahim Khan, that, as his widow, she was entitled to share in the estate of the deceased according to Muhammadan Law, that the defendants, who were the other heirs of the late Sardar, had denied her right to share in his estate; and that, in the event of its being held that she was not entitled to claim a share in the estate, she was entitled to maintenance. Upon these allegations she prayed for the reliefs set out above. The defendants pleaded that the plaintiff was not the lawfully married wife of Sardar Muhammad Ibrahim Khan and that, therefore, she was not entitled to claim any share in his estate or to receive any maintenance out of it. Upon these pleadings the District Judge framed the following issues:—

(1). Is plaintiff the lawfully married wife of Sardar Muhammad Ibrahim Khan?

(2). If so, to what share of his property is she entitled?

(3). To what relief is she entitled?

Upon these issues the learned Judge held that the plaintiff was not the lawfully married wife of the late Sardar, inasmuch as he had four wives living at the time when he married the plaintiff, and that, therefore, she was not entitled to any share in the property left by him, but he was of opinion that since the plaintiff's marriage with the Sardar was only invalid and not void [*Khurshaid Jan* v. *Abdul Hamid Khan* (1)] she had a right to be maintained out of the estate left by him. The learned Judge, therefore, passed a decree to the effect that until such time as she re-marries, maintenance at the rate of Rs. 20 per mensem be paid to the plaintiff out of the interest accruing on the sum of Rs. 12,000, which had been set apart for the purposes of the present suit out of the Sardar's estate and which was then in deposit with the Bank of Bengal. Payments of the monthly allowance were to commence from the date of the decree. From this decree the defendants have appealed to this Court, and on their behalf it has been contended by Mr. Muhammad Shafi that, upon the findings of the District Judge, that the plaintiff was not the lawfully married wife of the late Sardar and, therefore, not entitled to claim a share in his estate, she had no right to any maintenance out of it. The finding of the District Judge as to the plaintiff having been married to the Sardar at a time when his four lawfully married wives were still alive is not challenged by the respondent's Pleader and it could not well be challenged, considering that it is based upon the evidence of her own father, Muhammad Akram Khan, who was examined by the defendants as their witness; and it also accords with the statement of facts relating to the marriages of the late Sardar as given in *Khurshaid Jan* v. *Abdul Hamid Khan* (1), which was a case relating to the same family. The respondent's Pleader has, however, urged that the mere fact that his client could not be regarded as the lawfully married wife of the Sardar does not disentitle her, under

(1) 6 P. R. 1908.

Muhammadan Law, to receive maintenance out of his estate, and that the rate of maintenance fixed by the District Judge is a reasonable one. No clear provision of Muhammadan Law has been brought to our notice by the respondent's Pleader in support of the first branch of his contention, but he relies upon the analogy of the rule of Muhammadan Law under which, even in the case of an invalid marriage, the wife can claim the full amount of stipulated dower from her husband. To this the appellants' Counsel replies that the rule in question, assuming that it helps the other side by way of analogy, is applicable only to a case where the dower is claimed against the husband in his life-time, and not to a claim against his heirs in possession of his estate, and the learned Counsel urges that, under no circumstances, can the present respondent, whose marriage with the late Sardar has been held to have been invalid, claim maintenance out of his estate, now that he is dead, against his heirs, the appellants. He contends that whenever maintenance is allowed to a Muhammadan wife in the respondent's position (assuming that the fifth or sixth wife of a Muhammadan husband is entitled to maintenance), it is allowed only in his life-time and is claimable against himself, but that, as soon as he dies, his estate passes by right of inheritance to his heirs who thereupon become its exclusive owners, and as against them such wife, who cannot after the death of her husband, be regarded as his widow for purposes of Muhammadan Law, has not even the semblance of a right to be maintained out of the estate left by him. The respondent's Pleader is unable to quote any authority out of the text books on Muhammadan Law in support of his position and we have not been able ourselves to discover any such authority. We are, therefore, constrained to hold that the District Judge was not justified in decreeing maintenance in favour of the respondent out of the estate of the late Sardar Muhammad Ibrahim Khan.

We accordingly accept this appeal, and setting aside the decree of the District Judge, we dismiss the plaintiff's suit. As the plaintiff undoubtedly went through the form of marriage with the late Sardar and lived with him as his wife, she was, in our opinion, entitled to consideration at the hands of his heirs, the defendants, and on equitable grounds she was justified in asking to be maintained out of his estate. She has failed in Court because her claim could not be substantiated upon strictly legal grounds, but we think that it would be unjust to burden her with the costs of the defendants. We, therefore, direct that the parties bear their own costs throughout.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1912.

October 3, 1912.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

Akhund ABDUL WAHID *walad* *Akhund* MUHAMMAD USMAN—APPELLANT

versus

THE MANAGER, ENCUMBERED ESTATES IN SIND—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 80—*Suit for injunction—Cause of action already arisen—Courts in India not to invoke equitable jurisdiction of Chancery Court to override Indian statutes.*

Section 80 of the Code of Civil Procedure, 1908, applies to a suit for an injunction where the cause of action for the injunction is an act detrimental to the plaintiff's interests and already done by the public officer.

Fundumal v. *Mahomed Sharif*, 4 Ind. Cas. 1156; 3 S. L. R. 175, distinguished and doubted.

Asandas v. *The Manager*, Sadar Court First Appeal No. 38 of 1903, referred to.

Flower v. *Local Board of Low Leyton*, 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545; *Colls* v. *Home and Colonial Stores*, (1904) App. Cas. 179, 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 473, referred to.

Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Act of the Indian Legislature.

Appeal against the order of the District Judge, Hyderabad.

Mr. *Mathradas Ramchand*, for the Appellant.

Mr. *E. Raymond*, for the Respondent.

JUDGMENT.

PRATT, J. C.—This is an appeal against an order made by the District Judge, Hyderabad, rejecting the plaint filed

by the appellant. The order of rejection is appealable as a decree—see section 2. The reason for rejection was that the suit was barred for want of notice under section 80. The suit was for an injunction to restrain the Manager, Encumbered Estates in Sind, from selling the property of the plaintiff which he had attached.

It is contended that the suit being for an injunction to restrain a future act does not fall within the terms of section 80.

Section 80 is as follows :—

"No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing, etc."

It is said that the words "act purporting to be done by such public officer in his official capacity" refer to past and not to future acts. If the matter were *res integra* I should have no difficulty in deciding that they do refer to future acts. If the words were limited to past acts it would have been easy to express that limitation by such words as "purporting to have been done" as for instance, in section 167 of the Bombay District Municipal Act, 1901. I think it quite clear that the clause "purporting to be done by such public officer in his official capacity" is merely an adjectival clause qualifying the substantive word "act." The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future, but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty.

But in *Fundumal* v. *Mahomed Sharif* (1) it was held that the section did not apply to suits for an injunction to restrain a future act. However this was qualified by a condition derived from the case of *Asmdas* v. *The Manager* (2) that the section did apply when the cause of action for the injunction was an act detrimental to the plaintiff's interests and already done by the public officer. I do not think it necessary to refer to a Full Bench the question whether *Fundumal* v. *Mahomed Sharif* (1) was correctly decided for even applying the law as there declared notice is necessary for the property had been attached by the Manager prior to the institution of the suit.

It is next argued on the authority of *Flower* v. *Local Board of Low Leyton* (3) that the section does not apply to suits for an injunction for otherwise irreparable injury might be done before the Court can intervene.

In *Flower* v. *Local Board of Low Leyton* (3) a similar provision in the Public Health Act, 38 and 39 Vict., c. 55, was held inapplicable to suits for an injunction. The judgment in that case proceeded on the ground that a Court of Chancery would not have held that its jurisdiction to grant equitable relief was limited by the section. But the fallacy of this argument has been exposed in the case of *Colls* v. *Home and Colonial Stores* (4).

The Courts of Chancery exercised an exclusive as well as a concurrent jurisdiction. It enforced moral as well as legal duties and created new rights and remedies. The jurisdiction was crystallised during the Chancellorship of Lord Eldon and the creation of new rights and new remedies then ceased. Nevertheless in the concurrent jurisdiction the Court of Chancery instead of applying its equitable doctrines only to the remedy continued to apply them to the rights claimed. In this way it inadvertently altered the nature of the legal rights. This process was put a stop to by the House of Lords in *Colls* v. *Home and Colonial Stores* (4). There the Chancery Court had granted an injunction to restrain a building which would deprive plaintiff of some of the light he had been enjoying, but yet would not interfere with his common law right to such light as was necessary to make his house habitable. The Court of Chancery had thus indirectly enlarged the plaintiff's common law right. The House of Lords overruled a multitude of decisions of Chancery Judges and held that the equitable remedy must be limited to the legal right. Lord Macnaughten said: "Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the

(1) 4 Ind. Cas. 1156; 3 S. L. R. 175.
(2) Sadar Court First Appeal No. 38 of 1903.
(3) (1877) 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.
(4) (1904) A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475.

legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions."

Now in *Flower* v. *Local Board of Low Leyton* (3) an injunction was granted where plaintiff had under the Statute no right of action and thus the equitable jurisdiction of the remedy was inadvertently used to enlarge the legal right on which that remedy was claimed. This is the very abuse condemned in the judgment of the House of Lords in *Colls* v. *Home and Colonial Stores* (4).

Flower v. *Local Board of Low Leyton* (3) is, therefore, no longer good law; and it is perhaps necessary to add that Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Acts of the Indian Legislature.

I would, therefore, confirm the order of the lower Court and dismiss the appeal with costs.

FAWCETT, A. J. C.—I concur: but, for the reasons given in my judgment in Suit No. 252 of 1912, I think it would make no difference even if section 80 had contained the words "purporting to have been done" instead of "purporting to be done." I also think that apart from the flaw pointed out by the learned Judicial Commissioner in the reasoning on which the decision in *Flower's* case (3) is based, that decision cannot be properly followed in construing the provisions of an Indian Enactment like this section, *Cf. Secretary of State* v. *Gajanan Krishna Mavlankar* (5) and see the contrary construction now put on section 1 of the Public Authorities Protection Act, 1893, in *Fielden* (*Fielding*) v. *Morley Corporation* (6), and other cases cited in my judgment above referred to.

I also agree that this case is distinguishable from *Fundunal* v. *Mahomed Sharif* (1), even accepting the view taken in that case.

Appeal dismissed.

(5) 10 Ind. Cas. 639; 35 B. 362; 13 Bom. L. R. 273.
(6) (1899) 1 Ch. D. 1; 67 L. J. Ch. 611; 79 L. T. 231; 47 W. R. 295; 14 T. L. R. 566.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2338 OF 1909.

May 3, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Babu RAM BAHADUR—DEFENDANT—APPELLANT

versus

Babu DASURI RAM—PLAINTIFF—RESPONDENT.

Court of Wards Act (IX of 1879), *ss.* 10 A, 10 B—*Document not produced before Court of Wards not to be admissible in evidence subsequently—Claim not destroyed—Promissory-note inadmissible in evidence—Claim founded on original consideration may be enforced—Interest, claim for, under inadmissible promissory-note, not enforceable—Damages in lieu of interest may be awarded by Court.*

If a document in the possession of a creditor is not produced by him as required by sub-section (1) of section 10B of the Court of Wards Act, 1879, then under sub-section (3) of the section, it is not admissible in evidence as against the ward. But it does not follow that the effect of such omission on the part of the creditor is to destroy his rights or claim under the document.

Where a promissory-note is not admissible in evidence under the law, the true question to be considered is, whether the note has been taken in discharge of the claim or whether it is merely taken on account of the debt; in other words, if the claim is founded on the original consideration, it can be enforced, provided that the original consideration has not merged in the promissory-note. The loan itself implies a promise to re-pay, and if the promissory-note be treated merely as evidence of the loan although such evidence may be excluded by operation of law, there is no good reason why the plaintiff should not be permitted to sue on the original consideration.

Chenbasapa v. *Lakshman Ramchandra*, 18 B. 369; *Akbar* v. *Sheikh Khan*, 7 C. 256; 8 C. L. R. 583, *Krishnaji Narayan* v. *Rajmal Manikchand*, 24 B. 360 at p. 361; 2 Bom L. R. 25; *Pramatha Nath Sandal* v. *Dwarka Nath Dey*, 23 C. 851 and *Banarsi Prasad* v. *Fazal Ahmad*, 28 A. 298; A. W. N. (1906) 9; 3 A. L. J. 25, relied upon.

Where a promissory-note is inadmissible in evidence, oral evidence is not admissible under section 91 of the Evidence Act, to prove the terms of the contract for the payment of interest and, therefore, the claim for interest under the document cannot be sustained, but the Court may allow damages in lieu of interest.

Mohamaya Prosad Singh v *Ram Khelawan Singh*, 15 Ind. Cas. 911: 15 C. L. J. 684, followed.

Appeal from the decree of the District Judge of Bhagalpore, dated July 17th, 1909, confirming that of the First Sub-Judge of Monghyr dated February 12th, 1909.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Appellant.

Maulvi *S. M. Tahir*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendant in an action for recovery of money. On the 19th September 1906, the defendant borrowed from the plaintiff Rs. 1,100 and agreed to pay interest at the rate of two per cent. per mensem. On the same date, he gave a promissory-note duly stamped. In 1907 the Court of Wards assumed charge of the estate of the defendant, and a notification was issued by which the creditors of the estate were invited to prefer their claims and to produce evidence in support thereof. The plaintiff preferred his claim, but he did not produce the promissory-note before the Collector. On the 4th May 1908, he commenced this action for recovery of the sum advanced with interest thereon at the contract rate. The defendant in substance denied the loan. The Courts below have found upon the evidence that the loan has been proved and have accordingly made a decree in favour of the plaintiff. On behalf of the defendant, the decree of the District Judge has been assailed on two grounds, namely, *first*, that in view of the provisions of section 10B of the Court of Wards Act of 1879, the promissory-note was not admissible in evidence, nor was oral evidence admissible in proof of the claim; and, *secondly*, that in view of the provisions of section 91 of the Indian Evidence Act, oral evidence was not admissible in proof of the agreement to pay interest.

In support of the first contention, reliance has been placed upon the cases of *Ankur Chunder Roy* v. *Madhub Chunder Ghose* (1) *Prosunno Nath Lahiree* v. *Tripoora Soondaree Dabee* (2); *Sheikh Akbar* v. *Sheikh Khan* (3) *Valiappa* v. *Mahomed Khasim* (4) and *Pothi Reddi* v. *Velayudasivan* (5) reference has also been made to the cases of *Golap Chand Marwaree* v. *Thakurani Mohokoom Koouree* (6) *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (7), *Banarsi Prasad* v. *Fazal Ahmad* (8) and *Krishnaji Narayan* v. *Rajmal Manikchand* (9) with a view to distinguish them, as they appear at first sight to negative the argument of the appellant. In our opinion the first ground urged by the appellant cannot prevail.

Section 10B of the Court of Wards Act of 1879 provides that every creditor submitting his claim in compliance with the provisions of section 10A, sub-section (1), shall furnish, along with the written statement of claim, full particulars, and shall, within such time as the Court may appoint, produce all documents which are in his possession, power or control (including entries in books of account) on which he relies to support his claim, together with a true copy of every such document. If any document which, to the knowledge of the creditor is in his possession, power or control, is not produced by him as required by sub-section (1), the document shall not be admissible against the ward, whether during the continuance of the management or afterwards, in any suit brought by the creditor or by any person claiming under him in respect of such claim. It is clear, therefore, from sub-section (3) of section 10B, that if a document in the possession of the creditor is not produced by him as required by sub-section (1), the document is not admissible in evidence as against the ward. It does not follow, however, that the effect of such omission on the part of the creditor is to destroy his rights. In fact the provisions of section 10A make it reasonably plain that the right itself is not affected by the omission. Sub-section (2) of section 10A provides that if a claim is not preferred as provided in sub-section (1), notwithstanding any law or contract, decree or award to the contrary, it shall cease to carry interest from the date of the expiry of the period within which the claim was to be preferred. The omission to prefer a claim does not, consequently, operate to destroy the claim, it would thus be wholly unreasonable to hold that the omission to produce evidence in support thereof operates to extinguish the claim. We must take it, therefore, that, notwithstanding the provision of section 10B of the Court of Wards Act, 1879, the right of the plaintiff as creditor of the defendant remains unaffected.

It has been argued, however, by the learned Government Pleader that as the promissory-note is the foundation of the claim, the effect of the exclusion of the promissory-

(1) 21 W. R. 1.
(2) 24 W. R 88.
(3) 7 C. 256; 8 C. L. R. 533.
(4) 5 M. 166.
(5) 10 M. 94.
(6) 3 C. 314.
(7) 23 C. 851.
(8) 28 A. 293; A. W. N. (1906) 9; 3 A. L. J. 25.
(9) 24 B. 360 at p. 361; 2 Bom. L. R. 25.

note from evidence is substantially to make the claim inoperative and unenforceable. But this view is not supported by the cases upon which reliance has been placed. It was laid down by Lord Kenyon in *Farr* v. *Price* (10) that plaintiff, having claimed upon a promissory-note which is invalid for want of a proper stamp, is not debarred from claiming upon any ground of action which he can prove without the aid of the note; in other words if the plaintiff could give other evidence of consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant having given an improper promissory-note for it. The same view was adopted in the case of *Welson* v. *Kennedy* (11) where Lord Kenyon pointed out that it would be open to the plaintiff to sue on the original consideration and that if the defendant alleged that there was a bar to the claim by reason of the promissory-note being not properly stamped, such note would not be admissible in evidence, and so the plaintiff would be in a position to enforce his claim. A similar view was taken by Mansfield, C. J., in *Brown* v. *Watts* (12) and in the earlier decisions in *Farr* v. *Price* (10) and *Tyte* v. *Jones* (13). The same doctrine was recognised in *Crowe* v. *Clay* (14), *Griffiths* v. *Owen* (15), *Wain* v. *Bailey* (16) and *James* v. *William* (17). But it is argued by the learned Government Pleader that the decisions of this Court in the cases of *Ankur Chunder Roy* v. *Madhub Chunder Ghose* (1), *Prosunno Nath Lahiree* v. *Tripoora Soondaree Dabee* (2), and *Sheikh Akbar* v. *Sheikh Khan* (3), support his contention. It may be conceded that at first sight there does appear to be a conflict of judicial opinions upon this question; but upon a closer examination of the cases, it will appear that they may be reconciled if we recognise the principle that the true question in cases of this character is, whether the promissory-note has been taken in discharge of the claim or whether it is merely taken on account of the debt, in other words, if the claim is founded on the original consideration it can be enforced, provided that the original consideration has not merged in the bond or promissory-note. *Chenbasapa* v. *Lakshman Ramchandra* (18). This in fact is the principle which was recognised by Sir Richard Garth in *Sheikh Akbar* v. *Sheikh Khan* (3), and by Sir Lawrence Jenkins in *Krishnaji Narayan* v. *Rajmal Manikchand* (9). In the case before us the claim is substantially based on the original consideration. When the promissory-note was given it did not furnish any additional security for the loan. The loan itself implied a promise to re-pay and if the promissory-note be treated merely as evidence of the loan, although such evidence may be excluded by operation of law, there is no good reason why the plaintiff should not be permitted to sue on the original consideration. On the whole, therefore, we are of opinion that upon the principle recognised in the cases of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (7) and *Banarsi Persad* v. *Fazal Ahmed* (8), the claim of the plaintiff may be sustained. The first contention of the appellant accordingly fails.

In so far as the second contention is concerned, it must, in our opinion, prevail. The terms of the contract for payment of interest were reduced to writing. The written instrument has been excluded from evidence by reason of the provisions of section 10B of the Court of Wards Act, 1879. It is clear, therefore, that under section 91 of the Indian Evidence Act, oral evidence was not admissible to prove the terms of the contract for the payment of interest. The learned Vakil for the respondent has ingeniously suggested that as the instrument itself must be held inadmissible, there is no proof that the terms of the contract for payment of interest were reduced to writing. This argument is obviously fallacious. The written instrument may be looked at for the purpose of showing that the terms of the contract for payment of interest had been reduced to writing within the meaning of section 91 of the Indian Evidence Act, or oral evidence may be given to show that the contract, as a matter of fact, was reduced to writing. We hold accordingly that the

(10) (1800) 1 East 55; 5 R. R. 515; 102 Eng. Rep. 22.
(11) (1794) 1 Espinasses Rep. 245.
(12) (1808) 1 Taunt. 353; 9 R. R 793; 127 Eng. Rep. 870.
(13) (1788) 1 East 58*n*; 102 Eng. Rep. 23*n*.
(14) (1854) 9 Ex. 604; 23 L. J. Ex. 150; 18 Jur. 654; 2 W. R. 204; 96 R. R. 867; 23 L. T. (o. s.) 38.
(15) (1844) 13 M. & W. 58; 2 D. & L. 190; 13 L. J. Ex. 345; 67 R. R. 510.
(16) (1839) 10 A. & E. 616; 50 R. R. 514; 2 P. & D. 507; 113 Eng Rep. 234.
(17) (1845) 13 M. & W. 828.
(18) 18 B. 369.

claim for interest cannot be sustained. It is open to the Court however, to allow damages in lieu of interest [*Mohimaya Prosad Singh* v. *Ram Khilawan Singh* (19)].

The result is that this appeal is allowed in part and the decree of the District Judge modified. The plaintiff will have a decree for the principal sum together with damages in lieu of interest at the rate of six per cent. per annum from the date of the loan to the date of realization. As regards the costs of the suit in the Court below, the order made by that Court will stand, there will be no costs in this appeal.

Appeal allowed partly.

(19) 15 Ind. Cas. 911; 15 C. L. J. 684.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 16 OF 1912.

October 25, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

THADOMAL BEGRAJ AND OTHERS—APPELLANTS

versus

JESUMAL BEHARIMAL—RESPONDENT.

Easement—Light and air—Easement of air more important—Closing of ventilators—Depriving of effective ventilation—Serious injury—Damages—Where to be allowed.

Where by the closing of certain ventilators in a house, a through draft for the house and effective ventilation is not left, the injury is so serious that the house will not be as substantially useful as a residence as it was before.

In India the right to air is more important than the right to light.

Damages should be awarded where the injury is not so serious that the property might not still remain the plaintiff's and be as substantially useful to him as before.

Holland v. *Worley*, (1884) 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7; *Kadarbhai* v. *Rahimbhai*, 13 B. 674, relied upon.

Appeal from the decision of the Joint Judge, Sukkur-Larkana.

Mr. *Dipchand T. Ojha*, for the Appellants.

Mr. *Isarsing Hazarising*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is whether damages or an injunction is the appropriate relief in respect of the closing of the plaintiffs' *jaras* or ventilators by the defendant. That depends upon whether pecuniary compensation would be an adequate relief. This is always a difficult question to determine, but the rule laid down in *Holland* v. *Worley* (1) and adopted by the Bombay High Court in *Kadarbhai* v. *Rahimbhai* (2) seems to us to be a useful guide, that is "that damages should be given where the injury is not so serious that the property might not still remain the plaintiff's and be as substantially useful to him as before." Mr. Dipchand has laid great stress on the fact that the rooms from which the *jaras* open are used chiefly as store rooms and that the light coming from the *jaras* is intercepted by a shelf. He argues that as the rooms are always in semi-darkness this diminution of the light will not materially affect the comfort of the plaintiff or the utility of the rooms. The lower Appellate Court, however, has based its decision mainly on the question on ventilation. Plaintiff has a right to air as well as to light and in India the right to air is of more importance than the right to light. Now the house has no doors or windows on the east or west. There is a door and verandah on the north and the only opening on the south, are the three *jaras*. It seems obvious, therefore, that if the three *jaras* are closed there will be no through draft for the house and no effective ventilation. We think the absence of ventilation which the closing of the *jaras* will lead to is an injury so serious that the house will not be as substantially useful as a residence as it was before.

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1) (1884) 26 Ch. D. 578 at p. 585; 54 L. J. Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7.

(2) 13 B. 674.

GOKULDAS *v.* VALIBAI.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT No. 819
OF 1912.
February 21, 1913.
Present:—Mr. Justice Beaman.
GOKULDAS KARSANDAS—PLAINTIFF
versus
VALIBAI—DEFENDANT.

Trusts Act (*II of* 1882), *ss.* 53, 88—*Executor de son tort*—*Trustee purchasing a permanent tenancy in the estate*—*Purchase to be held for the benefit of the minor.*

An executor of the estate of a minor entrusted the management of the estate to *V.*, who after the death of the executor continued the management. During this period of management after the death of the executor, *V.* bought the Fazendari tenancy of a tenant of the estate:

Held, that *V.* was an executor *de son tort*, and therefore, a trustee. By taking over a permanent lease for his own benefit and use on the estate with which he was intermeddling, he came within the principle, if not the letter, of the prohibition contained in section 53 of the Trusts Act.

The case equally fell under section 88 of the Trusts Act, and the purchase by *V.* must be taken to have been a purchase on account of, and for the benefit of, the minor.

Mr. *Talyarkhan*, (with him Mr. *Inverarity*) for the Plaintiff.

Mr. *Bahadurji*, (with him Mr. *Wadia*), for the Defendant.

JUDGMENT.—I have stopped the case at this point because I think it useless to waste further time and money in the collection and criticism of evidence upon facts in dispute. I am not going to take the case one inch beyond the admitted facts. On these I do not entertain the least doubt but that the necessary conclusion of law follows.

Briefly, the material facts are that one Karsandas Liladhar died in 1902, having executed a Will, appointing as his executors his two elder sons, Ranchordas and Narotam, and bequeathing his estate to his two minor children, Gokuldas and Damodar. The family was attacked by plague and the eldest son, Ranchordas, pre-deceased his father by a few hours. Next Karsandas died, and very shortly afterwards his younger son Damodar. Thus there remained one executor Narotam and the present plaintiff, to whom the deceased Karsandas Liladhar had left all his estate. Narotam came to Bombay after having entrusted the management of Karsandas's Mahim properties (in which a small plot of land now in dispute is included) to Nathu Valji, a close friend and relative of the family. In 1903 Narotam died, and up to that time the minor, the plaintiff, Gokuldas, resided with Bai Premcorebai, widow of the deceased Ranchordas. In 1904 the plaintiff went to reside with Nathu Valji, who was continuing the management of the Mahim estate after the death of Narotam as before that event. In 1905 Nathu Valji bought the Fazendari tenancy of a tenant of the estate he was managing for the minor Gokuldas. It has been the plaintiff's contention that this purchase was made out of the estate money and for the benefit of the estate; and if that were so, then there could be no question but that the plaintiff would be entitled to succeed.

It is upon this point that the evidence was led and it was clear that if the case were allowed to proceed on these lines, a very great deal of evidence of a complicated kind would be accumulated. For the purposes of my decision I am quite willing to adopt the defendant's counter-suggestion that Nathu Valji bought the Fazendari tenure, described in these proceedings as house No. 294, out of his own money and for his own use. I still say that in these circumstances the case falls clearly within the scope and intention of section 88 of our Trusts Act and also under the prohibition of section 53 of the Trusts Act. It is clear from the facts, which I have stated, that after the death of Narotam, Nathu Valji in continuing the management of Karsandas Liladhar's estate was an executor *de son tort*.

I have stopped the narrative at the point when this property was purchased, because what followed in 1906 appears to me to have no effect upon the essential ingredients of the legal question I am considering.

In 1905, then, Nathu Valji, an executor *de son tort*, and, therefore, as held from early times in England, a trustee, or under obligations exactly analogous to those of a trustee [see the case of *Mulvany* v. *Dillon* (1)], took over a permanent lease for his own benefit and use on the estate

(1) (1810) 1 Ball & B. 409 at p. 418; 12 R. R. 43.

with which he was intermeddling. There can, I think, be no question that in such circumstances he is within the principle, if not the letter, of the prohibition contained in section 53 of our Trusts Act. That section in terms is restricted to a trustee or a person who has just ceased to be a trustee; and it may be argued that if construed strictly it ought to be confined to express trustees; but the English Judges have, I think, always taken a more enlarged view of the principle. In the notes to *Keech* v. *Sandford* (2) will be found a case *Mulhallen* v. *Marum* (3) decided by Sugden, L. C., of which the facts are almost identical with the facts here, and that eminent and learned Judge had no hesitation in setting aside the lease so obtained by the trustee for his own benefit. It appears to me equally plain that this falls under section 88 of the Trusts Act. Here the argument is not embarrassed by any dispute as to whether a literal or enlarged meaning should be given to the word "trustee," for it is the defendant's own case that Nathu Valji was an agent for all purposes of managing this Mahim portion of the estate, and section 88 expressly includes agents.

Then, it is to be seen whether in purchasing this Fazendari lease for himself, Nathu Valji's interests were in conflict with the interests of the estate he was bound to protect, and, if so, whether preferring his own interests to those of the estate he obtained an inequitable advantage. There can be no question but that he has obtained an advantage. Bating the disputed point whether Rs. 75 of the nominal consideration of Rs. 125 paid for this Fazendari lease was really made up of rents due to the estate, and admitting that Nathu Valji paid the whole consideration ot Rs. 125 to the widow of Benjamin De Souza, it is clear from further admitted facts that have been stated in argument here that the property to-day is worth considerably more than Rs. 125. Now the defendant, Valibai, is about to sell it to a Muhammadan for Rs. 800.

(2) (1726) 2 White & Tudor (7th Edn.) 693 at p. 701.

(3) (1843) 3 Dr. & W. 317.

There can, therefore, be but one answer to the question whether Nathu Valji obtained an advantage. Did he, then, obtain it in circumstances in which his own interests were in direct conflict with the interests of the estate? The first part of the section would only apply were the Court to find facts alleged by the plaintiff, namely, that Nathu was able to bring pressure to bear upon the Fazendari tenant by reason of that tenant having fallen in arrears of rent to the estate; and I am not making anything of that consideration, but the principle of the second part of the section seems to me to apply to the admitted facts here too clearly to allow of any serious argument to the contrary. The buying in of this permanent lease out of an estate, which is what Nathu Valji did for himself, must in almost every case be of extreme advantage to the estate. It is not as though this lease were upon a property elsewhere. It is upon a small plot of some two hundred and twenty square yards in the very heart of the Mahim Oart, and it was manifestly desirable if it could be done to buy out the Fazendari tenant and so get rid of this permanent lease which yielded no more than Rs. 12 for the estate. Had the estate purchased it, as it ought to have done, it would have been disencumbered of this continuing hindrance in the very centre of it, which, of course, prevents the owner dealing with so much of his property as he might wish, and in the present circumstances to his own best advantage. What has actually happened is that owing to the purchase by the agent for himself, his widow is now offering the tenancy for sale at Rs. 800 to a Muhammadan, who will thus, if allowed to purchase, become a permanent tenant and a very disagreeable one from the plaintiff's point of view, in the very heart of his property. Having regard to such considerations, it appears to me altogether indisputable that the manager of an estate like this, in which are to be found these old Fazendari tenants, ought to have known, and did know, that it was primarily in the interests of the estate and for the benefit of the estate to buy in whenever possible these old permanent tenancies. So that in purchasing one for himself he must be presumed, I think, to have taken advantage of his position and knowledge as temporary

manager to put his own interests in direct conflict with the interests of the estate and thereafter to have neglected the interests of the estate and preferred his own. If this view is correct, and I have no doubt that it is, then the principle laid down in section 88 of the Trusts Act must apply and the purchase by Nathu Valji in 1905 must be taken to have been a purchase on account of, and for the benefit of, the minor. Assuming as I have done for the purposes of this argument that the full purchase-money was paid by Nathu Valji out of his own pocket, the plaintiff would, no doubt, be liable to pay that sum to the defendant, Nathu Valji's widow. It is not worth-while in these circumstances to take evidence and decide what in fact was paid, and whether that money was paid by Nathu Valji himself or out of the funds of the estate, for the plaintiff, in order to cut the matter short and without any prejudice to his contentions to the contrary, is quite willing to reimburse the defendant, Valibai, the Rs. 125, which the defendant alleges was paid by Nathu Valji out of his own funds as the price of this property. It is to be clearly understood that in making this offer, the plaintiff does not abandon any of his contentions, and it is only because the sum is so inconsiderable and the matter, in my opinion, ought to be cut short that I make the re-payment of this money a term of the decree.

On the other hand, the defendant must clearly account to the plaintiff for actual rents of the land received since its purchase in 1905 and not applied to the plaintiff's use. The one sum to be set off against the other. And the plaintiff's claim in all other respects to be decreed with all costs.

By agreement the Solicitors to take these accounts.

Attorneys for the Plaintiff: Messrs. *Madhowji, Kamdar* and *Chhotubhai.*

Attorneys for the Defendant: Messrs. *Unwalla, Pirojshaw and Pappa.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1501 OF 1911.

March 27, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

KATRAGADDA RADHA KRISHNAYYA NAIDU—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

Water—Engagement with Government—Proof.

An agreement between a Collector and a private person will not bind the Government. But an implied engagement can be proved by the course of conduct followed for long by the Government officers and by such person.

It is wrong to hold that the Government can, under no circumstances, be bound not to interfere with the usual supply of Government water to plaintiff's lands unless there was an express engagement with the Government.

Second appeal against the decree of the District Court of Kistna and Masulipatam, in Appeal Suit No. 289 of 1908, preferred against that of the Subordinate Judge of Masulipatam, in Original Suit No. 2 of 1907.

Mr. *V. Rama Doss*, for the Appellant.

Mr. *C. F. Napier*, for the Respondent.

JUDGMENT.—The lower Courts are in error in holding that the Government can, under no circumstances, be bound not to interfere with the usual supply of Government water to the plaintiff's lands, unless there was an express engagement with the Government. They are right in saying that an agreement between the Collector and the plaintiff will not bind the Government.

But an implied engagement can be proved by the course of conduct followed for long by the Government Officers and by the plaintiff, and the Subordinate Judge was in error in stopping the plaintiff from letting in the whole of his evidence. In *Chidambara Rao* v. *The Secretary of State for India in Council* (1) it was held that *the Government were* bound not to interfere with the facilities enjoyed by the *inamdar* for irrigating the extent of land mentioned in his *Inam patta* as *mamool* wet. In *Kandukuri Mahalkshmamma Garu* v. *The Secretary of State for India* (2) it is suggested that "the admissions of the Officers of the Government" might be good

(1) 26 M. 66.

(2) 8 Ind. Cas. 67; (1910) M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823; 34 M. 295.

"evidence of the suggested" (implied), "engagement" between the Government and the plaintiff that Government should not interfere with the usual quantity of water supplied to the *mamool* area of wet lands. Whether in a case where an engagement is proved the Government could even then cut off the usual supply in pursuance of an alleged paramount right to regulate the supply of water in seasons of drought and to divert the water to irrigate other lands served by the same irrigation source, and whether such an alleged paramount right could only be effectual as between *ryotwari* tenants and could not be held to overrule the right flowing from the engagement (express or implied) between an *inamdar* or a *zemindar* and the Government need not be finally decided just now. It is unnecessary also to refer at this stage to the decision reported as *Sri Raja Venkata Rangayya Appa Rao* v. *The Secretary of State for India* (3) as the learned Government Pleader wishes to be allowed an opportunity (if necessary) to make his observations on certain portions of the judgment pronounced in that case. The lower Courts' decisions are reversed and the suit is remanded to the Court of first instance for a fresh decision after recording findings on issues Nos. 2 to 6 and on the following further issues :—*first additional issue*:—Has there been an implied engagement between Government and the *inamdar* to supply the *inamdar* with facilities for irrigation to the extent to which he enjoyed such facilities before his sources of supply to his *mamool* wet lands were interfered with by the Government works?

2nd additional issue.—Is such an engagement a qualified or an absolute one and, if qualified, to what extent?

Costs hitherto incurred will be costs in the cause.

Case remanded.

(3) 19 Ind. Cas. 227; 13 M. L. T. 330; (1913) M. W. N. 417

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1446 OF 1911.

December 10, 1912.

Present:—Mr. Justice Chevis.

HONDA RAM—JUDMENT-DEBTOR—PETITIONER

versus

CHIBBAR MAL—DECREE-HOLDER—RESPONDENT.

Punjab Courts Act (XVIII of 1884), s. 70 (1) (a)—Revision—Civil cases—Material irregularity—Question of law wrongly decided by lower Court.

Where it was urged on revision that the lower Court had erred in law in relying upon an inapplicable ruling of the Chief Court:

Held, that revision must be rejected as the question of law involved was not an easy one.

Jagan Nath v. *Budhwa*, 2 P. R. 1907; 157 P. L. R. 1906 and *Moti Ram* v. *Har Baghwan Dass*, 9 Ind. Cas. 549; 30 R. L. R. 1911; 15 P. R. 1911: 109 P. W. R. 1911, referred to.

Petition for revision, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, of the order of the District Judge, Muzaffargarh, dated the 2nd February 1911, reversing that of the Munsif, 1st class, Muzaffargarh, dated the 2nd December 1910, setting aside the sale of property in execution of a decree

Bhagat *Gobind Das*, for the Petitioner.

R. S. Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—This revision was admitted only in respect of ground No. 4 of the petition, which is that the lower Court has made a mistake in considering that *Jagan Nath* v. *Budhwa* (1) relates only to cases of conditional sale. The particular case dealt with in *Jagan Nath* v. *Budhwa* (1), was a case of conditional sale, and even if *Jagan Nath* v. *Budhwa* (1) be regarded as laying down the law relating to all classes of mortgage, I cannot after due reflection, help admitting that the objection raised by Rai Sahib Sheo Narain, *viz.*, that there is no irregularity shown such as would justify interference under section 70 (1) (*a*) has force.

The District Judge has duly considered the point of law raised and even if he has decided it incorrectly, I am of opinion, that this is not an irregularity justifying interference under section 70 (1) (*a*). In passing, I may add, that the question of law raised was not an easy one; the subject

(1) 2 P. R. 1907; 157 P. L. R. 1906.

is dealt with in another judgment [*Moti Ram* v. *Har Bhagwan Das* (2).]

This application for revision is dismissed with costs.

Advocate's fee Rs. 16.

Appeal dismissed.

(2) 9 Ind. Cas. 549; 15 P. R. 1911; 109 P. W. R. 1911; 30 P. L. R. 1911.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 723 OF 1912.

March 18, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

KARUMUSI BRAHMANNA SASTRULU

PLAINTIFF—APPELLANT

versus

JALDU VENKATA SUBHA ROW AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pleadings—Plaintiff alleging a fact—Defendant denying but admitting a certain sum due—Decree and judgment.

Where the plaintiff sues for dissolution of partnership and for ascertainment of his share and the defendant pleads that the partnership was dissolved and a certain amount is due to plaintiff, the Courts ought to give a decree for the sum admitted to be due by the defendant.

The fact that the plaintiff was persistent in denying the defendant's case and has refused his offer of payment is not a sufficient ground for refusing him the decree for the amount admittedly due.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Masulipatam, in A.S. Nos. 66 and 67 of 1911, presented against that of the Court of the Additional District Munsif of Masulipatam, in O. S. No. 1141 of 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—We are bound to accept the finding that, as a matter of fact, the partnership was dissolved on the 31st of May 1908. As regards the plaintiff's claim in this appeal for Rs. 650—decreed to him by the Court of first instance but refused by the Subordinate Judge in Appeal No. 67 of 1911, that sum was due to him under one of the terms of the dissolution, and though the plaintiff did dot admit in his plaint that the partnership was dissolved, the lst defendant alleged the dissolution and the liability of the firm to pay the plaintiff Rs. 650—and on this state of the pleadings the District Munsif gave the plaintiff a decree for Rs. 650—against the Jst defendant. We think the Subordinate Judge had not sufficient ground for reversing this decree. Though the sum was not due to the plaintiff, on his own case, it was due to him on the 1st defendant's case. The plaintiff's case was that what was due to him from the partnership had yet to be ascertained; the defendant's case was that, that sum had already been ascertained, and both Courts found in favour of the 1st defendant's case. In the circumstances a decree for the amount found due as alleged by the 1st defendant himself is justified by the pleadings though it was not claimed in the plaint (*Cf. Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (1) and the fact that the plaintiff was persistent in denying the 1st defendant's case and has refused his offer of payment is not a sufficient ground for refusing him the decree for the amount admittedly due. The plaintiff has been punished by being made to pay all the costs of the 1st defendant in the Court of first instance and of that he does not complain.

We allow the appeal and modifiy the decree by restoring the directions to the 1st defendant to pay to the plaintiff the sum of Rs. 650.

The appellant will pay the 1st respondent half his cost of the appeal in this Court.

In the lower Appellate Court the Appeal No. 67 of 1911—the 1st defendant's appeal against the decree for Rs. 650—will stand dismissed without costs.

Decree modified.

(1) 28 A. 482; 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 481; 1 M. L. T. 183; 8 Bom. L. R. 397; 16 M. L. J. 269 (P. C.).

GOPAL *v.* GOVIND.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 312 OF 1912.

February 5, 1913.

Present:—Sir Henry Drake-Brockman, KT., J. C.

GOPAL—DEFENDANT—APPELLANT

versus

GOVIND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Interest—Intention to pay, as such, not to be inferred from creditor's statutory power to appropriate a payment—Appropriation in accordance with contract—Specific appropriation on each occasion not required by law.

For the purposes of section 20 of the Limitation Act, 1908 an intention to pay interest as such ought not to be inferred merely from an act done by the creditor in pursuance of a power given him by law to appropriate a payment not appropriated by the debtor. But where the method of appropriation is determined at the outset by express contract between the parties, the law does not require a specific appropriation to be made on the occasion of each payment.

Gopalrao v. *Chindhu*, 15 C. P. L. R. 29 and *Mohammad Abdullah Khan* v. *Bank Instalment Company*, 2 Ind. Cas. 379; 6 A. L. J. 611; 31 A. 495, referred to and distinguished.

Compound interest in itself is perfectly legal.

Sunder Koer v. *Rai Sham Krishen*, 34 C. 150 (P. C.); 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75, referred to.

Second appeal against the decree of the Divisional Judge, Nagpur Division, dated the 6th April 1912, reversing that of the Subordinate Judge Nagpur, dated the 8th November 1911.

Mr. *S. Y. Deshmukh*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the mortgagee on foot of a mortgage dated the 13th July 1895. The document has been held inoperative as a mortgage for want of the attestation required by law, *i. e.*, an attestation of the execution as distinguished from an admission of execution : see *Pandurang* v. *Balaji* (1) and *Shamu* v. *Abdul Kadir* (2). The lower Appellate Court has given the mortgagee a decree for money.

The cause of action arose on the 21st April 1898, by which date default had been made in respect of three instalments of the mortgage-debt. The plaint gave credit for 10 payments of interest on dates between the 14th April 1901 and the 23rd May 1909. One of the two mortgagors pleaded in his written statement that the personal remedy was time-barred, inasmuch as the suit was filed more than six years after the mortgage-money became exigible. The plaintiff replied that in accordance with the express terms of the mortgage-deed every payment was made against interest. To this no rejoinder was filed. Compound interest was claimed in accordance with the terms of the deed, but the liability to pay it was denied on the ground of the stipulation for it being by way of penalty.

The lower Appellate Court has held that section 20, Indian Limitation Act, operates to save the claim from being time-barred, inasmuch as all the payments entered in the plaint were made as interest. In second appeal this decision is impeached as not supported by evidence, and it is urged that if the claim is not dismissed as barred by time the case should at least be remanded for trial of an issue embodying the question whether payments were made against principal or against interest.

Gopalrao v. *Chindhu* (3) and *Mohammad Abdullah Khan* v. *Bank Instalment Company* (4) are cited as authorities for the contention that no intention on the part of the debtor to pay towards interest has been made out. Both, however, are clearly distinguishable. In the former it was pleaded that the payments made were towards a debt other than that sued for, whereas in the present case there was admittedly no other debt due to the mortgagee. In the Allahabad case the claim was based on a promissory-note, and the learned Judges who decided the second appeal could find no indication whatsoever that the debtor's payments were made towards interest as such : the note evidently contained no stipulation on the point. Both decisions are authority for the position that an intention to pay interest as such ought not to be inferred merely from an act done by the creditor in pursuance of a power given him by law to appropriate a payment not appropriated by the debtor. The present case, however, is one in which the method of appropriation was determined at the outset by express contract between the parties, and I find nothing in section 20 of

(1) 14 C. P. L. R. 42.

(2) 16 Ind. Cas. 250; 39 I. A. 220; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596; 16 C. W. N. 1009.

(3) 15 C. P. L. R. 29.

(4) 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611.

the Indian Limitation Act to indicate that even where such an arrangement exists a specific appropriation must be made on the occasion of each payment. The defendant who raised the plea of limitation was represented by a Pleader when the plaintiff's written statement was put in and issues were framed, yet the allegation that the payments were made against interest was not denied. In these circumstances I am unable to think that any issue as to the nature of the payments can be said to have arisen. In this Court the dates of payment entered in the plaint are admitted to be correct and taking them with the stipulation as to appropriation of payments there is ample ground for holding the claim to be within time. Moreover, the Court of first instance did actually frame an issue embodying the question whether the claim for a simple money-decree is time-barred, so that the appellants, having failed to adduce any evidence of specific appropriation to principal, cannot at this stage be allowed to make good the omission.

This Court is also asked to disallow compound interest as penal. The rate stipulated for in the deed is the distinctly moderate one of $8\frac{1}{4}$ per cent. per annum and that is the original rate charged. In view of the decision of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (5) it is impossible to hold that the stipulation complained of amounts to a penalty. The earlier decision of this Court in *Bhagwant Atmaram* v. *Ganpati* (6) is also in the plaintiff-respondent's favour.

The appeal fails and is dismissed with costs. In the Courts below costs will be borne as already ordered.

Appeal dismissed.

(5) 34 C. 150 (P. C.); 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9.

(6) 1 N. L. R. 9.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1229 OF 1910.

May 12, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

RAHMAT KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BISAN AND OTHERS—DEFENDANTS RESPONDENTS.

Custom—Ghorewaha Rajputs *of Garhshankar Tahsil, Hoshiarpur District—Inheritance to ancestral estate—Daughters and daughter's sons not excluded by collaterals of more than seven degrees distant*—Onus probandi—Riwaj-i-am *of the Tahsil—Of no weight.*

Among *Ghorewaha Rajputs* of the Garhshankar Tahsil of the Hoshiarpur District, daughters and daughter's sons are not excluded from inheritance to the ancestral estate by collaterals more distantly related than the 7th degree.

The onus lies heavily upon the party alleging such exclusion.

No weight can be attached to the *Riwaj-i-am* of the Tahsil.

Second appeal from the decree of the Additional Divisional Judge, Hoshiarpur Division, at Ludhiana, dated the 22nd August 1910, confirming that of the Sub-Judge, 2nd class, Hoshiarpur, dated the 28th October 1909, dismissing plaintiffs' claim.

Mr. *Fazal i-Hussain*, for the Appellants.

The Hon'ble Mr. *Muhammad Sahfi*, K. B., for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether among *Ghorewaha Rajputs* of the Garhshankar Tahsil of the Hoshiarpur District the daughters and daughter's sons of a proprietor who died sonless are excluded from inheritance to the ancestral estate by collaterals more distantly related than the 7th degree.

Both the lower Courts have concurred in deciding this question in the negative, and have dismissed the suit of the collaterals, who have lodged a further appeal in this Court.

A good deal depends in this case on the question of onus.

In *Abdul Karim* v. *Sahib Jan* (1) it was laid down that there was no general presumption that regardless of tribe and creed agnates, however remote, exclude daughters from succession to ancestral property. It was found that the plaintiffs in that case, who were collaterals

(1) 5 P. R. 1908; 99 P. L. R. 1908; 29 P. W. R. 1908.

in the 7th degree, had failed to prove that they were entitled to succeed in preference to a married daughter of the deceased proprietor.

The onus was considered to lie on the plaintiffs-collaterals.

In *Rajo* v. *Karm Bakhsh* (2) the onus was held to be on collaterals of the 8th degree to show that they could succeed in preference to a daughter. The parties were *Jat Mussalmans.*

In *Bholi* v. *Man Singh* (3) similar view was taken as regards the onus, the dispute there being between daughters and collaterals of the 6th degree. The parties were *Rajputs* of the Ambala District.

Having regard to the above authorities we are clear that the onus lay heavily upon the plaintiffs.

The main point in their favour is the *Riwaj-i-am* of the Garhshanker Tahsil, in which the following sentence occurs:

"*Am taur par kisi surat men dukhtar ko haq na pahunchta, lekin ba halat na maujud hone aulad narena wa karabatian jaddi ya goti dukhtar ko pahunchta.*"

The learned Divisional Judge has pointed out the difference in the provisions relating to daughters in the *Riwaj-i-ams* of the three Tahsils of the Hoshiarpur District.

In Dasuha it is stated that daughters have no right under any circumstances, whereas in Hoshiarpur she is stated to succeed if there is no one more nearly related to her father than one descended from a common great grandfather.

No instances are given in any of the *Riwaj-i-ams.* The statement in that of Dasuha that daughters cannot succeed under any circumstances is obviously absurd, and it is highly improbable that in Garhshankar Tahsil they would be excluded by any reversioner, however remote. This is not in accordance with custom as generally ascertained throughout the Punjab.

We, therefore, are of opinion that no weight attaches to the *Riwaj-i-am.*

The instances cited are not very much in point, *Ranjli Khan* v. *Musammat Kamun* (4) was a case of *Naru Rajputs* of the Hoshiarpur Tahsil, and the decision was based upon the *Riwaj-i-am* which was against the collaterals, who were related in the 6th degree.

The case referred to as D-1 by the first Court, *Fauji Khan Wazir Khan* v. *Musammat Alto,* is, however, in favour of the respondents, as it was a case of *Ghorewaha Rajputs* of the Garhshankar Tahsil; it was decided in favour of the daughter and against the plaintiffs, who were collaterals in the 9th degree.

The other copies put in by defendants-respondents are not very much in point as shown by the learned Divisional Judge, and we need not discuss them.

The parties belong to an endogamous tribe and one of the daughters is married to a collateral as nearly related as plaintiffs are to the deceased proprietor. The onus is certainly on the plaintiffs and there is very little evidence in their favour except the *Riwaj-i-am* to which we can attach no weight. We agree with the lower Courts, and dismiss the appeal with costs.

Appeal dismissed.

(2) 11 P. R. 1908; 13 P. W. R. 1908; 92 P. L. R. 1908.
(3) 86 P. R. 1908; 146 P. W. R. 1908.
(4) 179 P. R. 1889.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 922 OF 1911.

May 20, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Agnew.

KAURA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Village Bet Punnunhan, Tahsil Alipur, District Muzaffargarh—Wajib-ul-arz—*Alluvion diluvian—Rights of* ala maliks inter se.

A plot of land in the village Bet Punnunhan, Tahsil Alipur, District Muzaffargarh, belonging to some of the *ala* proprietors before submersion and taken possession of by them on re-appearance, cannot be treated as the joint property of all the *ala* proprietors of the village, on the strength of paragraph 15 (2) of the *Wajib-ul-arz,* which relates only to land belonging to *adna* proprietors and has nothing whatever to do with the rights of *ala maliks inter se* in such a case.

First appeal from the decree of the District Judge, Muzaffargarh, dated the 18th May 1911, dismissing plaintiffs' suit.

KAURA *v.* MUHAMMAD BAKHSH.

Lala *Durga Das*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—The parties in this case are *ala* proprietors of *Patti* Rakba Daulat Khan, which is one of the two principal *pattis* of village Bet Punnunhan, Tahsil Alipur, District Muzaffargarh. A plot of land known as *Patti shamilatwali* is entered in the revenue records of this village as the joint holding of the parties; and in the year 1909, the defendants-respondents applied to the Revenue Officer, Sardar Muhammad Sarwar Khan, for partition of this joint holding under the Land Revenue Act. The plaintiffs-appellants objected to the partition principally on the ground that two other plots of land known as *Patti* Fazil Muhammadwali and *Patti* Jogiwali, which were entered in the revenue papers as belonging exclusively to the applicants, the present defendants-respondents, were the joint property of the parties, and that *patti shamilatwali* should not be partitioned until the aforesaid two *pattis* were also treated as joint and divided along with *patti shamilatwali*. By order dated the 22nd July 1910, the Revenue Officer referred the objectors to a Civil Court to establish their alleged title to *Patti* Fazil Muhammadwali and *Patti* Jogiwali; and it was in compliance with that order that the present suit (as laid down in the amended plaint) was brought by the plaintiffs-appellants for a declaration that the defendants-respondents were not entitled to have *patti shamilatwali* partitioned without including *Patti* Fazil Muhammadwali and *Patti* Jogiwali in the partition, or in the alternative for possession of 9/24th share of the last mentioned two *pattis*.

Before the District Judge arguments on both sides were practically confined to the proper interpretation of paragraph 15 (2) of the *wajib-ul-arz* of the village (Exhibit P-4, printed at page 7 of the paper-book), and the District Judge has held that that paragraph relates only to the respective rights of the *ala maliks* of the village, on the one hand, and of the *adna maliks*, on the other, in the land owned by the *adna maliks*, which having been washed away by the river comes out of the water again and in respect of which the *ala maliks* refuse to accept any *jhuri* from the *adna maliks*. The District Judge held that such land on re-appearance becomes the property of the *ala maliks* of the village; but he was of opinion that when the land which is submerged was the property not of *adna maliks* but of *ala maliks* then on its re-appearance it remains the property of the same *ala maliks* as before and that it does not become the *shamilat* of the *ala* proprietors of the village. Upon these findings he held that the land comprised in *Patti* Fazil Muhammadwali and *Patti* Jogiwali had been rightly recorded as belonging exclusively to the defendants respondents, and he dismissed the suit of the plaintiffs appellants.

After hearing Lala Durga Das for the plaintiffs-appellants, we have no hesitation in holding that the District Judge has taken a correct view of the case. The provision of the *wajib-ul-arz* which bears on the question before us runs as follows:—"*Basurat burd hokar baramad hove raqba ke milkiat malikan-i-ala ka hota hai. Malikan adna ka us raqba burd shuda par kuchh istehqaq nahin rahta ta waqt-i-ke woh phir jhuri malikan-i-ala ko na dewen. Agar malikan-i-ala amadan jhuri na lewen to raqba baramda par malikan i-adna qabza nahin kar sakte aur tadad haq jhuri haisiat malik-i-adna wa raqba par muquf hai, shara khaskar koi mukarar nahin hai.*

It seems to us that the only reasonable construction which can be placed upon this paragraph is that it relates only to land belonging to *adna* proprietors which is submerged in the river and which afterwards is thrown up by the water; and in respect of this kind of land it is laid down that on its submersion the proprietary rights of the *adna maliks* cease to exist therein and that on its re-appearance it becomes the property of the *ala maliks*, unless they choose to accept *jhuri* dues from the *adna maliks* and permit them to take possession of it on the same tenure as before. The paragraph in question has nothing whatever to do with the rights of the *ala* proprietors *inter se* in respect of a plot of land which being owned by and being in possession of some of those proprietors is carried away by the river and thereafter is thrown up in due course and is taken possession of, by its former owners. A case of this kind is not provided for in the *wajib-ul-arz* at all; and as admittedly *Patti* Fazil Muhammadwali and *Patti* Jogiwali belonged to the

defendants-respondents before submersion and have been taken possession of by them on re-appearance, the plaintiffs-appellants cannot ask the Court to treat these *pattis* as the joint property of the parties simply and solely on the strength of the provision in the *wajib-ul-arz* referred to above. The oral evidence in the case to which reference has been made by the appellants' Pleader is worthless, as the witnesses produced by them do not mention one single instance in which under circumstances similar to those of the present case, the land of some of the *ala maliks* became the joint property of all the *ala maliks* of the village by reason of submersion in the river and subsequent re-appearance.

In our opinion the District Judge has rightly dismissed the plaintiff's suit; and we accordingly uphold his decree and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3655 OF 1910.

February 6, 1913.

Present:—Sir Justice Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MOTI LAL ROY—PLAINTIFF—APPELLANT

versus

KALU MANDAR—DEFENDANT—RESPONDENT.

Landlord and tenant—Suit for possession—Plea of tenancy and limitation—License—Status of tenant, if may be obtained by possession—User of land—Erection of structures to reside—Consent of plaintiff's predecessor—License, different kinds of.

In a suit for possession of land brought against an alleged tenant who is really a trespasser, the defendant may set up a case of tenancy and also raise the issue of limitation.

Dinomoney v. *Doorgapersad*, 21 W. R. 70 (F. B.); 12 B. L. R. (F. B.) 274, relied upon.

But where the defendant not only does not repudiate but expressly admits the title of the plaintiff's predecessor and alleges a settlement from him, the defendant's possession has never been adverse to the extent of the entire interest of the owner.

If he never obtained a settlement, he may have acquired the status of a tenant or licensee by the assertion of such limited title and possession in that character for the statutory period.

Ishan Chandra v. *Raja Ramranjan*, 2 C L. J. 125, relied upon.

If the plaintiff's predecessor allowed the defendant the use of the land in suit so that he might erect structures and reside therein, the plaintiff would not be entitled to revoke the license, at any rate, not till the defendant had been adequately indemnified.

Surnomoyee Peshakar v. *Chunder Kumar Das*, 8 Ind. Cas. 793; 12 C. L. J. 443, referred to.

A bare license may be revocable at the will of the grantor and upon reasonable notice.

Mellor v. *Watkins*, L. R. 9 Q. B. 400; 23 W. R. 55, relied upon.

A license on the faith whereof works have been executed may be revoked only upon payment of compensation to the licensee.

Winter v. *Brockwell*, 8 East. 308; 9 R. R. 454; 103 Eng. Rep. 359, relied upon.

A license coupled with a grant is irrevocable.

Wood v. *Ledbitter*, 13 M. & W. 838; 14 L. J. Ex. 161; 9 Jur. 187, relied upon.

Appeal from the decree of the District Judge of Bhagalpore, dated July 1st, 1910, reversing that of the Munsif of Bhagalpore, dated March 31st, 1910.

Babu *Lal Mohun Ganguly*, for the Appellant.

Moulvi *Khurshed Hossain*, for the Respondent.

JUDGMENT —This is an appeal by the plaintiff in an action in ejectment. The property in dispute admittedly belonged to one Kali Nath Missir. He transferred it on the 24th December 1895 to Dwarka Nath Banerjee who sold to the plaintiff on the 3rd February 1909. The plaintiff sought to eject the defendant as a trespasser, who has continued in occupation notwithstanding a notice sent to him on the 2nd February 1909, by which he was asked to quit the land on the 7th March following. The defendant pleaded that he had come upon the land under a settlement from Kali Prosad Missir and had been in occupation for over fourteen years: but he did not in his written statement, disclose the precise terms of the alleged settlement. When examined in Court the defendant alleged that he had paid a premium of Rs. 5 but he made contradictory statements as to whether he had or had not paid any rent. The Court of first instance held that the defendant had not made out, as against the plaintiff any title to continue in occupation of the land. In this view, the Court decreed the suit and directed the defendant to vacate the land and to remove the structures therefrom within a period specified. Upon appeal, the District Judge has reversed this decision and dismissed the suit. He has found that the allegations made by the plaintiff in his plaint are not

true, that the defendant did not come upon the land after Dwarka Nath Banerji had acquired title from Kali Prosad Missir, that the defendant was in adverse possession for more than 12 years and that consequently the claim to eject him was barred by limitation. In our opinion, this view cannot possibiy be supported.

The defendant did not in his written statement or in the course of his examination in Court, set up an adverse title. Consequently the case of *Haji Khan* v. *Baldeo Das* (1) to which reference has been made, has no application. In that case, the plaintiff sued to eject the defendant on the allegation that he came into possession as a tenant but had continued in occupation even after his tenancy had been terminated. The defendant denied that he had ever been a tenant and pleaded adverse possession since he came upon the land. At the trial, the plaintiff failed to establish the tenancy alleged by him. The Court held, consequently, that the defendant had been in adverse possession for the statutory period, and as he had never acknowledged the title of the plaintiff, the suit was plainly barred by limitation. This is in accord with the decision of a Full Bench of this Court in *Dino Money Debea* v. *Doorgapersad Mozoomdar* (2), where it was ruled that in a suit for possession of land, brought against an alleged tenant who is really a trespasser, the defendant may set up a case of tenancy and also raise the issue of limitation. In the case before us, the defendant not only does not repudiate but expressly admits the title of Kali Prosad Missir and alleges a settlement from him. His possession consequently has never been adverse to the extent of the entire interest of the owner; if, as a fact, he never obtained a settlement, he may have acquired the status of a tenant or licensee by the assertion of such limited title and possession in that character for the statutory [period. *Ishan Chandra Mitter* v. *Raja Ramranjan* (3)]. In this view, his position would be that of a person who had actually obtained a settlement from the owner. From this stand point, he may, at the highest, be either a tenant or a licensee. If he is regarded as a tenant, the question arises, whether the tenancy is terminable, and if terminable, whether the notice served was adequate for that purpose. If, on the other hand, the defendant is not a tenant but merely a licensee, the question arises, whether the license was revocable. If it is established that Kali Prosad Missir allowed the defendant the use of the land so that he might erect structures and reside therein, it might very well be held that the grantor and his representatives were not entitled to revoke the license, not at any rate till the defendant had been adequately indemnified. [*Surnomoye Peshakar* v. *Chunder Kumar Das* (4)] The true position of the defendant must, consequently, be determined by the Court below.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the question whether the defendant is a tenant or licensee may be investigated. If he is found to be a tenant, the question will arise, whether the tenancy was terminable and had been legally terminated before the institution of the suit. If he is found to be a licensee, the question will arise, whether it was a bare license revocable at the will of the grantor, and upon reasonable notice *Mellor* v. *Watkins* (5), or a license on the faith whereof works have been executed and which may be revoked only upon payment of compensation to the licensee, *Winter* v. *Brockwell* (6), or license coupled with a grant and consequently irrevocable; *Thomas* v. *Sorrell* (7), *Wood* v. *Ledbitter* (8). We may add that on behalf of the defendant, it has been stated to us that he is willing to pay fair rent to the plaintiff: this, we are inclined to think, would be a reasonable settlement of the dispute. We make no order as to the costs of this appeal.

Appeal allowed and case remanded.

(1) 24 A. 90; A. W. N. (1901) 188.
(2) 21 W. R. 70; 12 B. L. R. (F. B.) 274.
(3) 2 C. L. J. 125.
(4) 8 Ind. Cas. 793; 12 C. L. J. 443.
(5) 9 Q. B. 400; 23 W. R. 55.
(6) 8 East 308; 9 R. R. 454; 103 Eng. Rep. 359.
(7) Vaughan 330 at p. 351; 124 Eng. Rep. 1098 at p. 1109.
(8) 13 M. & W. 838; 14 L. J. Ex. 161; 9 Jur. 187.

TAHL DAS *v.* MALIK SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1023 OF 1910.

May 10, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

TAHL DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MALIK SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Brahmans *of Tahsil Gujar Khan, Rawalpindi—Hindu law or custom—Gift of ancestral land to daughter's son—Daughter and her husband living with the donor and serving him—Gift valid.*

A *Brahman* of a village, in Tahsil Gujar Khan, Rawalpindi District, made a gift of ancestral land to his daughter's son. The donor and his wife were blind, and the donee's parents lived with them, so far as was compatible with the donee's father being in the army, and served and maintained them:

Held, that the parties were governed by the ordinary agricultural custom limiting alienation of ancestral property.

Devi Ditta Singh v. *Dropti*, 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909, followed.

Hira Nand v. *Hari Chand*, 4 Ind. Cas. 687; 125 P. R. 1908; 10 P. L. R. 1909; and *Musammat Maya* v. *Gurdit Singh*, 4 Ind. Cas 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909, distinguished.

That the evidence on the record and the customary law applicable justified the gift.

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 22nd June 1910, reversing that of the Munsif, 1st class, Rawalpindi, dated the 10th December 1909, decreeing plaintiffs' claim.

Diwan *Mehr Chand* and Bakshi *Gokal Chand*, for the Appellants.

Lala *Sangam Lal*, for the Respondents.

JUDGMENT.—The parties are *Brahmans* of a village in Tahsil Gujar Khan, Rawalpindi.

The first question for consideration is whether the law to be applied is Hindu or the ordinary agricultural customary. The lower Appellate Court has applied Hindu Law, on the grounds that *Hira Nand* v. *Hari Chand* (1) and *Musammat Maya* v. *Gurdit Singh* (2), are in point, that the oral evidence, does not establish a custom modifying Hindu Law, and that the parties combine service in the army with agriculture.

The finding of the Court of first instance, that 5/6ths of the present owners are *Brahmans*, has not been contested. The lower Appellate Court has not referred to *Devi Ditta Singh* v. *Musammat Dropti* (3), cited before it was reported in the Punjab Record and distinguished at some length in *Hira Nand* v. *Hari Chand* (1), the distinguishing features being that in *Devi Ditta* v. *Musammat Dropti* (3), the village in which the land in suit was situate was mainly owned by *Brahmans*, most of the landowners being of that caste and being essentially agricultural *Brahmans*, though some few of them eked out a living by taking service, while in *Hira Nand* v. *Hari Chand* (1), the main occupation of the parties was service or the performance of priestly functions. They did not "live on agriculture as a profession" and the whole of their land was cultivated by non-occupancy tenants. It was further found in *Hira Nand* v. *Hari Chand* (1), that there were only five *Brahmun* families in the village which was held on a *bhayachara* tenure, and that the village community consisted of many different castes, the *lambardar* being a Muhammadan Gujar. In *Musammat Maya* v. *Gurdit Singh* (2), the parties cultivated their land through servants, had been in possession for a few generations and followed other pursuits besides agriculture, the land of the clan in the village comprised 50 acres only, and the *Brahmans* did not form a compact village community but were merely a few land-owners.

The facts of the present case are practically on all fours with those of *Devi Ditta Singh* v. *Musammat Dropti* (3), and differ widely from those dealt with in *Hira Nand* v. *Hari Chand* (1) and *Musammat Maya* v. *Gurdit Singh* (2) cited above. The materials on the record do not justify the conclusion that these agricultural *Brahmans* are governed by Hindu Law, and we hold that the ordinary agricultural custom, limiting alienation of ancestral property, is applicable. Tahl Das, the present appellant, is *lambardar* of the village and was originally the sole plaintiff. Other collaterals joined him as plaintiffs, having originally been made formal defendants, but they have not joined in this appeal.

The suit was for a declaration that the gift of ancestral land to the donor's daughter's

(1) 4 Ind. Cas. 687; 125 P. R. 1908; 10 P. L. R. 1909.

(2) 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909.

(3) 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909.

son would not affect the plaintiffs' reversionary rights after the death of the donor. The donor and his wife were blind, and we are satisfied that the donee's parents lived with them, so far as was compatible with the donee's father being in the army, and served and maintained them. The evidence on the record and the Customary law applicable justified the gift and it is significant that the appellant, whose share of the land in suit (216 *kanals*) is 1/12th or 1/18th, is the sole objector. There is no force in the argument that Order XLI, rule 4 of the Code of Civil Procedure is applicable to the case and that the appellant represented all the share-holders. The fact that the donee's father has not been proved to have been a *khanadamad* in the strict sense of the term does not affect our conclusion that the gift was valid against the collaterals. He married both the daughters of the donor and lived with him, and it is by no means improbable on the record that the donee's mother, his second wife, did not leave her father's house except to live with her husband when he was serving with his regiment.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 798 OF 1910.

May 14, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

NIHAL CHAND—DEFENDANT—APPELLANT

versus

GHULAM MUHAMMAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 7, 8, applicability of—Punjab Alienation of Land Act (XIII of 1900), s. 16 (1)—Mortgage—Interest—Heavy rate—No undue influence or fraud proved, mortgagor bound to perform his contract—Form of decree—Redemption decree not executed does not bar fresh suit—Court Fees Act (VII of 1870), s. 12 (2)—Court-fees to be paid on memorandum of appeal—Duty of Chief Court to order deficiency to be made good.

In 1894 plaintiff mortgaged his land for Rs. 80. The interest to be paid was at the rate of Rs. 25 per cent. compound interest. Nothing was paid to the mortgagee up to the date of suit for redemption instituted by the mortgagor. According to the terms of the mortgage-deed the amount due from the mortgagor up to the date of the decree of the first Court was Rs. 2,550. The decree ordered redemption conditionally upon the payment of Rs. 2,550 within six months, and also declared that in default of such payment the property was to be sold.

Held,

(*i*) that the Court did not pass a preliminary decree, and consequently rule 7 of Order XXXIV of the Civil Procedure Code was not in terms applicable;

(*ii*) rule 8 (4) of the Order authorises the Court to pass a decree that the mortgaged property be sold only when the defendant (the mortgagee) makes an application in that behalf:

(*iii*) that in view of the specific provisions of section 16 (1) of the Punjab Alienation of Land Act, 1900, the Court had no power to direct the sale of land of the plaintiff who is a member of an agricultural tribe;

(*iv*) that the decree should have been limited to granting plaintiff the right to redeem the mortgage upon payment of the sum found to be due from him. This decree the mortgagor could execute at any time within the period of limitation, and if he failed to execute it he would have the right to sue again for redemption so long as his right to redeem remained alive;

Balmokand v. *Ramji Lal*, 20 P. R. 1887 and *Joggu* v. *Musammat Nanni Jan*, 93 P.R. 1887, referred to.

(*v*) that in the absence of evidence to prove that the mortgagor did not understand the terms of his contract, or that the mortgagee exercised undue influence over him or was guilty of fraud, he cannot be relieved of the results of his bargain simply because that bargain was foolish on his part and has entailed hard consequences;

(*vi*) that the plaintiff while appealing from the decree of the first Court, should have paid Court-fee upon the sum of Rs. 2,550 less the sum of Rs. 80 which he admitted to be due from him;

(*vii*) that under section 12 (2) of the Court Fees Act the Chief Court was bound to require the plaintiff to make good the deficiency;

Narain Singh v. *Chaturbhuj Singh*, 20 A. 362, A. W. N. (1898), 72 followed.

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 5th March 1910, modifying that of the District Judge, Jhelum, dated the 28th July 1909, decreeing plaintiff's claim on payment of Rs 2,550, within six months, or mortgaged land to be sold.

Mr. *Nand Lal*, for the Appellants.

JUDGMENT.—The facts are stated in the judgment of the Divisional Judge, and it is unnecessary to repeat them.

Plaintiff who is admittedly in possession of the property, either by himself or through

his assignees, seeks to redeem a mortgage effected by him in 1894, the consideration for which was the sum of Rs. 72-8-0, due on a decree held by the mortgagee and sum of Rs. 7-6 paid in cash. The mortgage provided that the mortgagee should be put in possession of 10 *kanals* 5 *marlas* of land, and it was agreed that the produce realised by the mortgagee should be credited to the payment of, *first*, interest and *secondly*, of principal. The remainder of the land included in the mortgage-deed was hypothecated by way of collateral security, and it was provided that if the mortgagor failed to pay interest (which was to be at the rate of Rs. 25, per cent. compound interest) or its equivalent in produce, the mortgagee should have the right of obtaining possession of the whole of the land, *viz.*, an area of 102 *kanals* 17 *marlas* and a house.

It is proved that the mortgagee never obtained possession of the 10 *kanlas* 5 *marlas* of land and that the mortgagor paid nothing to the mortgagee up to 1903 when the latter sued for, and obtained, a decree for possession of the mortgaged property in accordance with the terms of the mortgage-deed. This decree has not been executed and it is admitted before us by the mortgagor that he has since its date paid nothing to the mortgagee.

According to the terms of the mortgage-deed the amount due from the mortgagor up to the date of the decree of the District Judge in this case was Rs. 2,550, and the plaintiff's right to redeem was decreed by that learned Judge conditionally upon his paying the said sum within six months. This decree was drawn up in accordance with the provisions of rule 7 (*d*) of Order XXXIV of the Civil Procedure Code, and it further declared that in default of such payment, the property was to be sold.

This latter part of the decree is open to several objections. In the first place, the Court was not passing a preliminary decree and consequently rule 7 of the order was not in terms applicable. In the second place, rule 8 (4) of the order authorises the Court to pass a decree that the mortgaged property shall be sold only when the defendant (the mortgagee) makes an application in that behalf, and no such application was made in this case.

In the third place in view of the specific provisions of section 16 (1) of the Punjab Alienation of Land Act, 1900, the Court had no power to direct the sale of land belonging to the plaintiff who is a member of an agricultural tribe.

The District Judge's decree should, therefore, have been limited to granting plaintiff the right to redeem the mortgage upon payment of the sum found to be due from him. This decree the mortgagor could execute at any time within the period of limitation and if he failed to execute it, he would have the right to sue again for redemption so long as his right to redeem remained alive [see *Balmokand* v. *Ramji Lal* (1), and *Jaggu* v. *Musammat Nanni Jan* (2).]

The learned Divisional Judge upon plaintiff's appeal appears to have been of opinion that the plaintiff did not understand the nature and terms of the contract entered into by him, when he executed the mortgage-deed, and that in such circumstances he was justified in ignoring the terms of the agreement between the parties and in adjudging the mortgagee "a rate of interest representing a fair estimate of damages, for non-performance and of income on his capital". He accordingly accepted the appeal and granted plaintiff a decree for redemption upon payment of Rs. 300, a sum which upon purely arbitrary grounds he considered to be fair and equitable. The mortgagee has appealed to this Court and prays that the amount to be paid by the mortgagor may be raised to that decreed by the District Judge on the ground that such amount represents the sum which under his contract the mortgagor agreed to pay.

We have given the case full consideration and we are not unmindful of the fact that the original consideration for the mortgage-deed was merely a sum of Rs. 80. At first sight it naturally appears extremely hard that the mortgagor should now have to pay the large sum of Rs. 2,550 in order to relieve the property of the burden cast upon it when he mortgaged it for the small sum of Rs 80. But it must be remembered that this mortgage was executed so long ago as 1894, and that during all these years the mortgagor has paid nothing to the mortgagee and that he did not attempt to give effect to the

(1) 20 P. R. 1887.
(2) 93 P. R. 1887.

provision that the mortgagee should have possession of the 10 *kanals* 5 *marlas* of land. He is a *lambardar* and not illiterate and neither in 1906 when the mortgagee sued for possession of the property nor in the present suit has he pleaded undue influence or fraud or mistake. On the contrary, in the previous suit he admitted in his written statement that the condition regarding interest was correct and in the present suit when examined on his pleadings he stated that he "made the condition to pay interest in default of payment of produce". In view of these admissions and of the entire absence of any evidence to prove that he did not understand the terms of his contract or that the mortgagee exercised undue influence over him or was guilty of fraud, we find it impossible to relieve him from the results of his bargain simply because that bargain was foolish on his part and has entailed hard consequences. His main—indeed his only—plea in this case as in the previous case was that he had duly paid the mortgagee the produce of the 10 *kanals* up to the date of the institution of the previous suit, and this allegation he has entirely failed to substantiate.

In these circumstances we are compelled to hold the plaintiff to the terms of his contract and we must, therefore, accept the appeal. We accordingly set aside the decree of the Divisional Judge and in lieu thereof we grant plaintiff a decree for redemption of the mortgage conditional upon his payment of the sum of Rs. 2,550 to the mortgagee.

We observe, however, that the amount of Court-fee paid by respondent upon his memorandum of appeal in the lower Appellate Court was calculated merely upon the sum of Rs 80. But the subject-matter in dispute in that Court was whether the respondent-plaintiff was to pay the sum of Rs. 2,550 (as decreed by the District Judge) or merely the sum of Rs. 80 and, consequently, upon the principle laid down by the Full Bench in Civil Appeal No. 1217 of 1910,* he should have paid Court-fee duly upon the sum of Rs. 2,550 less the sum of Rs. 80 which he admitted to be due from him. In holding otherwise the learned Divisional Judge was clearly in error and under section 12 (2) of the Court Fees Act, we are bound to require the plaintiff to make good the deficiency. Following the principle of the ruling in *Narain Singh* v. *Chaturbhuj Singh* (3), we direct that the plaintiff-respondent shall pay into Court the sum of Rs. 144 which represents the deficiency of the Court-fee payable by him upon his memorandum of appeal in the Divisional Court. If this sum is paid within three months of the date when this order is communicated to him a decree in the terms above indicated will be drawn up in favour of plaintiff. If it is not so paid the decree will be to the effect that plaintiff's suit stands dismissed. In any event we leave the parties to bear their own costs throughout.

Appeal accepted.

(3) 20 A. 362; A. W. N. (1898) 72.

* *See Waryam Singh* v. *Mahtab Singh*, 19 Ind. Cas. 961 *Infra—Ed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 255 OF 1912.

February 18, 1913.

Present:—Mr. Hallifax, Offg. A. J. C.

BINDESHRI PRASAD—APPLICANT

versus

VISHWANATHDAS—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), *Sch. II, Art.* 8—*Jurisdiction—Suit by landlord for rent at enhanced rate after notice for vacating.*

Plaintiff served defendant with a notice to vacate his house occupied by the latter as a tenant, by a certain date, and warned him that on his failure to vacate he would be charged rent at an enhanced rate; the defendant did not vacate, and the plaintiff sued for rent at the enhanced rate and the question was whether the suit was cognizable by a Court of Small Causes:

Held, that the suit was one for the 'recovery of house-rent' and nothing else, and was cognizable by the Small Cause Court.

Haji Ahmad Husain v. *Sundar Lal*, 80 P. R. 1893; *Janoo Mundur* v. *Brijo Singh*, 22 W. R. 548 and *Bhoobun Mohun Bose* v. *Chundernath Banerjee*, 17 W. R. 69, referred to.

Civil revision against the order of the Judge, Small Cause Court, Jubbulpur, dated the 28th November 1912.

Mr. *M. B. Kinkhede*, for the Applicant.

JUDGMENT.—The plaintiff sued the defendant for house-rent in the Jubbulpur Court of Small Causes. He alleged that the defendant agreed to pay Rs. 8-5-4 per mensem up to the end of October 1911 and Rs. 8-8-0 after that date. As he fell into arrears the plaintiff delivered to him a written notice on 29th April 1912 calling upon him to vacate the house

by 31st May 1912 and warning him that if he failed to do so rent would be charged at the rate of Rs. 20 per mensem from that date. The defendant was still in the house at the date of suit, and the plaintiff claimed rent up to the end of the previous month, September 1912, at the three different rates stated. The learned Judge returned the plaint, holding that the suit was not triable by his Court for the following reasons: "Plaintiff claims Rs. 80 from the defendant on account of the occupation of the house at Rs. 20 per mensem after the determination of the lease according to the notice. After this period the defendant was trespasser and amount claimed is mesne profits. As such major portion of the claim is beyond the jurisdiction of this Court.

If there were any question of mesne profits in the matter the order would be correct, being in accordance with the ruling in *Lachman Rao* v. *Waman Rao* (1). But there obviously is not. In *Haji Ahmad Husain* v. *Sundar Lal* (2) an exactly similar claim was made for enhanced rent after an exactly similar notice to quit or pay higher rent, the only difference in the cases being that there the parties had agreed that if the defendant failed to pay his rent in advance the plaintiff would be at liberty to give him notice to vacate the property or to pay rent at an enhanced rate to be specified in the notice. It was held that this was a suit for house-rent and did not come within the scope of Article 7 of the second Schedule of Act IX of 1887. In *Janoo Mundur* v. *Brijo Singh* (3) Phear and Morris, JJ., held that if a tenant continues in occupation after receipt of a notice similar to that served on the defendant he must be taken to have agreed by implication to pay the enhanced rent. Again in *Bhoobun Mohun Bose* v. *Chundernath Banerji* (4) a similar suit in respect of land, not a house, was held to be a suit for damages, not for an enhancement of rent and, therefore, triable by a Small Cause Court.

In the Punjab case of *Haji Ahmad Husain* v. *Sundar Lal* (2), mentioned above, Mr. Justice Rivaz said: "The suit mentioned in Article 7 'for the assessment, enhancement, abatement or apportionment of the rent of immoveable property' cannot, I should say, be intended to cover any suit relating to house rent. The terms used are well understood as referring to rent of land only. Anyhow, the present suit appears to me to be one which cannot correctly be described as a suit for 'enhancement of rent' in any sense, being rather a suit for rent, including rent at an enhanced rate agreed upon by the parties. The suit is one for the 'recovery of house-rent' and nothing else, and Article 8 of the 2nd Schedule conclusively settles that such a suit lies in the Small Cause Court." The words apply exactly to the present case, and I concur entirely in the view expressed. The order that the plaint shall be returned for proper presentation is, therefore, set aside. The plaint, which has been filed in this Court, will be returned to the applicant for presentation in the Small Cause Court of Jubbulpur, and the Judge of that Court will be directed to treat the claim as one triable by a Small Cause Court.

(1) 16 C. P. L. R. 1.
(2) 80 P. R. 1893.
(3) 22 W. R. 548.
(4) 17 W. R. 69.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPLICATION No. 15 OF 1912.

May 12, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr Justice Beadon.

LAKHMI DAS—PETITIONER

versus

Musammat DAROPTI AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), *s.* 7 (iv) (c) *and* (d) *—Alienations by Hindu widow—Suit by reversioner for declaration—Appointment of Receiver and restoration of property to* status quo—*Suit valued by plaintiff—Court-fee to be paid* ad valorem.

A suit for declaration that certain alienations made by a Hindu widow will not after her death affect the interest of the plaintiff, reversioner, for appointment of a Receiver, and for restoration of the property to the *status quo ante* certain arbitration proceedings was valued for purposes of jurisdiction and Court-fees at Rs. 31,849-1-9:

Held, that section 7 (*iv*) (*c*) and (*d*) of the Court Fees Act applied and that *ad valorem* Court-fee, calculated on the valuation by the plaintiff of the suit, was leviable.

Girdhari Lal v. *Ram Lal*, 21 A. 200; A. W. N. (1899) 32, distinguished.

Umrao Mirza v. *Jones*, 10 C. 599; *Mahommed Zohur-*

ud-din v. *Mahommed Noor-ood-din*, 21 C. 85; *Hari Sanker Dutt* v. *Kali Kumar Patra*, 32 C. 734; 9 C. W. N. 690; *Raghunath Ganesh* v. *Gangadhar Bhikaji*, 10 B. 60; *Sardarsinghji* v. *Ganpat Singhji*, 17 B. 56, referred to.

Application, under Order XLIV, rule 1, Civil Procedure Code (Act V of 1908), for permission to appeal in *forma pauperis*.

Mr. *Ganpat Rai*, for *R. B. Sukh Dial*, for the Petitioner.

Pandit *Kishori Lal*, for the Respondents.

ORDER.—The question for consideration is the amount of Court-fee to which the appeal filed in this Court is liable. The nature of the suit has been described by the Court below as follows:—

"The plaintiff's claim, briefly put, is that *Musammat* Daropti, defendant No. 1, who is the widow of Labhu Ram, the last male-holder of the property in suit, is wasting the property having already made several alienations in favour of defendants Nos. 2 to 9, and that he as the sole surviving reversioner of Labhu Ram is entitled to possession, or at least to the declaratory decree that the alienations made by *Musammat* Daropti shall not affect his reversionary rights after her death. He further prays that the alienees or donees may be compelled to restore the money they have received from *Musammat* Daropti and that the same may be deposited in some reliable Bank so that he may not be deprived of his rightful dues on the death of *Musammat* Daropti. He alleges that by giving away portions of Labhu Ram's property to his sisters, *Musammat* Daropti has been guilty of such waste as entitles him to present possession of the property according to Hindu Law, by which the parties being Jains are bound in matters of inheritance."

The suit was valued for purposes of jurisdiction at Rs. 31,849-1-9 and the plaintiff was allowed to sue in *forma pauperis*. The suit was dismissed. The appeal to this Court was valued at the same amount, and, in the application for permission to appeal in *forma pauperis*, the claim was said to be for possession of a house, two shops, and recovery of cash, clothing and jewelry and the value for purposes of jurisdiction and Court-fee was assessed at Rs. 31,849-1-9.

Notice was issued on the application for permission to appeal in *forma pauperis* for hearing by a Single Bench and at the hearing the learned Advocate for the applicant stated that his appeal was not for possession of the whole of the estate of the deceased Labhu Ram, but for a declaration and appointment of a Receiver and restoration of the property of Labhu Ram to the *status quo ante* arbitration proceedings. The learned Advocate expressed his inability to say what Court-fee should be affixed and said that he had applied for permission to sue as a pauper because his client could not pay the *ad valorem* Court-fee on the value assessed in the Court of first instance. The question of the amount of Court-fee was referred to a Division Bench.

Counsel for the petitioner relied on *Girdhari Lal* v. *Ram Lal* (1). The suit was for appointment of new superintendents for the management of certain endowed property and the fulfilment of the object of endowment of and for the transfer of the whole endowed property from the possession of the existing superintendents to the possession of the superintendents to be appointed; for an account, from the existing superintendents, of the income and expenditure of the endowment; and for the issue of instructions and rules for the management of the endowment and its income and expenditure. A Court-fee of ten rupees was affixed, the plaintiff alleging that the subject-matter was not capable of valuation. It was held that Act VII of 1870, Schedule II, Article 17 (*vi*) applied.

The learned Pleader for the respondents contended that the suit was under Order XL, rule 1, of the Code of Civil Procedure, and cited the following authorities for the proposition that the appeal should bear an *ad valorem* Court fee on the value of the suit assessed in the Court of first instance and on appeal:—

(1) *Omrao Mirza* v. *Jones* (2), in which it was held that the value, for purposes of Court-fee of a suit, valued at Rs. 7,000 for the purpose of jurisdiction, for the removal of the defendant from the management of certain trust funds on the ground of misconduct, was Rs. 7,000.

(2) *Mahommed Zohur-ud-Din* v. *Mahommed Noor-ood-Din* (3), in which it was held

(1) 21 A. 200; A. W. N. (1899) 32.
(2) 10 C. 599.
(3) 21 C. 85.

at page 91, that the appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the Receiver except by permission of the Court.

(3) *Hari Sankar Dutt* v. *Kali Kumar Patra* (4), in which it was held that a suit by a plaintiff in possession, for declaration of his title to land, and for an injunction restraining defendants from interfering with his possession by cutting trees thereon and for damages, is governed by section 7 (*iv*); (*c*) and (*d*) of the Court Fees Act, and that in such a suit the Court must accept the value of the relief stated in the plaint for the purposes of the Court-fees as well as for the purposes of jurisdiction.

(4) *Raghunath Ganesh* v. *Gangadhar Bhikaji* (5), in which it was held that, where the suit was for a declaration that the plaintiff was entitled to the exclusive management of certain endowed property, and the plaint contained a prayer for an injunction, section 7 (*iv*) (*c*) of the Court Fees Act applied, and the appellant must state in the memorandum of appeal the amount at which he valued the relief sought, the injunction prayed for being consequential relief.

(5) *Sardarsinghji* v. *Ganpatsinghji* (6), in which it was held that a suit for a declaration and for an injunction is governed by section 7 (*iv*) (*c*) and (*d*) of the Court Fees Act and that the valuation of the relief sought rests with the plaintiff, and not with the Court.

It will be seen that the Allahabad case differs from the present case in the fact that the plaintiffs-appellants therein alleged throughout that the subject-matter in dispute was not capable of valuation, while in the present case the specific value was assessed. Consideration of the authorities has satisfied us that section 7 (*iv*) (*c*) and (*d*) of the Court Fees Act applies and that an *ad valorem* Court-fee, calculated on the valuation by the plaintiff-appellant of the suit, is leviable. The record will be returned to the Single Bench. Costs of this Court will be costs in the cause.

Counsel's fee thirty-two rupees.

(4) 32 C. 734; 9 C. W. N. 690.
(5) 10 B. 60.
(6) 17 B. 56.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51 OF 1912.

February 20, 1913.

Present:—Sir Henry Drake-Brockman, KT., J. C.

HIRA RAM—APPELLANT

versus

UDHE RAM—RESPONDENT.

Hindu Law—Joint Hindu family—Mortgage by father—Legal necessity—Antecedent debt—Test—Distinction between duty to pay father's debts, and being bound by father's alienations—Alienation by one co-parcener to the extent of his share.

In the case of a mortgage of ancestral property by the father of a joint Hindu family governed by the *Mitakshara*, legal necessity for cash advanced over and above the amount of a prior mortgage, cannot be presumed, merely from the recital in the mortgage-deed that money was borrowed for private expenses, and the existence of the prior mortgage, and large family of the mortgagor.

In the absence of legal necessity, however, the mortgagee of ancestral property from a Hindu father is at least bound to show that the debts for which the mortgage was effected were antecedent to that transaction.

The true test seem to be whether the payment and the transfer are in reality a single transaction or not.

There is a distinction between a son's pious duty to pay his father's debts and his liability to be bound by his father's alienations of ancestral property, the rule to pay father's debts ought not to be pressed to all its logical consequences.

Provided that an alienation is for value, in the Central Provinces one co-parcener may dispose at his pleasure of ancestral undivided estate by private conveyance to the extent of his own share.

Mukund Ram v. *Ram Ratan*, 2 N. L. R. 52, followed.

First appeal against the decree of the District Judge, Bilaspur, dated the 5th February 1912.

Mr. *A. C. Roy*, for the Appellant.

The Hon'ble Mr. *M. B. Dadabhoy*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for foreclosure of a mortgage executed by one Chhabinath on the 24th April 1897. Chhabinath died in 1899, the mortgage-money fell due on the 22nd April 1900 and the suit was instituted on the 31st October 1910. The defendants are six of the seven sons of Chhabinath with their descendants and the sons of the 7th son. The mortgaged property consists of an 8-annas share in *Mauza* Misda in the Janjgir Tahsil which was admittedly ancestral property in the hands of

the joint family consisting of Chhabinath and his sons.

The consideration for the mortgage is described as Rs. 3,000 taken for private expenses and payment of debts due to creditors. It has been found that Rs. 50 were already due to the mortgagee and that Rs. 2,357 were taken to satisfy a previous mortgage. As to the remainder (Rs. 593) of the principal the lower Court has found that there is no evidence to show why this money was required or indicating inquiry made by the mortgagee as to the reason for borrowing it. A decree for foreclosure of the mortgaged share in default of paying Rs. 2,407 principal with interest has been passed against all the defendants.

The object of this appeal by the plaintiff is to have included in the mortgage-money the disallowed portion of principal and interest thereon. Three points are pressed, namely:—

(1) the said portion is small as compared with the whole principal:

(2) Chhabinath's circumstances were such that the lender might reasonably presume that Rs. 593 were needed for some expenses or other of the joint family:

(3) the sons and grandsons are as such legally bound to pay Chhabinath's debts and so to discharge the mortgage effected by him in the absence of any allegation that the debts were immoral.

In support of the first point the decision of the Full Bench of the Allahabad High Court in *Badri Prasad* v. *Madan Lal* (1) is cited. There the consideration for the mortgage sought to be enforced consisted of Rs. 1,638-7-0 due for principal and interest on a previous mortgage and a cash advance of Rs. 11-9-0 made on the execution of the bond in suit. The Court expressly held that Rs. 11-9-0 did not constitute an "antecedent" debt but nonetheless gave the mortgagee a decree for sale in respect of the entire principal (Rs. 1,650) and interest thereon. The report does not indicate the purpose for which the cash was taken, much less negative the possibility that it was needed for expenses in connection with the fresh mortgage, *e. g.*, purchase of stamp-paper and registration-fees, nor is any reference made to the question of legal necessity. In these circumstances I think it may fairly be assumed that legal necessity for the trifling advance was taken for granted. An alternative view is expressed in *Chandradeo Singh* v. *Mata Prasad* (2), namely that the sum of Rs. 11-9-0 was regarded as a negligible quantity. In any case I am not prepared to treat the decision of the Full Bench as authority for requiring no proof of legal necessity where so much as 19.7 per cent. of the consideration consists of a cash advance. The main question covered by that decision was whether previous advances made by the person in whose favour the mortgage sued on was executed could be treated as antecedent debts and this was answered in the affirmative.

The second point proceeds on the assumption that legal necessity for the cash advance should be made out in some way. The appellant's learned Pleader relies on the recital in the mortgage deed that money was borrowed for private expenses, on the existence of a prior mortgage on the same property on which Rs. 2,357 were due and on Chhabinath's large family of sons and grandsons. It is argued that in such circumstances there cannot but have been a need to borrow for ordinary house-hold and agricultural purposes. There might have been some force in this contention had the evidence shown the share to have been previously mortgaged with possession or the income to have been less than sufficient to meet the necessary expenses of the family. As the record stands we cannot even be sure that the share is the sole item of the joint property. The mortgagee was content to accept Chhabinath's assertion that he needed money for "private expenses" and did not even trouble to get some particulars entered in the deed. To make the desired presumption would in effect be to dispense with any proof at all and so to nullify the requirement in Chapter I, section 1, paragraph 29 of the *Mitakshara* that there should be "a calamity affecting the whole family", "a need of support" or "an indispensable duty." It has also to be observed that Chhabinath's large family would in some

(1) 15 A. 75; A. W. N. (1893) 52 (F. B.).

(2) 1 Ind. Cas. 479; 31 A. 176 at p. 188; 6 A. L. J. 263 (F. B.).

ways be a distinct advantage to him, as the members could and presumably did do much of the work for which a childless man would have to employ labourers. I hold, therefore, that no such presumption as that pressed for can be based on the circumstances mentioned.

It remains to deal with the contention that whether the principal of a mortgage-debt was borrowed at the time of the mortgage or at some earlier date the transaction is binding on the sons' and grandsons' interests. In this connection the appellant's learned Pleader relies on the view of the minority in *Chandradeo Singh* v. *Mata Prasad* (2), on the decision of Boddam and Bhashyam Ayyangar, JJ., in *Chidambara Mudaliar* v. *Koothaperumal* (3), and on the definition of "antecedent debt" given by Pigot and Rampini JJ., in *Khalilul Rahman* v. *Gobind Pershad* (4), and approved in *Kishun Pershad* v. *Tipan Pershad Singh* (5). The Madras decision has been overruled by the Full Bench in *Venkataramanaya* v. *Venkataramana Dass Pantulu* (6), which upheld as correctly decided *Sami Ayyangar* v. *Ponnammal* (7), where Subramania Ayyar and Benson, JJ., declined to accept the view taken in *Khalilul Rahman* v. *Gobind Pershad* (4). The balance of authority seems to me clearly against the appellant in this matter. Apart from the Full Bench decisions of the Allahabad and Madras High Courts there is one of the Calcutta High Court—*Suria Prasad* v. *Golab Chand* (8)—in which Ghose and Harington, JJ., held the mortgagee of ancestral property from a Hindu father bound to show that the debts for which the mortgage was given were antecedent to that transaction. In Bombay the view favoured in *Kishun Pershad* v. *Tipan Pershad Singh* (5) has long been followed: see *Dattatraya* v. *Vishnu Narayan* (9); but even so the balance of authority is as I have said and my own view inclines strongly in the same direction. If the rule above cited from the *Mitakshara* is to have any force whatever—and it is noteworthy that in express terms it limits the father's power as against his sons and grandsons to the case in which the latter are minors we should not treat it as overridden by the rule imposing on a son the religious duty of paying his father's debts. No doubt a difficulty arises if it is laid down that a debt is not "antecedent" which is incurred one day and secured by a mortgage executed on the next. But for present purposes it is not necessary to go this length, nor do I think that the Courts should allow themselves to be hood-winked by so transparent a device as that of delaying execution of a transfer for a short time. The true test seems to be whether the payment and the transfer are in reality a single transaction or not.

I agree entirely with Stanley, C. J., in thinking it essential to draw a distinction between the son's pious duty to pay his father's debts and his liability to be bound by his father's alienations of ancestral property. As that learned Judge points out, the rule of the *Mitakshara* does afford some protection to sons and grandsons against the land-hunger of money-lenders. I would not, therefore, press to all its logical consequences the rule established by modern case-law which has elevated into a legal obligation what the Hindu-lawgivers describe as a pious duty.

The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be borne as already ordered.

In conclusion I desire to remark that neither in the lower Court nor in the memorandum of appeal was any attempt made to obtain a decree against what would have been Chhabinath's divided share had partition been effected immediately after the mortgage. It seems, however, in view of the law governing voluntary alienation by a co-parcener of his share in undivided ancestral property as laid down in *Mukund Ram* v. *Ram Ratan* (10) that the amount of principal here in dispute might conceivably be treated as a secured debt against Chhabinath's undivided share now in the hands of his sons and grandsons.

Appeal dismissed.

(3) 27 M. 326.
(4) 20 C. 328.
(5) 34 C. 735 at p. 747; 11 C. W. N. 613; 5 C. L. J. 569.
(6) 29 M. 200.
(7) 21 M. 28.
(8) 27 C. 762.
(9) 12 Ind Cas. 949; 36 B. 68; 13 Bom. L. R. 1161.
(10) 2 N. L. R. 52.

TAJ MUHAMMAD *v.* KANSHI MAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 667 OF 1910.

April 24, 1913.

Present:—Mr. Justice Scott-Smith.

TAJ MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANSHI MAL, PLAINTIFF, KHAIROO AND HASSOO REPRESENTATIVES OF BAHADUR DECEASED—DEFENDANTS—RESPONDENTS.

Custom—Village Karampura, Tahsil Mailsi, Multan District—Alienation of house by non-proprietor—Distinction drawn between Aroras *and others—Acquiescence by proprietors in previous sales does not amount to renunciation—Review not to be granted without notice to the opposite party.*

In the village of Karampura in the Mailsi Tahsil of the Multan District, a non-proprietor cannot dispose by sale of his house with a right of residence therein.

The *wajib-ul-arz* of the village draws a distinction in this respect between *Aroras* and the ordinary menials, permitting the former to sell as before.

Mere acquiescence in previous sales will not imply a renunciation of the discretionary right of the proprietors to object to a subsequent sale.

Teja Singh v. *Mirza Sayad Muhammad Khan*, 121 P. R. 1888, and *Kallu* v. *Amian Singh*, 40 P. R. 1886, referred to.

An application for review cannot be accepted without notice to the opposite party.

Second appeal from the decree of the District Judge, Muzaffargarh, empowered to act as Divisional Judge, dated the 11th December 1908, reversing that of the Munsif, 2nd class, Multan, dated the 14th November 1907, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Mr. *Gokal Chand* and Lala *Sangam Lal*, for the Respondents.

ORDER.—This is an appeal admitted under section 70 (1) (*c*) of the unamended Punjab Courts Act.

The application was in the first instance rejected on 9th June 1909, but subsequently an application for review was entertained after the records had been seen on 11th May 1910. Lala Sangam Lal, for respondent, urges that the application for review should not have been accepted without notice to his client under Order XLVII, rule 4, Civil Procedure Code. This appears to be correct and I have, therefore, considered the order of 11th May 1910 as one merely admitting the application for review subject to any objections that might be urged. Lala Sangam Lal can really show no good cause against the application and I am the more disposed to grant it, because the order of the 9th June 1909 was regarded in a subsequent suit as an authoritative decision by this Court on the question of custom. I, therefore, accept the application for review and admit this as an appeal.

JUDGMENT.—It was originally ordered that this appeal should be heard along with Civil Revision No. 233 of 1910, but the latter case was not complete to-day and had to be adjourned. The point at issue is not the same in the two cases and there appeared no good reason why the hearing of the present appeal should be again adjourned.

The question is whether in the village of Karampura in the Mailsi Tahsil of the Multan District a non-proprietor (a *Machhi* in this case) can dispose by sale of his house with a right of residence therein.

The general custom in the Punjab is well known and is laid down in Article 236 of Rattigan's Digest. The first Court found that plaintiff upon whom the burden lay had not proved the existence of a custom authorizing sales by non-proprietors.

The lower Appellate Court found that the custom was established.

It appears to me on a full and careful consideration of all the evidence that the conclusion of the lower Appellate Court is not warranted.

The *wajib-ul-arz* contains the following rule: 'If any resident (*bashindah*) leaves without heir the materials of his house belong to the proprietor. If the resident built a house at his own expense he can give away or sell the materials.'

Other residents such as *Aroras*, etc., who are accustomed to sell to each other are not prohibited from doing so.' The first Court interpreted this to mean that ordinary non-proprietary residents could sell the materials of houses built by them, but not the sites as nothing was said about the latter, whereas *aroras* and similar people such as shop-keepers could sell to each other as heretofore. I think this interpretation is correct. A distinction is drawn between *Aroras*, *i.e.*, the shop-keeping and money-lending classes, and the ordinary

menials. I see no reason why the special privilege in this respect granted to *Aroras* should be extended to *Machhis*; in my opinion the *wajib-ul-arz* does not at all help the plaintiff to prove the custom alleged by him.

Some eight or nine instances of sales by non-proprietary residents have been cited, but several of these are by *Aroras*, and only four or five are really in point. In the case of one sale Taj Muhammad signed as an attesting witness, but that merely signified his assent thereto, and it is settled by a long series of decisions of this Court that mere acquiescence in previous sales will not imply a renunciation of the discretionary right of the proprietors to object to a subsequent sale, see *Teja Singh* v. *Mirza Sayad Muhammad Khan* (1) and *Kallu* v. *Amian Singh* (2) and many other rulings. The few instances cited in the present case are by no means sufficient to establish the alleged custom.

I accept the appeal, and setting aside the decree of the lower Appellate Court restore that of the first Court, but I leave the parties to bear their own costs throughout.

Appeal accepted.

(1) 124 P. R. 1888.
(2) 40 P. R. 1886.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2924 OF 1909.
May 28, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PEARY LAL DAW AND OTHERS—PLAINTIFFS —APPELLANTS

versus

MADHOJI JIBAN AND OTHERS—DEFENDANTS —RESPONDENTS.

Assignment—Suit for royalty and commission—Plaintiff jointly entitled with defendant No. 3—Form of suit whether bad—Payment to one of three persons jointly entitled to receive money, whether good payment against others—Title of assignee when complete—Title dependent on notice to tenants—Tenants paying rents bona fide *to assignor—Tenants paying rent to assignor after receiving notice of assignment from assignee, whether* bona fide—*Transfer of Property Act (IV of* 1882*), ss.* 37, 50, 109—*Contract Act (IX of* 1872*), s.* 45.

The plaintiffs as assignees were entitled to recover royalty and commission jointly with their assignor, the defendant No. 3, who asserted that he had received from the principal defendants the sums claimed by the plaintiffs:

Held, that the plaintiffs were not bound to sue with defendant No. 3 as a co-plaintiff, that the suit as framed was not bad, and that it was not necessary for the plaintiff to sue for the recovery of the entire sum.

Pyari Mohun v. *Kedar Nath Roy*, 26 C. 409 (F. B.) and *Pergash Lal* v. *Akhoori Balgobind*, 19 C. 735, referred to.

Payment to one of three persons entitled to receive the money, is not a good payment against the others.

Barber Maran v. *Ramana Goundan*, 20 M. 461; 7 M. L. J. 269, dissented from.

Harihar Pershad v. *Bholi Pershad*, 6 C. L. J. 383 at p. 394 and *Husainara Begum* v. *Rahmannessa Begum*, 8 Ind. Cas. 837; 13 C. L. J. 3; 38 C. 342, followed.

Under sections 37, 50 and 109 of the Transfer of Property Act, the title of the assignee is completed upon execution and, where necessary, registration of the deed of assignment; the completion of the title is not postponed till notice has been given either by the assignor, or by the assignee to the tenant.

The Collector of Rajshahye v. *Hursoondery Debea*, W. R. 1864, Act X Rulings, 6, relied upon.

As soon as the title of the assignee is complete, he is entitled to claim rent. The tenant can escape the liability if he can establish that he has paid rent to the assignor in good faith before he had notice of the assignment.

It is immaterial whether the notice of assignment is received from the assignor or the assignee, and the tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he has received notice of the assignment from the assignee.

Pope v. *Biggs*, 9 B. and C. 245; 32 R. R. 665; 4 Man & Ry. 193; 7 L. J. (o. s.) K. B. 246; 109 Eng. Rep. 91; and *Rogers* v. *Humphreys*, 4 A. & E. 299; 43 R. R. 340; 5 N. & M. 511; 1 H. & W. 625; 5 L. J. K. B. 65; 111 Eng. Rep. 799, relied upon.

A suit for recovery of arrears of royalty and commission, is not one for rent within the meaning of Article 110 of Schedule II of the Limitation Act of 1877, but is governed by Article 116.

Umesh Chunder Mundul v. *Adarmoni Dasi*, 15 C. 221, followed reluctantly.

Appeal from the decree of the Judicial Commissioner of Manbhum, dated August 31st, 1909, reversing that of the Sub-Judge of Purulia, dated June 23rd, 1908.

Mr. *S. P. Sinha*, Babus *Dwarka Nath Chakravarti* and *Nagendra Nath Mitra*, for the Appellants.

Dr. *Rash Behary Ghose* and Babu *Lakshmi Narain Singh*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for recovery of arrears of royalty and commission from the principal defendants. On the 6th June 1901, the third defendant, obtained a lease from the Raja of Jherriah; and, seven days later, he executed a mining lease in the name of the 2nd defendant for the benefit of the

first two defendants. The case for the plaintiff is that on the 27th December 1902 the third defendant transferred a part of his interest to the plaintiffs, namely to the extent of a ten-sixteenths share in favour of the first plaintiff and to the extent of a tenth share in favour of the 2nd plaintiff. The position was that the two plaintiffs and the third defendant thereupon became entitled to recover royalty and commission from the first two defendants in the proportion of 10, 1 and 5. The plaintiffs claim in this suit, instituted on the 28th August 1907, to recover royalty and commission for the period between the 27th December 1902 and the 16th July 1907. The first two defendants denied the title of the plaintiffs; they also pleaded payment of the sums claimed to the third defendant, and, in the course of the trial, they sought to prove four payments alleged to have been made on the 8th November 1906, 11th April 1907, 15th April 1907 and 16th April 1908. The Subordinate Judge held that the reality of these payments was at least doubtful. He further held that the defendants were aware of the assignments in favour of the plaintiffs, before the date of the earliest of the alleged payments, and as, in his opinion, the title set up by the plaintiffs was established, he made a decree in their favour. Upon appeal the Judicial Commissioner has reversed that decision. He has held that the defendants were entitled to a notice from the transferor and also to know the precise conditions and terms of the transfer. As regards the alleged payments, he did not expressly find that they had been made, but, so far as we can gather from his judgment, he was possibly inclined to hold that the payments were genuine. In this view, although the Judicial Commissioner held that the assignments in favour of the plaintiffs were established, he concluded that they were not entitled to a decree as against the first two defendants, but he gave the plaintiffs a decree against the third defendant, their assignor, and this could be made only on the assumption that the third defendant had, as a matter of fact, received the sums alleged to have been paid by the first two defendants. This decision has been assailed before us on behalf of the plaintiffs on the ground that as their title by assignment was established, they were entitled to recover the arrears due, and, that the burden was upon the first two defendants to allege and establish that they had made the payments without notice of the assignment. On behalf of the respondents, it has been contended, although the objection was not seriously pressed, that the suit was not properly constituted, and that, at any rate, the payment of the sum due to one of the three persons jointly entitled to receive it, was a valid discharge. It has further been argued on behalf of the respondents that the title of the plaintiffs was not completed till notice had been given and that it was essential that such notice be given to the tenants by the assignor himself. It has also been urged that the findings of the Judicial Commissioner concluded the case and that it was not competent to this Court to interfere in second appeal. It has finally been argued that a considerable portion of the claim was barred by limitation.

In so far as the preliminary grounds urged by the respondents are concerned, there is obviously no substance in either of them. It was contended that the suit was badly framed, because the plaintiffs, if they were assignees, were entitled to recover royalty and commission only jointly with their assignor and that consequently they were bound to sue with him as a co-plaintiff. In view of the decision of a Full Bench of this Court in the case of *Peary Mohan* v. *Kedar Nath* (1) this position cannot possibly be maintained. It is further clear that as the third defendant asserted that he had received from the other two defendants the sums claimed by the plaintiffs, it was not necessary for the latter to sue for the recovery of the entire sum, as was explained by this Court in the case of *Pargash Lal* v. *Akhowri Balgobind Sahi* (2). Nor can the position be sustained that payment to one of the three persons entitled to receive the money, is a good payment against the others. Although this contention may be supported by the case of *Barbar Maran* v. *Ramana Gounian* (3) the contrary view has been taken by this Court in the cases of *Harihar Pershad* v. *Bholi Pershad* (4) and *Husainara Begum* v. *Rahmannessa Begum* (5).

(1) 26 C. 409 (F. B.).
(2) 19 C. 735.
(3) 20 M. 461; 7 M. L. J. 269.
(4) 6 C. L. J. 383 at p. 394.
(5) 8 Ind. Cas. 837; 13 C. L. J. 3; 38 C. 342.

The questions thus arise for consideration, *first*, whether the title of the plaintiffs was completed upon the assignment in their favour by the third defendant or whether it was obligatory on the landlord transferor to give notice to the tenants; *secondly*, if such notice was necessary for the completion of the title of the plaintiffs, whether such notice could be given only by the assignor; *thirdly*, whether upon the facts found the first two defendants had notice of the assignment, and *fourthly*, whether any portion of the claim is barred by limitation.

In so far as the first point is concerned, the answer must depend upon the construction of sections 37, 50 and 109 of the Transfer of Property Act. Section 37 provides that when, in consequence of a transfer, property is divided and held in shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation: and provided that no person on whom the burden of the obligation lies, shall be answerable for failure to discharge it in the manner provided by the section, unless and until he has had reasonable notice of the severance. Section 50 provides that no person shall be chargeable with any rents or profits of any immoveable property which he has in good faith paid or delivered to any person of whom he, in good faith, held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits. Section 109 applies the principle embodied in sections 37 and 50, to the case of leases, if the lessor transfers the property leased or any part thereof or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor should not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him: provided that the transferee is not entitled to arrears of rent due before the transfer and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. It is evident upon a true construction of these statutory provisions that the title of the assignee is completed upon execution and, where necessary, registration of the deed of assignment, the completion of the title is not postponed till notice has been given either by the assignor or by the assignee. This, in fact, is in accordance with what has been treated as good law, in this Court since the decision in the case of *The Collector of Rajshahye* v. *Harsoondary Debea* (6). The same view has been taken in England, and the history of the law on the subject will be found set out in the cases of *Moss* v. *Gallimore* (7), *Doed Agar* v. *Brown* (8), and *Scallock* v. *Harston* (9). [see also *Woddilove* v. *Barnett* (10) and *Wilton* v. *Dunn* (11), *De Nicols* v. *Saunders* (12), *Cook* v. *Guerra* (13).] Under the law as it now stands in England the grant of the reversion is effectual to all intents and purposes without any attornment of the tenants of the lands out of which the rent shall be issuing, as if their attornment had been had and made. Consequently, we must take it that the title of the plaintiffs to the royalty and commission claimed by them was perfected on the 27th December 1902 when the assignment in their favour was made. The first ground put forward on behalf of the respondent cannot, therefore, be supported.

In so far as the second point is concerned, it

(6) (1464) W. R., Act X Rulings, 6.

(7) (1779) 1 Douglas 279; 1 Smith L. C. 514; 99 Eng. Rep. 182.

(8) (1853) 2 E. & B. 331 at p. 347; 95 R. R. 580; 22 L. J. Q. B. 432; 17 Jur. 1161; 21 L. T. (o. s.) 300; 118 Eng. Rep. 791.

(9) (1875) 1 C. P. D. 106; 45 L. J. C. P. 125; 34 L. T. 130; 24 W. R. 431.

(10) (1836) 2 Bing. N. C. 538; 4 D. P. C. 347; 2 Scott. 763; 1 Hodges 395; 5 L. J. C. P. 145; 132 Eng. Rep. 210.

(11) (1851) 17 Q. B. 294; 85 R. R. 471; 21 L. J. Q B 69; 15 Jur. 1104; 117 Eng. Rep. 1292.

(12) (1870) L. R. 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.

(13) (1872) L. R. 7 C. P. 132; 41 L. J. C. P. 80; 26 L. T. 97; 20 W. R. 367.

has been argued that notice by the assignors is essential in order that the tenant may not be competent to plead that he has in good faith paid rent to the assignor without notice of the assignment. In support of this position reliance has been placed upon the case of *Barnhart* v. *Greenshields* (14). In our opinion, there is no foundation for this contention. In our view, as soon as the title of the assignee has been completed, he becomes entitled to claim rent. But the tenant is able to escape the liability, if he alleges and establishes that he has paid rent to the assignor in good faith before he had notice of the assignment. It is immaterial whether the notice of the assignment is received from the assignor or the assignee. In fact the cases of *Pope* v. *Biggs* (15) and *Rogers* v. *Humphreys* (16) show that the tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor if he has received notice of the assignment from the assignee. No doubt, Lord Kingsdown observed in the case of *Barnhart* v. *Greenshields* (14), that a purchaser is not bound to attend to vague rumours or flying reports or to statements by mere strangers; a notice in order to be binding must, according to Lord Kingsdown, proceed from some person interested in the property. But it is desirable to point out that notwithstanding the strong terms in which this expression of opinion is put by Lord St. Leonards in *Rochard* v. *Fulton* (17), it is not always prudent and safe in practice for a purchaser to ignore a deliberate and particular statement of an adverse claim, merely on the ground that it has not been made by a party interested, the credibility of the informant must surely be considered. The substance of the matter is that when the tenant pleads payment to the assignor, the Court has to consider, upon all the circumstances of the case, whether the payment alleged to have been made by him was *bona fide*. If he has made the payment with notice, actual or constructive, of the assignment he cannot escape liability merely by proof that the notice he received was from the assignee and not from the assignor. The second ground, therefore, must be overruled.

In so far as the third point is concerned, it divides itself into two branches, *first*, what is the precise point of time with reference to which the question of notice has to be considered; and, *secondly*, whether upon the materials before the Court the defendants have established that they made the alleged payment without notice of the assignment.

In so far as the first branch of the third contention is concerned it is clear that if the payments were made after the defendants had received notice of the assignment, the payments are of no avail. The defence can be valid only in respect of payments proved to have been actually made before notice was received. We take this view notwithstanding the decision in *Wilton* v. *Dunn* (11), where the Court refused to follow *Waddilove* v. *Barnett* (10). The decision in *Wilton* v. *Dunn* (11) proceeds on the untenable assumption that the title of the assignee is not perfected till notice has been given. The title of the plaintiff here was completed on the 27th December 1902, they, thereupon, became entitled to receive from the defendant royalty and commission, and the defendants can escape liability, only if they establish that, as, a matter of fact, they had made payments to the assignor before they received notice of the assignment. Consequently, we have to consider whether the defendants had notice before the 8th November 1903 the date on which the first of the alleged payments was made.

In so far as the second branch of the third contention is concerned, it reduces itself to this: have the first two defendants established that they had no notice before the 8th November 1906? Now Exhibit X, a letter from the 2nd plaintiff to the first defendant dated the 7th June 1906, produced by the tenants defendants proves conclusively that they had notice of the assignment on that date. This letter refers to another letter which had been received by the writer from the first defendant in which the latter had stated that he would not make any payments to the second plaintiff till he had got a letter from the first plaintiff and the third defendant. This indicates plainly that the first defendant had notice of the assignment in favour of the first plaintiff. In so far as the as-

(14) (1853) 9 M. P. C. 18; 14 Eng. Rep. 204.

(15) (1829) 9 B. & C. 245; 32 R. R. 665, 4 Man. & Ry. 193; 7 L. J. (o. s.) K. B. 246; 109 Eng. Rep. 91.

(16) (1835) 4 A. & E. 299; 43 R. R. 340; 5 N. & M. 511; 1 H. & W. 625; 5 L. J. K. B. 65; 111 Eng. Rep. 799.

(17) (1844) 1 Jo. & La Touche 413 at p. 442; 7 Ir. Eq. R. 131.

signment in favour of the second plaintiff is concerned, the letter sets out the date of the assignment and the pages in the registration book where the deed could be found. No doubt, the letter on the face of it does not state specifically the share which had been assigned in favour of the 2nd plaintiff. But that is immaterial. It is not necessary for our present purpose to consider what restrictions have to be applied in the application of the doctrine, somewhat broadly stated, that notice of a deed is notice of its contents, and there may be room for difference of opinion, whether in a particular case as for instance in *Coppin* v. *Fernyhough* (18), *Bisco* v. *Banbary* (19) and *Davies* v. *Thomas* (20), the decision in so far as it held that notice of a deed was notice not only of its contents but also of the contents of other deeds mentioned therein, may not have gone too far. The case before us is reasonably free from difficulty [*Bank of Bombay* v. *Soleman Somji* (21).] The tenants defendants had notice of the claim set up by the 2nd plaintiff and they were referred to the pages in the registration book where the deed of assignment was copied out. An inquiry in the registration office would have brought to their notice the specific share which had been assigned in favour of the second plaintiff. There is nothing to indicate that the second defendant called upon the 2nd plaintiff after the receipt of this letter to specify the share which he had acquired by purchase; nor is there anything to show that the defendants made any inquiries at all. We are of opinion that the defendants have failed to establish that they had no notice of the assignment. The view we take is supported by the decision in *Taylor* v. *Baker* (22), *Jones* v. *Smith* (23) and *Patman* v. *Harland* (24). It is further worthy of note that the last payment alleged was made after they had filed their written statement in this suit and had full notice of the claim of the plaintiff. We hold accordingly that the plaintiffs have established their title to the royalty and commission claimed and that the defendants have failed to discharge the burden which lay upon them to prove that the payments alleged to have been made by them were, as a matter of fact, made before they had notice of the assignment. The third contention, therefore, wholly fails.

The fourth question which requires consideration is whether any portion of the claim is barred by limitation. It has been argued for the respondent that the suit is one for rent within the meaning of Article 110 of the second Schedule of the Limitation Act, whereas it has been contended by the appellant that the suit is governed by Article 116 of the second Schedule of the Limitation Act. The cases of *Umesh Chunder Mundul* v. *Adarmoni Dasi* (25), *Raniganj Coal Association, Limited* v. *Jadoonath Ghose* (26), *Umrao Bibi* v. *Mahomed Rojabi* (27) and *Bhola Nath Dass* v. *Raja Durga Prosad Singh* (28), support the contention of the appellants. But it has been suggested on behalf of the respondents that these cases were erroneously decided and that on the principle of the decision of a Full Bench of this Court in the case of *Mackenzie* v. *Haji Syed Mahomed Ali Khan* (29), which practically overrules the case of *Umesh Chunder Mundul* v. *Adarmoni Dasi* (25), Article 116 has no application to cases of this description. If the question raised had been *res integra*, we would have been prepared to accept the contention of the respondents and to hold that a suit of this description is governed by Article 110 of the second Schedule of the Limitation Act, and this in fact is the view adopted in the case of *Ram Narain* v. *Kamta Singh* (30). But in view of a series of decisions of this Court which have apparently been treated as good law, though sometimes not without considerable hesitation, for nearly a quarter of a century, we are not prepared to dissent from them and to refer the matter for decision to a Full Bench. If

(18) (1788) 2 Br. Ch. Cas. 291; 29 Eng. Rep. 159.
(19) (1876) 1 Ch. Cas. 287.
(20) (1836) 2 Y. & Coll. Ex. 234; 7 L. J. (N. S.) Ex. 21; 47 R. R. 399.
(21) 1 Ind. Cas. 369; 35 I. A. 139; 33 B. 1; 12 C. W. N. 993; 4 M. L. T. 201; 18 M. L. J. 435; 5 A. L. J. 661; 10 Bom. L. R. 1065; 8 C. L. J. 345.
(22) (1818) 5 Price 306; 19 R. R. 625; Daniell Ex. Eq. 71.
(23) 66 Eng. Rep. 943; 58 R. R. 22; (1841) 1 Hare 43 at p. 58; 11 L. J. Ch. 83 affd. in 12 L. J. Ch. 381; 7 Jur. 431; 1 Ph. 245; 41 Eng. Rep. 624.
(24) (1881) 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.
(25) 15 C. 221.
(26) 19 C. 489.
(27) 27 C. 205; 4 C. W. N. 76.
(28) 12 C. W. N. 724.
(29) 19 C. 1.
(30) 26 A. 138; A. W. N. (1903) 210.

we were to adopt such a course, we might seriously prejudice the position of many innocent persons who have not brought their suits within the time prescribed by Article 110 in the belief that Article 116 was applicable, as laid down in the case of *Omesh Chunder Mundul* v. *Adarmoni Dasi* (25). This, in our opinion, is a case where the Legislature may intervene, if necessary, because the result of legislative interference would be that rights would not be retrospectively affected. Under these circumstances, notwithstanding a strong inclination in favour of the contrary view, we feel constrained to follow the rule laid down in *Umesh Chunder* v. *Adarmoni Dasi* (25). The conclusion follows that no portion of the claim is barred by limitation, and the fourth point taken by the respondents cannot be sustained.

The result is that this appeal is allowed, the decree of the Court below discharged, and that of the Court of first instance restored with costs in all the Courts.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 4 OF 1912.

November 1, 1912.

Present:—Mr. Pratt, J. C, and Mr. Crouch, A. J. C.

WADHUMAL *walad* ISARDAS—APPELLANT

versus

CHELLOMAL *walad* SHEWOMAL AND OTHERS—RESPONDENTS.

Jurisdiction—Valuation of suit—Value of claim by plaintiff determines jurisdiction—Jurisdiction not to be ousted by exaggerating claim—Partition suit—Value of share claimed, determines value of suit for purposes of jurisdiction—Parties consenting to refer inquiry into valuation for jurisdiction to Commissioner and to be bound by his finding—Waiver.

The value that *prima facie* determines jurisdiction is the value put upon the subject-matter by the plaintiff.

But the jurisdiction of the Court properly having cognizance is not to be ousted by unwarrantable additions to the claim.

Lakshman Bhatkar v. *Babaji Bhatkar*, 8 B. 31, referred to.

Damodhar Timaji v. *Trimbak Sakharam*, 10 B. 370; *Hamidunnissa Bibi* v. *Gopal Chandra Malakar*, 24 C. 661; 1 C. W. N. 556, distinguished.

In a partition suit the value for jurisdiction should be determined according to the specific share claimed.

That law does not prevent parties waiving an inquiry by the Court as to facts for the determination of the question as to jurisdiction when that fact depends upon facts to be ascertained.

Jose Antonio v. *Francisco Antonio*, 7 Ind. Cas. 950; 35 B. 24; 12 Bom. L. R. 712, referred to.

Hence, where on a question of valuation of a suit for purposes of jurisdiction, the parties agreed to be bound by the decision of a Commissioner, it would not be open to either party to object to the reference to the Commissioner as illegal.

Appeal from the order of the first class, Sub-Judge, Sukkur.

Mr. *Isaedas Oodharam*, for the Appellant.

Mr. *Hirdaram Mewaram*, for Respondent No. 1.

Mr. *Gidumal Awatrai*, for Respondent No. 4.

JUDGMENT.—The plaintiff-appellant filed the partition suit in the Court of the Sub-Judge, first class, Sukkur alleging that he was in joint possession. The plaint was stamped with the fixed fee of Rs. 10 under Schedule II, Article 17.

The plaintiff alleged that the joint property was worth Rs. 42,500 and that his share was a quarter. This valuation of the suit for purposes of jurisdiction was objected to and the Sub-Judge referred to a Commissioner an issue as to the amount and value of the joint estate, the parties agreeing to be bound by the decision of the Commissioner.

The Commissioner found that the joint property was worth Rs. 19,627-10-0 and that the value of plaintiff's quarter share was, therefore, less than Rs. 5,000.

The Sub-Judge accordingly returned the plaint for presentation in the Court of the Sub-Judge, second class, Larkana.

The plaintiff appeals against this order on three grounds:—

(1) That the valuation in the plaint governs jurisdiction;

(2) that the value for jurisdiction is the value of the whole joint estate; and

(3) that the reference to the Commissioner was illegal.

Now it is true that the value that *prima facie* determines jurisdiction is the value put upon the subject-matter by the plaintiff for it is to be determined at the commencement of the inquiry. But another principle has been recognised by the Courts and that is that the jurisdiction of the Court properly having cognizance is not to

be ousted by unwarrantable additions to the claim. *Lakshman Bhatkar* v. *Babaji Bhatkar* (1). It was there said that such an exaggerated claim was a fraud upon the law and should be rejected. This principle may now be referred to section 151 of the Code of Civil Procedure. The case of *Damodhar Timaji* v. *Tirnbak Sakharam* (2) is distinguishable, for there jurisdiction was determined by section 5 of Act XI of 1865 according to the "demand" made by the plaintiff, so also is the case of *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (3) which was decided under section 11 of the Suits Valuation Act. But even in the latter case it was admitted as a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction, and that when it was found that a party had intentionally exaggerated his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it before the merits of that claim have been gone into, the plaint should be returned for presentation to the proper Court. These remarks have a special application in this case for the property is situate at Larkana and the parties are residents of that place and the suit seems to have been designedly filed at Sukkur. The Sub-Judge, therefore, had jurisdiction to inquire into the valuation of the suit made by the plaintiff.

As to the second point it was settled by the Bombay High Court as long ago as 1883 in the case already cited that in a partition suit the value for jurisdiction should be determined according to the specific share claimed. The *ratio decidendi* was that the subject-matter in the suit was generally the specific thing sought in the suit; that in a partition suit the whole estate was the *substratum* out of which the claim arose and could, therefore, only be remotely described as the subject-matter; but that the claim itself was the immediate subject-matter. We think this line of reasoning is correct. In our view the whole estate is the corpus or object-matter out of which the claim arises but that the claim itself, *i.e.*, the particular share claimed is the subject-matter in suit. Order XXXIX, rule 2 (1), requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of his cause of action. Section 24 of the Bombay Civil Courts Act refers to suits "wherein the subject-matter does not exceed in amount or value Rs. 5,000." Reading these two provisions of the law together, there can, we think, be no doubt that the subject-matter is the claim.

If the suit were not only for partition, but also for recovery of possession of the share claimed, the valuation would be made under section 8 of the Suits Valuation Act and the value for jurisdiction and the value for Court-fee would be the same. This value would unquestionably be the value of the share claimed. This was decided in the case of *Motibai* v. *Haridas* (4). The contrary view expressed in *Bhagwat Sahay* v. *Pashupahi Bose* (5) loses sight of section 8 of the Suits Valuation Act.

In the present case the plaintiff claims to be in joint possession and the claim is only to convert his joint possession of the whole into a several possession of a part. This is a claim that is difficult to value, but in any case its value cannot be greater than the value of the same claim where the plaintiff had not possession. This also is the view expressed by the Legislature in section 4 of the Suits Valuation Act.

The last point taken in appeal refers to the Commissioner. No doubt, the scope of the commission is wider than that, contemplated by Order XXVI, rule 9, but as parties agreed to be bound by the finding of the Commissioner it is not open to the plaintiff to raise this objection. As said in *Jose Antonio Baretto* v. *Francisco Antonio Rodrigues* (6): "The law does not prevent parties waiving an inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, when that question depends upon facts to be ascertained."

We, therefore, confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 8 B. 31.
(2) 10 B. 370.
(3) 24 C. 661; 1 C. W. N. 556.
(4) 22 B. 315.
(5) 10 C. W. N. 564; 3 C. L. J. 257.
(6) 7 Ind. Cas. 950; 35 B. 24; 12 Bom. L. R. 712.

HAMED ALI SADAGAR *v.* ATLAS ALI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2585 OF 1911.
April 11, 1913.
Present:—Mr. Justice Chapman aud Mr. Justice Newbould.
HAMED ALI SADAGAR AND ANOTHER PLAINTIFFS—APPELLANTS
versus
ATLAS ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue Sale Law Act (XI of 1859), s. 37—"Settlement," meaning of.

For the purposes of section 37 of the Revenue Sale Act, 1859, the word "settlement" in that section must be taken to mean the permanent settlement of the estate concerned and not the year 1793 in which the greater portion of Bengal was permanently settled.

Nagendra Lal Chowdhury v. *Nazir Ali*, 10 C. W. N. 503, referred to.

Appeal from the decree of the first Sub-Judge of Chittagong, dated August 1st, 1911, confirming that of the Third Sadar Munsif, dated September 14th, 1910.

Babu *Dhirendra Lal Kastagir*, for the Appellants.

Babu *Khitish Chandra Sen*, for the Respondents.

JUDGMENT.—This estate was originally a Nawabad *taluk* which had always been temporarily settled. It was permanently settled for the first time in 1861. The question we have to decide is whether for the purposes of section 37 of the Revenue Sales Act, 1859, the word "settlement" in that section shall be taken to mean for the purpose of this case the year 1793 in which the greater portion of this Province was parmanently settled; or whether the word "settlement" in that section has the meaning which would naturally apply to it, namely, the permanent settlement of the estate concerned. The learned Subordinate Judge has taken the latter view, and we have no doubt that, that view is correct. We have been referred to the case of *Nagendra Lal Chowdhury* v. *Nazir Ali* (1). The facts of that case are different in a very important particular, for in that case the estate concerned had originally been permanently setted in 1793. The portion of the judgment on which the appellant has relied is that in which Mr. Justice Mitra has said that the Permanent Settlement of 1793 is taken to be a date of the same nature as the reign of Richard II in England. We are not disposed to take this view. The provisions of section 37 of the Revenue Sales Act of 1859 were designed merely for the purpose of preserving an estate so far as may be in the condition in which it was at the time when the estate was permanently settled. We do not think that the Legislature had any regard to the considerations under which the Coronation of Richard II was once taken in England as the date beyond which the history of English Law cannot be profitably traced.

The second ground argued in appeal is that the learned Subordinate Judge placed the onus of proof wrongly on the plaintiff in so far as he held with reference to the terms of the *kabuliat* which was executed at the time of the Permanent Settlement of this estate to the effect that the person taking settlement would recognize all the *pattahs* then existing that it lay upon the plaintiff to show that the term of the *pattah* had expired. The appellant is unable to support his contention except by reference to the terms of section 37 of the Revenue Sales Act; and we have already held that the appellant is not entitled to the benefit of the provisions of that section. The second contention, therefore, fails.

A preliminary objection to the hearing of this appeal was made on the ground that the land had been acquired under the Land Acquisition Act, and that although the first Court had found that the land had not been so acquired yet pending the hearing of the present appeal a rule has been applied for by the appellant upon the ground that the land had in fact been so acquired and that Rule had been made absolute. The argument was that the question at issue between the parties was exclusively within the province of the land Acquisition Court. The respondent, however, conceded that he would make use of the decision of the learned Subordinate Judge in this matter before the Land Acquisition Court. It is clear, therefore, that it would not be right to hold that there was no appeal from the Subordinate Judge's decision nearly upon the ground of the fact, if it be a fact, that the land had been acquired in land acquisition proceedings.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) 10 C. W. N. 503.

KALI KUMARI *v.* BACHHAN SINGH.

CALCUTTA HIGH COURT.
CIVIL RULE No. 420 OF 1913.
April 28, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KALI KUMARI—PETITIONER
versus
BACHHAN SINGH—OPPOSITE PARTY.

Receiver—Selection—Judicial discretion—Non-interference by Appellate Court—Party to suit not to be appointed Receiver unless in special case—Residence beyond jurisdiction, not fatal objection—Adequate guarantee that he will be subject to control of Court—Residence at great distance from property, if absolute disqualification—Circumstance to be considered.

The selection and appointment of a particular person as Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and the exercise of this like other matters of judicial discretion, will rarely be interfered with by an Appellate tribunal.

Perry v. *Oriental Hotels Company*, 5 Ch. App. 420; 23 L. T. 525; 18 W. R. 779 and *Cookes* v. *Cookes*, 2 De G. J. and S. 526, relied upon.

But one of the parties to a cause shall not be appointed Receiver without the consent of the other party unless a very special case is made.

Sargant v. *Read*, 1 Ch. D. 600; 45 L. J. Ch. 206, *Budgett* v. *Improved Patent Syndicate Limited*, (1901) W. N 23, followed.

Residence beyond jurisdiction is not by itself a fatal objection, but where a non-resident is appointed Receiver, there must be adequate guarantee that he will be subject to the effective control of the Court.

The fact that the Receiver chosen resides at a great distance from the property which is to be subjected to his management and control, while not regarded as an absolute disqualification for the office, is an important circumstance to be taken into consideration.

Tharpe v. *Tharpe*, 12 Ves. 317; *Wynne* v. *Lord Newborough*, 15 Ves. 283: *In re Carshalton Park Estate Limited*, (1908) 2 Ch. 62 at p. 68; 77 L. J. Ch. 550; 99 L. T. 12; 15 Manson 228; 24 T. L. R. 547, relied upon.

Rule against the order of the District Judge of Bhagalpore, dated March 3rd, 1913.

Babus *Baldeo Narain Singh* and *Biraj Mohan Majumdar*, for the Petitioner.

Mr. *Sinha* and Dr. *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made under subsection (1) of section 12 of the Guardians and Wards Act for the temporary protection of the property of an infant. The opposite party, Bachhan Singh, is the maternal grandfather of the infant and is one of the rival claimants for the office of guardian of his property. He was appointed guardian by the District Judge but his appointment has been set aside by this Court on appeal and the District Judge has been directed to re-consider the question of the appointment of a proper guardian. During the pendency of this matter the District Judge has made an order under sub-section (1) of section 12 and has appointed the maternal grandfather as Receiver of the estate of the minor. On behalf of the paternal grandfather of the infant objection has been taken to this appointment on the ground that one of the applicants for the office of guardian should not have been placed in a position of undue advantage by appointment as Receiver before the respective claims of all the applicants have been examined. It has also been urged that he resides at Gorakhpur, beyond the limits of the local jurisdiction of the Court and that it is unlikely that he will be able to supervise effectively the management of the estate of the minor which is situated in the District of Bhagalpur. It has finally been contended that whosoever is appointed Receiver, should be required to furnish adequate security. In answer to these contentions, it has been argued that selection of a suitable person as Receiver is largely a matter of discretion with the primary Court, and that a Court of Appeal or revision should not interfere with the choice made by that Court. It need not be disputed that the selection and appointment of a particular person as Receiver is a matter of judicial discretion, to be determined by the Court according to the circumstances of the case, and the exercise of this, like other matters of judicial discretion, will rarely be interfered with by an Appellate tribunal [*Perry* v. *Orientals Hotels Company* (1)] or, as has been sometimes said, to induce an Appellate Court to interfere with the decision of an inferior tribunal in the selection of a Receiver, it is necessary to show some "overwhelming objection" in point of propriety or some fatal objection in principle, to the person named. *Cookes* v. *Cookes* (2). It will presently be shown, the case before us falls within this exception, and the order of the Court below must be discharged in the interest of the infant

In the first place as was observed by

(1) 5 Ch App. 420; 23 L. T. 525; 18 W. R 779.
(2) 2 De G. J. & S. 526; 46 Eng. Rep. 1093; H. & M. 124; 34 L. J. Ch. 459; 11 Jur. (N. S.) 533; 12 L. T. 408; 13 W. R. 697.

Sir George Jessel in the case of *In re Lloyd, Allan* v. *Lloyd*(3) it is the settled rule that one of the parties to a cause shall not be appointed Receiver without the consent of the other party unless a very special case is made. [*Sargant* v. *Read* (4); *Budgett* v. *Improved Patent Syndicate Limited* (5)]. In the present case, the person selected for appointment as Receiver is interested in the matter before the Court: he is one of the rival claimants to the office of guardian of the property of the infant. What is more, he was appointed guardian, but that order has been set aside by this Court. The effect of his appointment as Receiver is to restore him forthwith to the position which he occupied under the order which has been cancelled by this Court.

In the second place, not only is no special case made out to take the matter out of the ordinary rule that a party to the proceedings should not be appointed Receiver. Serious objections may be and have been taken to his appointment. He resides ordinarily at a place far beyond the local limits of the jurisdiction of the Court, and as he has not been called upon to furnish any security, much less tangible security within the jurisdiction of the Court, the Court will have practically no control over him in the event of default. Residence beyond jurisdiction is not by itself a fatal objection, but where a non-resident is appointed Receiver there must be adequate guarantee that he will be subject to the effective control of the Court. Similar observations apply to this question of eligibility as affected by distant residence. The fact that the Receiver chosen resides at a great distance from the property which is to be subjected to his management and control, while not regarded as an absolute disqualification for the office, is an important circumstance to be taken into consideration. [*Tharpe* v. *Tharpe* (6); *Wynee* v. *Lord Newborough* (7); *In re Carshalton Park Estate Limited* (8)]. In the case before us, the person selected resides at Gorakhpur in the United Provinces, and if his appointment stands the estate of the infant in Bhagalpur will practically be in the charge of other people: it has not been disputed that from such distance constant and regular supervision is extremely difficult, if not impossible.

The result is that this Rule is made absolute and the order of the Court below discharged. The Judge will proceed under sub-section (1) of section 12 of the Guardians and Wards Act to appoint a suitable outsider as Receiver of the properties, on such terms as to remuneration and security as may be reasonable. We may add that several names have been mentioned in this Court but we have no materials to enable us to deal with the qualifications of these or any other candidates. The record will be sent down at once, so that, this matter may be taken up for disposal as also the question of the appointment of a guardian. There will be no order as to the costs of this Rule.

Rule made absolute.

(3) (1879) 12 Ch. D. 447 at p. 451; 41 L. T. 171; 28 W. R. 8.
(4) 1 Ch. D. 600; 45 L. J. Ch. 206.
(5) (1901) W. N. 23.
(6) 12 Ves. 317; 33 Eng. Rep. 121.
(7) 15 Ves. 283; 33 Eng. Rep. 761.
(8) (1908) 2 Ch. 62 at p. 68; 77 L. J. Ch. 550; 99 L. T. 12; 15 Manson 228; 24 T. L. R. 547.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 323 OF 1911.

April 10, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

DIGAMBAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JATINDRABALA DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Sonthal Parganahs Settlement Regulation III of 1872, *ss.* 11, 25A—*Defendant found by Settlement Authorities as tenant—Suit to determine whether plaintiff or defendant is tenant, whether maintainable.*

In a suit for declaration of title to immoveable property, for correction of an entry in a Record of Rights prepared under the Sonthal Perganahs Settlement Regulation, 1872, and for consequential reliefs, the plaint alleged that the disputed land constitutes a *jote*, and the question in controversy is, whether the first defendant as found by the Settlement Authorities is the tenant in respect thereof or the plaintiff along with their brother, the second defendant, as asserted by them:

Held, that this is a matter decided by a Settlement Court within the meaning of section 11 of the Regulation and consequently a suit does not lie in a Civil Court except as provided in section 25A; that the rights in controversy in the present suit are not those mentioned in section 25A, that is, rights of *zemindars* or other proprietors as between themselves; and that, therefore, the suit was not maintainable.

DIGAMBAR DAS *v.* JATINDRABALA DASI.

Ram Churn Singh v. *Daturi Singh*, 18 C. 143; *Kangal Chandra* v. *Modhu Sudan*, 1 C. L. J. 75*n*, relied upon.

Appeal from the decree of the District Judge of Sonthal Parganahs, dated November 8th, 1910, affirming that of the Sub-Judge of Pakur, dated August 18th, 1910.

Babu *Tarak Chandra Chakravarti*, for the Appellants.

Babu *Surendra Nath Ghoshal*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to immoveable property, for correction of an entry in a Record of Rights prepared under the Sonthal Parganahs Settlement Regulation, 1872, and for consequential reliefs. The Courts below have dismissed the suit as not maintainable under the law.

The circumstances under which the plaintiffs have instituted this suit are not in controversy. The disputed land originally belonged to one Prithibi Chandra Nula; on the 17th November 1883 the property was purchased from him in the name of the second defendant Harihar Das. In 1905 proceedings were taken under the Sonthal Parganahs Settlement Regulation for the preparation of a Record of Rights. One Dinesh Chandra Das thereupon appeared and claimed to hold as tenant in occupation of this land; he was so recorded by the Assistant Settlement Officer, apparently without objection. During the pendency of the settlement proceedings, however, Dinesh Chandra Das died and thereupon, the second defendant applied that he might be recorded as the tenant in respect of this land. This application was opposed by Jatindrabala Dasi, the widow of Dinesh Chandra Das, and now the first defendant in this suit. She alleged that the holding belonged to her husband, and, that, upon his death, she had succeeded thereto by rights of inheritance. The matter in controversy was determined by the Assistant Settlement Officer on the 14th September 1906. He overruled the contention of the second defendant that Dinesh Chandra Das held under a gift for life, and found in substance that the second defendant had transferred his interest absolutely in favour of Dinesh Chandra Das and that, consequently, upon the death of the latter, his widow had succeeded to the property by inheritance. This order was confirmed by the Settlement Officer on the 1st February 1907, and by the Commissioner on the 31st October 1907. The Commissioner came to the conclusion, upon a review of the evidence, that the second defendant had failed to establish the right alleged by him. The present suit was commenced on the 7th July 1909 by the plaintiffs, who are the brothers of the second defendant. Their allegation is that the property was acquired on the 17th November 1883 ostensibly in the name of the second defendant, but really for the benefit of all the four brothers, that Dinesh Chandra Das, who was their relation, had fraudulently got himself recorded as the absolute owner, and that they are consequently entitled to a declaration of their title and for consequential amendment of the Record of Rights. They further pray that a decree for mesne profits, obtained against them by the first defendant on the basis of the entry in the Record of Rights, may be set aside. The Courts below have held that the suit as framed is not maintainable. In our opinion this view is clearly well founded on principle.

Section 9 of Regulation III of 1872 provides that the Lieutenant-Governor may from time to time declare that a Settlement shall be made of the whole or any part of the Sonthal Parganahs for the purpose of ascertaining and recording the various interests and rights in the lands. Section 10 then lays down that the Lieutenant-Governor may appoint the officers by whom the Settlement is to be made and may invest any officer with the control over them by way of appeal and revision and may make rules for the procedure of such officers in the investigation into rights in the land and the hearing of suits and generally for the guidance of such officers. It is plain that the Settlement Officer is called upon in a proceeding, instituted under section 9, to ascertain and record the various interests and rights in the land. In the case before us, the Assistant Settlement Officer has ascertained and recorded the interests and rights in the land, and the entry made is to the effect that the first defendant, Jatindrabala Dasi is the tenant of the disputed land. What, then, is the effect of this entry? Section 11 lays down that, except as provided in section 25 A, "no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under the rules; but the

decisions and orders of the Settlement Courts, made under the rules, regarding the interest and rights above-mentioned, shall have the force of a decree of Court." Consequently the decision of the Assistant Settlement Officer dated the 14th September 1906 and subsequently confirmed by the Commissioner on the 31st October 1907 has the force of a decree of Court. The question thus arises, whether a suit lies in a Civil Court in respect of this matter. In the first place, it is clear, that this is a matter decided by a Settlement Court within the meaning of section 11. Consequently a suit does not lie in a Civil Court, except as provided in section 25A. Now section 25A provides that when only the rights of *zemindars* and other proprietors as between themselves are concerned, a suit may, unless it is barred by section 13 of the Code of Civil Procedure of 1882, be brought in a Court established under the Bengal Civil Courts Act of 1887 to contest the finding or record of the Settlement Officer, within three years from the date of the publication of the Record of Rights or of the final order of the Revenue Court. The present suit, however, unlike *Ramranjan* v. *Nanda Lall* (1) is not one in which the rights of *zemindars* and other proprietors as between themselves are concerned. The very first paragraph of the plaint alleges that the disputed land constitutes a *jote*, and the question in controversy is, whether the first defendant, as found by the Settlement Authorities, is the tenant in respect thereof or the plaintiffs along with their brother, the second defendant, as asserted by them. Consequently, the suit is not maintainable under section 25 A of Regulation III of 1872. If, we next turn to section 25 sub-section (1), we find it laid down that after the period of six months from the date of the publication of the Record of Rights of any village, such record shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in section 25A. As already explained, the rights in controversy are not those mentioned in section 25A. Consequently the record is conclusive proof of the rights therein recorded. Under these circumstances we are of opinion that the suit as framed is not maintainable. This view is substantially in accord with that taken by this Court in the cases of *Ram Churn Sing* v. *Daturi Sing* (2), *Kangal Chandra* v. *Madhu Sudamn*, Miscellaneous Appeal No. 135 of 1904 (3) and *Ram Ranjan* v. *Satish Chandra* (4). The appeal fails and is dismissed with costs

Appeal dismissed

(1) 22 C. 473.
(2) 18 C. 146.
(3) 1 C. L. J. 75*n*.
(4) S. A. No. 2129 of 1908.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 29 OF 1912.
January 6, 1913.
Present:—Mr. Justice Beaman and Mr. Justice Rao.
MADHVACHARYA RAMCHANDRACHARYA AND OTHERS—DEFENDANTS—APPELLANTS
versus
SHRIDHAR NARASINHA BHAT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Grant of land—Bestowal of hereditary office—Coupled with grant of land—Land not resumable—Service or duty sole motive of grant—Failure or refusal to perform service or grant—Forfeiture of grant—Terms of grant unknown—Difficult to decide duty or service to have been the sole motive or condition of grant.

Where an hereditary office is created, and bestowed hereditarily upon a person's family from generation to generation, and lands are assigned as remuneration therefor, the lands so granted are not resumable.

But where there is a grant of land burdened with duty or service, the duty or service being the sole motive and condition of the grant, on failure or refusal to perform the duty or service, the land is resumable.

Where there is an interest in land coupled with duty, and the grant is not forthcoming so that its actual terms may be known it must always be a matter of great difficulty, and no more than a mere conjecture, to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former.

First appeal from the decision of the acting District Judge of Kanara, in Suit No. 1 of 1910.

Mr. *Coyajee*, (with him Mr. *G. S. Mulgaonkar*), for the Appellants.

Mr. *Rangnekar*, (with him Mr. *S. V. Palekar*), for the Respondents.

MADHVACHARYA RAMCHANDRACHARYA *v.* SHRIDHAR NARASINHA BHAT.

JUDGMENT.—Adopting the view most favourable to the plaintiffs that the land in suit originally belonged to the temple and was granted by the temple to the ancestors of the defendants hereditarily for the performance of the *vritti* of reciting Purans in the temple, we should still be of opinion that no case has been made out for removing the defendants and restoring the lands to the temple. In fairness to the defendants it ought, however, to be said that, in our opinion, there is very little evidence, and that not of the best quality, to support either of the propositions assumed in the last preceding observation. The only evidence that the lands ever belonged to the temple consists in a single entry in a revenue record, where it is stated that the land is of the ownership of the God. Beyond that there is absolutely nothing, for I reckon as of no evidentiary value the statements of the witnesses at the present day or the alleged admissions of the father of defendant No. 1 and one admission of defendant No. 1 himself. Nothing is easier than for witnesses to come forward and make a bold statement that such and such land belonged to the temple. It does not appear that any single one of these witnesses was asked how he came by that information. And since it is common ground that the grant, if a grant was ever made, was made some time in the very early years of the 19th century, and since then that every act of ownership has been done by the defendants themselves, it is obviously impossible that any living witness could have any first hand knowledge of such a grant having been made, and, therefore, of the ownership of the property having inhered in the temple anterior to such grant. Next it is equally uncertain so far as the evidence recorded in this case goes, assuming that the lands in suit were ever granted to the defendants by the plaintiff, what the terms of that grant were, whether it was in reality the creation of the hereditary office of *vritti* for the reciting of Purans, then bestowed hereditarily upon the defendants' family from generation to generation, and the lands in suit assigned as remuneration therefor, or whether it was a grant of lands burdened with the service of reciting Purans in the temple. In our opinion the evidence upon which the lower Court has mainly relied is at least as consistent with the grant having been of the former as of the latter description. And if that were so, the law is well established that the lands so granted are not resumable. Further where there is an interest in land coupled with the duty, and the grant is not forthcoming so that its actual terms may be known, it must always be a matter of great difficulty, and no more than a mere conjecture, to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former. Where that is so, the law is well established that on failure or refusal to perform the duty the interest in the land is resumable. But there are innumerable cases of an interest in land, so coupled with the duty as not to fulfil the requirements of the last stated definition; and in all those cases it cannot be said that it is settled that the land can be resumed even upon failure or refusal to perform the duty.

We are, therefore, assuming a great deal when we begin by adopting the view most favourable to the plaintiffs, namely that this was a grant of land burdened with service, the service being the sole motive and condition of the grant. Even were it so, however, it is clear upon the record that there is no satisfactory evidence either that the defendants are incapable of performing or unwilling to perform the duty, which the plaintiff alleged was the motive and condition of the grant, namely, reciting Purans during three months of the year. The plaintiff has sworn that the defendants were called upon to recite those Purans and refused to do so. On the other hand, the defendants have in their written statement expressed their willingness to recite the Purans. And beyond the bare word of the plaintiffs there is only the statement of a single witness which can by means of little interpretation be made to support him. At first that witness said that after asking the defendant why he was not reciting the Purans and the defendant having replied that he was ill, he afterwards went on to say that he was quite willing to do so if his interrogator so wished. The witness, however, immediately corrected the last statement by saying that he understood by "if he wished" if he were willing to pay him for doing it. However that may be, there is really no evidence worth the name, certainly none upon which we should feel disposed to rely, in support of the conclusion arrived at

by the learned Judge below, one of the effects of which would be to deprive the defendants of the enjoyment of lands which they have admittedly held uninterruptedly since 1823, and at the same time to deprive them of what it is quite likely they regard as a privilege rather than a duty, namely, reciting Purans during the three months of the year in the temple. In respect of grants burdened with service resumable for failure or refusal to perform that service the Court would ordinarily, we think, require very strong and conclusive evidence, where the facts are as found in this case, before disturbing the practice which has persisted for a century. No reflection is made upon the competence of the defendants, and it is the defendants' case that so far from having refused to read the Purans, they have been prevented by the plaintiffs and their adherents from doing so; and speaking for myself, I think, this is much more probably true than that they should have obstinately refused the performance of the duty which is usually regarded as conferring some great honour upon those entrusted with it. It is not an onerous duty, and assuming that lands were held upon condition of performing it, it appears to us that it would be most unjust upon the bare word of the plaintiff that he called upon the defendants to do this service and that the defendants refused to take these lands out of the possession of the defendants and to preclude the defendants' family from reciting the Purans, as they have admittedly been doing for nearly a century. We entertain some doubts whether in view of the observations upon the alternative hypothesis, which the Court might well have adopted, we ought not really to dismiss this suit; but taking the evidence as a whole there may be material enough logically to support the opinion of the learned Judge below that the land was given by the temple to the defendants' family on condition that that family should thenceforward and for ever hereditarily recite the Purans during the stated months in the temple, and we think that so long as there is a descendant of the defendants' family ready and willing to discharge those duties, he should be allowed to do so and the lands should remain as before in the possession of the defendants and their descendants. We must, therefore, modify the decree of the Court below and substitute for it a decree founded upon the foregoing judgment. Having regard to the fact that in their written statement the defendants absolutely repudiated any duty coupled with the interest they had in the land, and further to the fact that the plaintiffs theoretically have moved in this matter not in their own but in the interests of the public charity, we think that each party should bear his own costs throughout.

Decree varied.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 561 OF 1908.

February 14, 1913.

Present:—Mr. Justice Coxe and Mr. Justice N. R. Chatterjea.

SHEONARAIN ROY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOKSHODA DAS MITRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Hindu Law—Mitakshara—*Mortgage of ancestral property by father—Suit for sale against sons—Money charged on immoveable property—Limitation Act (XV of 1877), Sch. II, Art.* 132.

A suit to obtain payment of debts contracted by a father governed by the *Mitakshara* law upon a mortgage of the ancestral property, by a sale of the said property in the hands of the sons and grandsons, is a suit to enforce payment of money charged on immoveable property, and the 12 years' rule of limitation provided by Article 132 of the Limitation Act will apply to it.

Moheshwar Dutt Tewari v. *Kishun Singh*, 34 C. 184; 11 C. W. N. 294; 5 C. L. J. 441, and *Bissonath Prosad Malita* v. *Brindesri Prosad Singh*, 17 Ind. Cas. 577; 40 C. 342, followed.

Suraj Bansi Koer v. *Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 C. L. R. 223, *Bhagwat Pershad* v. *Girja Koer*, 15 C. 717; 15 I. A. 99, relied upon.

Luchmun Dass v. *Giridhur Chowdhry*, 5 C. 855 (F. B.); 6 C. L. R. 473, *Suraj Prosad* v. *Golab Chand*, 27 C. 762 and *Bhagawat Narain Chowdhury* v. *Suba Lal Jha*, 7 C. L. J. 195, not followed.

Appeal from the decree of the first Sub-Judge of Patna, dated July 18th, 1908.

Babus *Narendra K. Bose*, *Karunamoye Bose* and *Charu Chandra Chatterjee*, for the Appellants.

Babus *Umakali Mukherjee*, *Jogesh Chandra Dey*, *Chandra Sekhar Prosad Singh* and *Surendra Kumar Bose*, for the Respondents.

SHEONARAIN ROY *v.* MOKSHODA DAS MITRA.

JUDGMENT.

COXE, J.—This was a suit on a mortgage said to have been executed by the defendants Nos. 1 and 2. The suit has been decreed and the defendants Nos. 3, 4 and 11 appeal. Defendants Nos. 3 and 4 are the sons of defendant No. 1 and defendant No. 11 is a subsequent purchaser. They appeal on the same grounds.

The first ground taken on their behalf is that the mortgage is not properly proved inasmuch as the document is dated the 3rd June, but the attestations are dated the 16th and 19th. Positive evidence, however, is given by one of the attesting witnesses, a man of respectable position and fully believed by the Subordinate Judge, that the document was executed in the presence of the witnesses and attested by them the same day. The defendants Nos. 1 and 2 must know if this is true but the contesting defendants did not venture to put them in the box. It is pleaded by defendants Nos. 3 and 4 that defendants Nos. 1 and 2 are in collusion with the plaintiffs. These defendants, however, did not appear at the hearing of the suit and this plea is not taken by the defendant No. 11. No evidence whatever is adduced in support of the assertion. In these circumstances I fully agree with the learned Subordinate Judge that the execution and attestation of the document are proved.

Secondly it is contended that a certain village or hamlet called Samanpura is not included in the mortgage. It appears that Towji No. 37 is *Mahal* Dumri Bahar which includes *Mouza* Dumri Bahar and *Mouza* Samanpura. Evidence is given that the defendants Nos. 1 and 2 represented that the property consisted of 300 *bighas* yielding Rs. 2,000 profit. An inquiry was made and it was found that the *mahal* including Samanpura did consist of 300 *bighas* yielding Rs. 2,000 profit. The lands of the two villages were not separate. Here too the defendants do not put the defendants Nos. 1 and 2 into the box to deny that they intended to mortgage Samanpura. In these circumstances the fact that the parties used the word '*mouza*' instead of the word '*mahal*' in the document does not seem to me of importance. That the words are interchanged and used inaccurately is clear from the 11th defendant's sale-deed, which admittedly included Samanpura and yet described the property merely as *Mouza* Dumri Bahar. I think, therefore, that this contention also fails. It may be observed that the defendant No. 11 in his application to the Land Registration Authorities pleaded that he was "in possession of the 8-annas *takhta* of the *Mouza* Dumri Bahar aforesaid having purchased the same at a public auction" and that as such purchaser he was "in possession of all lands appertaining to the said estate Dumri Bahar including the lands known under the name of Samanpura and that the rent rolls for the estate Dumri Bahar includes the lands known as Samanpura without distinction and without any specification." This is a clear admission on the part of the defendant No. 11 that Samanpura is an integral part of Dumri Bahar. It is not, of course, valuable as evidence against defendants Nos. 3 and 4 but it must be remembered that they did not even appear to contest the suit.

Thirdly it is argued that as defendant No. 12 and plaintiff No. 2 are joint, and the defendant No. 12 is a subsequent purchaser, the suit must fail to the extent of his purchase. Here too no evidence is given by the defendants though the burden of proof was on them. All that they rely on is a statement of the plaintiff's witness Purnendu that the defendant No. 12 and the plaintiff No. 2 are in joint mess and seem to him to be joint. There is also a statement in the plaint that defendant No. 12 is a subsequent purchaser. There is no evidence whatever to show what he has purchased or to prove that he is joint in estate with his brother or that the plaintiff No. 2 has any interest in the purchase. This contention, therefore, must also fail.

The fourth and the last point taken is that the suit, so far as it affects the shares of the defendants Nos. 3 and 4 is barred by limitation. On this point it appears to me that there is a considerable divergence of judicial opinion and I am not sure that we should not refer the matter to the decision of a Full Bench. As my learned colleague, however, thinks that this course is unnecessary and as I agree with him in his view of the law. I agree that the appeal should be dismissed with costs.

SHEONARAIN ROY v. MOKSHODA DAS MITRA.

N. CHATTERJEA, J.—As regards the first three points, I have nothing to add to the judgment of my learned colleague.

The fourth and last point taken is that the suit, so far as it affects the shares of the defendants Nos. 2 and 4 is barred by limitation, the suit having been instituted more than six years after the due date mentioned in the mortgage bond. The decision of this question depends upon whether the mortgage executed by the father can be enforced against the sons, as a mortgage, in which case the 12 years' rule of limitation provided by Article 132 of the Limitation Act would apply.

It appears that no evidence was adduced by the defendants to prove that the debt was contracted for immoral purposes and the issue raised upon that point was given up. The Court below found it to be proved that with the exception of Rs. 750 the rest of the money borrowed was expended in re-payment of antecedent debts and that the Rs. 750 was required for family purposes and held that the plaintiffs were entitled to a mortgage decree for the entire property mortgaged including the shares of defendants Nos. 3 and 4.

In the cases of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) and *Bhagwat Pershad* v. *Girja Koer* (2) their Lordships of the Privy Council quote with approval a *dictum* of Chief Justice Westropp that "subject to certain limited exceptions (as for instance debt contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of sons and grandsons, liable to the debts of the father and grandfather." If that is so it would seem to follow that a suit to obtain payment of these debts contracted by a father upon a mortgage of the ancestral property by a sale of the said property in the hands of the sons and grandsons would be a suit to enforce payment of money charged on immoveable property governed by Article 132 of the Limitation Act. It is true in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (3) the Full Bench held that the mortgage itself upon which the money was raised could not be enforced, but that the debt so contracted by the father being itself an antecendent debt within the rulings of the Privy Council and the son being a party to the suit, the mortgagee notwithstanding the form of the proceeding would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. So far as the share of the father is concerned it is now the accepted view that the mortgage is capable of enforcement to the extent of his share. In the case of *Moheshwar Dutt Tewari* v. *Kishun Singh* (4) the learned Judges were of opinion that the law as laid down by the Full Bench of this Court cited above, cannot be held to be any longer binding on us in view of the later decisions of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (5) and *Bhagwat Pershad* v. *Girja Koer* (2) that the principle laid down in these decisions of the Privy Council as applicable to cases of complete alienation must be held equally to apply to cases of partial alienation, such as mortgages and that a mortgage-bond executed by the father on receipt of a loan which the sons failed to prove to have been taken for immoral purposes was binding on the sons, and that the limitation applicable to a suit on the bond in respect of the sons as well as in respect of the father was that provided by Article 132 of the Limitation Act. The learned Judges declined to follow the case of *Surja Prosad* v. *Golab Chand* (6) in which a contrary view was taken on the ground that that case did not follow the principles laid down by the Privy Council. No doubt, the case of *Moheshwar Dutt Tewari* v. *Kishun Singh* (4) was dissented from in the case of *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh* (7) but in the latter case the question of limitation did not arise, the suit having been instituted within six years from the due date and the learned Judges in that case, expressly reserved their opinion upon the question of limitation applicable to a suit of this description.

The question whether a mortgage executed by the father can be enforced against the son as a mortgage, was considered in a very

(1) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226.
(2) 15 C. 717; 15 I. A. 99.
(3) 5 C. 855; 6 C. L. R. 473.
(4) 34 C. 184; 11 C. W. N. 294; 5 C. L. J. 441.
(5) 13 C. 21; 13 I. A. 1.
(6) 27 C. 762.
(7) 34 C. 735; 11 C. W. N 613; 5 C. L. J. 569.

recent case of *Bissonath Prosad Malita* v. *Brindesri Prosad Singh* (8). In that case the suit was instituted six years after the due date, but it was held with reference to the provisions of section 85 of the Transfer of Property Act and to the case of *Lala Suraj Prosad* v. *Golab Chand* (9) (where it was held that the provisions of the section are compulsory) that the law has been materially modified by statute and statutory rule since the Full Bench decision cited above. It was pointed out that a mortgagee must now in a suit on a mortgage of the joint property of a *Mitakshara* family, executed by a father, join as a party the executant's son though he was a minor at the date of the instrument, that such a son, therefore, is a person having an interest in the property comprised in the mortgage and it is on that account and on that account alone that he is a necessary party and, moreover, it is only to a suit under Chapter IV of the Transfer of Property Act (now reproduced in Chapter XXXIV, Civil Procedure Code) relating to the mortgage that he is a necessary party, that the purposes of so joining the son is not to obtain a personal decree against him on the strength of his obligation to pay his father's debts but primarily to give him an opportunity of redeeming, as a person interested in the mortgaged property and incidentally to resist the suit as against himself on the ground that the character of the debt absolved him from any personal obligation.

The cases of *Suraj Prosad* v. *Golab Chand* (6) and *Bhagwat Narain Chowdhury* v. *Suba Lal Jha* (10) are certainly authorities for holding that the mortgagee is not entitled to a decree upon the mortgage against the son, but only to a money-decree and that, therefore, the suit is governed by the six years' rule of limitation. But in *Moheshwari Dutt Tewary* v. *Kishun Singh* (4) the learned Judges declined to follow the case of *Suraj Prosad* v. *Golab Chand* (6) on the ground that it was opposed to the decisions of the Privy Council. The provisions of section 85 of the Transfer of Property Act upon which it was held in the unreported case cited above, that the law since the Full Bench decision in *Luchman Das'* case (3) had been materially modified, were not considered in either of the cases of *Suraj Prosad* v. *Golab Chand* (6), *Bhagwat Narain Chowdhury* v. *Suba Lal Jha* (10) and the case of *Suraj Prosad* v. *Golab Chand* (6), which laid down that the provisions of section 85 of the Transfer of Property Act are compulsory, had not been decided when the case of *Suraj Prosad* v. *Golab Chand* (6) was decided.

Under the circumstances I think we are not bound to refer the matter to a Full Bench and I think we can follow the case of *Moheshwar Dutt Tewari* v. *Kishun Sing* (4) and the unreported case cited above which is the latest decision of our Court.

I accordingly hold that the suit against the defendants Nos. 3 and 4 is governed by Article 132 of the Limitation Act. The appeal will accordingly be dismissed with costs.

Appeal dismissed.

(8) 17 Ind. Cas. 577; 40 C. 342.
(9) 28 C. 517; 5 C. W. N. 640.
(10) 7 C. L. J. 195.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 837 OF 1912.

February 19, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

NARAHARI SAHU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SIRA KORITHAN NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43—Alienation forbidden by law—Service inam *land—Act VI of 1895, s. 5—Inalienability of service* inam *property.*

A purchaser of property from the holder of a service *inam*, who is prohibited by law from alienating the property cannot claim a valid title to it on the ground that the *inam* was subsequently enfranchised and a *patta* for the land was granted to the alienor.

The principle of section 43 of the Transfer of Property Act has no operation when the alienation is forbidden by law on grounds of public policy.

C. Ramaswami Naik v. *Ramaswami Chetti*, 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201, *L. Anganayya* v. *Darpoor Narasanna*, 18 M. L. J. 247 at p. 248; 3 M. L. T. 243, referred to.

Second appeal from the decree of the District Court of Vizagapatam, in A. S. Nos. 375 and 367 of 1910, preferred against that of the District Munsif of Rajam, in O. S. No. 303 of 1909.

RAGHAVENDRA AYYAJI DESAI *v.* GURURAO RAGHAVENDRA DESAI.

Mr. *B. Sommayya* for Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *S. Srinivasa Aiyanger*, for the Respondents.

JUDGMENT.—The question for decision in this second appeal is whether the plaintiff who purchased the property in question from the holder of a service *inam*, who was prohibited by law (section 5 of Act VI of 1895) from alienating the property, can claim a valid title to it on the ground that the *inam* was subsequently enfranchised and a *patti* for the land was granted to the alienor. The principle of section 43 of the Transfer of Property Act has no application to such a case, where the invalidity of a transfer is due merely to the transferor not having a title or having only a defective title, the subsequent acquisition of a good title would enable the transferee to claim the benefit of the title acquired under the rule laid down in the section, but it can have no operation when the alienation is forbidden by law on grounds of public policy. *O. Ramasami Naik* v. *Ramaswami Chetti* (1), where it was held that the sale of an expectancy, which is forbidden by section 6 of the Transfer of Property Act cannot be improved by the transferor subsequently acquiring an estate in possession. We are with all deference unable to agree with the decision in *L. Anganayya* v. *Darpoor Narasanna* (2). We dismiss the second appeal with costs.

Appeal dismissed.

(1) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.
(2) 18 M. L. J. 247 at p. 248; 3 M. L. T. 243.

BOMBAY HIGH COURT.
APPEAL FROM ORDER No. 10 OF 1902.
January 24, 1913.
Present:—Mr. Justice Heaton and
Mr. Justice Rao.

RAGHAVENDRA AYYAJI DESAI—APPELLANT

versus

GURURAO RAGHAVENDRA DESAI—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 9, *Sch. II, s.* 20—*Enabling Court to entertain application in respect of subject-matter partly lying within jurisdiction—Not controlled by section* 9 *of the Code—Policy of law relating to awards—Award providing for distribution of pension in a particular way—Not against—Pensions Act* (*XXIII of* 1871).

Section 20 of the second Schedule of the Code of Civil Procedure, 1908, was devised for the purpose of enabling any Court having jurisdiction where the subject-matter of the award lies within more than one jurisdiction, to direct that the award be filed.

The section does not suggest any disability of the kind that arises on a consideration of section 9 of the Code.

Provided that there is something to arbitrate on, that there is a reference and an award, then the policy of the law is that that award should be given effect to without minute inquiry by the Court.

A decree in accordance with an award providing for the distribution in a certain manner of a pension when received from Government does not contravene the provisions of the Pensions Act.

Appeal from an order passed by the first class Subordinate Judge at Bijapur, in Suit No. 65 of 1910.

Mr. *Coyajee*, (with him Mr. *K. H. Kelkar*), for the Appellant.

Mr. *N. V. Gokhale*, for the Respondent.

JUDGMENT.—The first question which was raised in this appeal was that no appeal lay because it was, it is urged, an appeal against a decree and such appeal is barred by clause (2) of section 21 of the second Schedule of the Civil Procedure Code. But we think that the proceedings, and the Judge's order, and the memorandum of appeal, make it quite clear that the appeal is not against a decree but is against the order directing that the award be filed. And that is an appeal which is specifically allowed by clause (*f*) of section 104 of the Code. There is, therefore, nothing in that question which was raised as a preliminary point by the respondent.

Three separate objections have been taken by the appellant. The first is that the award is so indefinite as to be incapable of execution. This objection can be taken under section 14 of the second Schedule. A careful reading of the award itself discloses that the objection to it, if any, is rather that it is too definite and not indefinite. In one or two matters it was argued, even after this conclusion had been arrived at, that there was indefiniteness. Without going into details it will suffice to say that we are not satisfied that the incapacity to execute any part of the decree to be made on the award will arise from indefiniteness. The only incapacity that will arise will be from

the circumstance that a portion of the decree will be declaratory. That of course is not an objection of the kind urged. We think, therefore, that there is no substance in the objection taken under section 14 of the second Schedule.

Then it was objected that the Court had no jurisdiction to order the award to be filed. This objection in the first instance was based on section 20 of the second Schedule, and it took this form. The award deals amongst other things with *manpan*, matters relating to a compliment or dignity, and so forth: matters of a kind such that the Civil Courts have no jurisdiction to entertain suits arising out of disputes regarding them. Therefore, it was argued that in respect of part of the subject-matter of the award the Court has no jurisdiction, and that as the Court is bound to take the award as a whole and to accept or reject it as a whole, it must in this case reject it. But I do not think that this objection can be upheld under section 20 of the second Schedule.

That section, I think, is devised for the purpose of enabling, where the subject-matter of the award lies within more than one jurisdiction, any Court within whose jurisdiction a part of the subject-matter lies to direct that the award be filed; and I do not think that the section contemplates an objection of the kind here taken.

Nevertheless, although the purpose of section 20 of the second Schedule is plain enough and does not support this objection, it is maintained on general grounds. It is said that apart from section 20 of the second Schedule altogether, as a matter of fundamental principle, if the Court is without jurisdiction in respect of a portion of the subject-matter of the award, it cannot order the award to be filed. Now the difficulty about suits relating to what is called *manpan* arises out of section 9 of the Code, and it arises when disputes relating to *manpan* prove to be disputes which are not of a civil nature within the meaning of those words as used in section 9; the disability of the Court to try these suits arises out of the circumstance that jurisdiction is conferred by section 9. The jurisdiction to file an award is not conferred by section 9 at all but by section 20 of the second Schedule. Section 20 does not suggest any disability of the kind that arises on a consideration of section 9 of the Code. So that the words of the law do not suggest such a disability. Then do the underlying principles, does the policy of the law, suggest it? It seems to me that it does not. The policy of the law is to enable parties who by private arrangement settle a dispute to have that settlement made legally effective. And provided that there is something to arbitrate on, that there is a reference and an award, then the policy of the law is that that award should be given effect to without minute inquiry by the Court. Disputes about *manpan* which cannot be settled in the Courts can often only be effectively settled by arbitration. Surely, the policy of the law is to encourage the possibility of an effective settlement rather than to make such a thing impossible. If, because an arbitration had decided a dispute as to *manpan*, therefore, the Civil Court were to refuse to order the award to be filed, it would be equivalent to denying any effective settlement to disputes of this character. It seems to me that the policy of the law cannot possibly mean this. We find, therefore, that the words of the law do not support this objection and the policy of the law is against it. Therefore that objection cannot prevail.

The last objection was one taken under the Pensions Act. The award provides:—"As to cash allowances becoming due from Government in respect of the two villages of Murmath and Muttatta, Raghavendra Ayaji and Bhimaji Ayaji should conjointly take an eight-anna share from Government and Gururao Raghavendra the other eight-anna share." It is said that if this term finds a place in the decree then we are entertaining a suit relating to a pension within the meaning of the Pensions Act of 1871. In answer to that it may be said that we are not entertaining a suit at all. But there is another answer. The parties are quite at liberty without in any way going against the words or the spirit of the Pensions Act to agree amongst themselves that when the cash allowance is received from Government it shall be distributed amongst them in a certain way. This, as I read the passage in the award, is exactly what the arbitrators have done for the parties, and the decree when passed will be no more, in effect than a declaration that the money-

when received from Government by the pensioner appointed by the Government, shall be distributed in a certain way. That is not against the provisions of the Pensions Act. If that distribution is not in any particular instance made, it may be that the injured claimant will have to bring a suit. Whether in that suit he would need a certificate under the Pensions Act it is not for us to determine.

All the objections that have been urged against the order having failed we must dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2449 OF 1910.
November 26, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
JADU NATH BELEL—DEFENDANT No. 1—APPELLANT
versus
RAJ NARAIN MUKHERJEE—PLAINTIFF—RESPONDENT.

Landlord and tenant—Occupancy holding—Purchase of non-transferable holding—Occupation by purchaser for more than 12 *years—Rent paid by him as* marfatdar *for original tenant—Suit for possession by landlord—Plea of limitation—Limitation Act (IX of* 1908), *Sch. I, Art.* 142.

A person after purchasing a non-transferable occupancy holding in 1896, held it in the name of the original tenant, and in 1898 paid rent to the landlord on behalf of the tenant, and the landlord gave him a rent receipt in which he was described as *marfatdar* for the tenant. Subsequently in 1904 the purchaser was described in the Record of Right as a trespasser and in 1909 the landlord brought a suit against him for possession; and he pleaded limitation:

Held, that he could not do so, and the suit was not barred.

Ishan Chandra v. *Ramranjan*, 2 C. L. J. 125 and *Raktoo Singh* v. *Sudhram Ahir*, 8 C. L. J. 557, distinguished.

Appeal from the decree of the Sub-Judge of Hooghly, dated April 25th, 1910, affirming that of the Munsif of Serampur, dated September 22nd, 1909.

Babu *Amarendra Nath Bose* for Babu *Kshetra Mohan Sen*, for the Appellant.

Babu *Surendra Chandra Sen*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is the question of limitation. The defendant No. 1, Jadu Nath Belel, purchased the occupancy *jote* of one Kurukhetra on the 9th *Ashar* 1303 corresponding to the 22nd June 1896. The present suit was brought by the eight-annas landlord on the 12th February 1909. The suit was for partition of the plaintiff's eight-annas share from the eight annas held by defendant No. 1. The *pro forma* defendants who are the eight-annas landlords had recognised the defendant No. 1 as their tenant. The alternative prayer of the plaintiff was for joint possession of the said share with defendant No. 1.

The defendant's argument is based on the fact that there is no question that he was in possession of the *jote* throughout the period of thirteen years, and that the plaintiff now says that he is a mere trespasser as far as his eight annas is concerned. He, therefore, contends that Article 142 of the Limitation Act applies to this case, although there has been no dispossession of the plaintiff as landlord or discontinuation of his possession within twelve years. Had it been the fact that defendant No. 1 had encroached upon the plaintiff's land and had held it as a trespasser after the landlord had repudiated any relation of landlord and tenant for twelve years, then this case might fall within the very limited interpretation which was put by Mr. Justice Mookerjee upon this Article in the case of *Ishan Chandra* v. *Ramranjan* (1), this was further considered by the same learned Judge in the case of *Raktoo Singh* v. *Sudhram Ahir* (2), in which it was held that it is open to the defendants in the first place to plead that the lands were comprised in their tenancy, and that consequently the plaintiffs were not entitled to recover possession; and in the second place to assert that if the tenancy was not established, as they had held possession for more than twelve years, the right of the plaintiffs to recover possession was extinguished by the law of limitation. But in that case the case of the plaintiffs was that the defendants were tenants in respect of other lands not in dispute, and that by an act of trespass they came to

(1) 2 C. L. J. 125.
(2) 8 C. L. J. 557

occupy the disputed land within twelve years before suit. But it was proved that the defendants had been in occupation for more than twelve years; the title of the plaintiffs to recover possession by ejecting the defendants was barred by limitation, and the question was not one of adverse possession but of limitation, and the learned Judges distinctly say that in coming to this conclusion they follow the case of *Ishan Chandra* v. *Ramranjan* (1) to which we have just referred. The same very limited application of Article 142, therefore, is made in that case.

But in this case the facts are totally different. It appears that after his purchase, Jadu Nath Belel held the *jote* in the name of the original tenant Kurukhetra and he himself has proved that he paid rent to the plaintiff on behalf of the old tenant, Kurukhetra, in *Aghran* 1305, and that the plaintiff gave him a rent receipt in which he was described as *marfatdar* for Kurukhetra. Of course, the plaintiff knew that he was a tenant, but he was not bound to take rent from anybody but the recorded tenant; and both parties must be held to have accepted the position that Jadu Nath Belel was paying rent in the name of the old tenant and that the plaintiff was his landlord. Subsequently when the Revenue Officer declared in 1904 that Jadu Nath Belel was nothing better than a trespasser and had no right to the tenancy at all, the plaintiff turned round and sought to eject him as a trespasser. But this cannot get rid of the admission of the defendant himself that he was the plaintiff's tenant so late as *Aghran* 1305, and as he was the plaintiff's tenant at that time he cannot plead limitation.

That is the only point that is argued before us and we are, therefore, of opinion that the appeal must be dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 14 OF 1912.

January 10, 1913.

Present:—Mr. Justice Beaman and Mr. Justice Rao.

ISHWAR LINGO DESAI—APPELLANT

versus

DATTU GOPAL DESAI—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Partition pendente lite—Void against plaintiff—Covert dealing with property pendente lite does not cast duty upon the opposite party—Parties to suit incompetent to change person of incidence or inherence to the detriment of opponent.

Plaintiff sued for redemption. The mortgagee defendants were four brothers, members of a joint Hindu family. During the pendency of the suit one of the brothers died sonless. It was held that the right to sue survived against the three other defendants' joint tenants of the mortgaged property. After the decree for redemption, the widow of the deceased brother intervened in execution, claiming that the property had fallen to her husband's share on partition between the brothers during the pendency of the redemption suit, that she being the sole heir of her husband and never having been made a party to the suit, could not be dispossessed of the property:

Held, that the partition fell within the mischief of section 52 of the Transfer of Property Act, and could not in any way be allowed to affect the plaintiff's right, either under his redemption decree or in execution.

A covert dealing with property in suit *pendente lite* by any party to the suit, cannot possibly cast any duty or obligation upon the opposite party.

No party during the conduct of a suit has any power, by dealing with the property, to change the person of incidence or inherence to the detriment of the other.

Letters Patent Appeal from the following judgment of

BATCHELOR, J.—(21*st February* 1912).—The facts upon which this second appeal has to be decided are these: The property in suit originally belonged to the three joint brothers—plaintiff, Krishnaji and Hanmant. In 1876 it was mortgaged by Krishnaji to one Imam, and Imam in 1880 assigned his rights to Jivaji, who is the father-in-law of the 1st defendant and the father of the defendants Nos. 2, 3 and 4. In 1898 the plaintiff sued Jivaji to redeem his one-third share and obtained a decree. The decree ordered payment to be made on or before the 23rd March 1899. The plaintiff made the payment, but made it after the date appointed. He applied that his late payment should be accepted, and that he should be given possession. He was opposed by the 1st defendant's husband, Gopal, and

the defendants Nos. 2, 3 and 4. The Subordinate Judge allowed this application by the plaintiff. On the 7th January 1902, however, the District Judge reversed this order of the Subordinate Judge.

On the 10th of January 1902, a partition was effected, between Gopal on the one hand, and the defendants Nos. 2, 3 and 4 on the other, and the property in suit fell on the partition to Gopal's share. Gopal died five days after the partition, that is, on the 15th January 1902.

On the 14th of April 1902, the plaintiff appealed to the High Court from the District Judge's decree, and in August 1903 this Court reversed the District Judge's decree and remanded the *darkhast* for disposal with reference to the observations made in the judgment which will be found in *Ishwar Lingo* v. *Gopal Jiwaji* (1). In the appeal before the High Court Gopal had been made the 1st respondent, but the notice to him was returned unserved with the report that he was dead. Upon the remand, the District Judge, Mr. Crump, allowed an extended time for payment, and allowed the consequent redemption. Gopal was not a party to the proceedings before Mr. Crump. Thereafter execution proceeded against defendants Nos. 2, 3 and 4 and the plaintiff obtained possession.

Then Gopal's widow, the present 1st defendant, applied in miscellaneous application before the Subordinate Judge to recover possession from the plaintiff, and the Subordinate Judge allowed her claim.

The suit is now brought by the plaintiff to set aside the foregoing order of the Subordinate Judge and to get possession of the property in suit. In the trial Court the plaintiff succeeded, the learned Subordinate Judge being of opinion that section 52 of the Transfer of Property Act applied to the partition effected between the co-parceners in January 1902 and that the plaintiff's rights were not affected by that partition.

On appeal this decree was reversed by the learned District Judge mainly on the ground that the plaintiff had failed to communicate certain facts to the High Court in the second appeal to which I have referred.

(1) 28 B. 102; 5 Bom. L. R. 719.

Mr. Mulgaonkar for the plaintiff-appellant now relies upon section 52 of the Transfer of Property Act, and contends that his client is not to be defeated by reason of any dealing with the property among the co-parceners mortgagees, and in support of his view he has referred me to *Settappa Goundan* v. *Muthai Goundan* (2). It appears to me desirable to note at the outset that the plaintiff, if he is to succeed in this suit, must succeed under the decree made by Mr. Crump. Indeed in the appeal before the High Court, which ordered the remaud to Mr. Crump, Gopal's name, although he was dead, still appeared upon the record. Many adjournments were obtained, and there can be no doubt that the fact of Gopal's death was prominently brought to the plaintiff's notice, but no steps were ever taken to bring Gopal's representatives on the record in that appeal.

In the District Court when the case was remanded, the matter was carried one step further, for there Gopal's name was struck off the record and no name was substituted in its place.

In this state of facts, I am of opinion that the case is not governed by section 52 of the Transfer of Property Act. The partition was, it seems to me, a mere internal arrangement between the mortgagee co parceners, and was not such a transfer or dealing as is referred to in section 52. For it did not, I think, operate to affect the rights of any other party to the suit. Upon this point reference may be made to the decision in *Munisami* v. *Dakshanamurthi* (3). So far as the partition in this suit was concerned, I do not think that there was any transfer or dealing inconsistent with the rights established by the decree. The decree gave a right to redeem and that right remained. Moreover the person against whom that right was to be exercised was not a new person but had been always one of the parties liable to be redeemed. It seems to me, therefore, that if the plaintiff's rights have in this case been adversely affected by anything that has happened, it is not by the partition which was effected between the co-parceners, but by the plaintiff's own negligence in omitting to

(2) 31 M. 268; 4 M. L. T. 77.
(3) 5 M. 371.

bring upon the record the representatives of the deceased Gopal.

For these reasons I think the decision of the Court below is right and I dismiss the appeal with costs.

Mr. *G. S. Mulgaonkar*, for the Appellant.

Mr. *S. S. Patkar*, for the Respondent.

JUDGMENT.—Plaintiff owned a one-third share of an equity of redemption. He brought a suit to redeem one-third of the mortgaged property from the four surviving joint mortgagees. The litigation has, up to the hearing of this appeal, passed through the hands of one or more Subordinate Judges, three District Judges and three Judges of the High Court. But at no time did the form of the suit excite any comment or give rise to any objection. I must, therefore, take it that this is a normal feature of the law of mortgage in the *mofussil*.

Omitting mention of the earlier stages through which the redemption suit passed, it is sufficient to say that on the 7th January 1902, the District Judge dismissed the suit. Plaintiff appealed to the High Court. On the 10th January 1902, the four joint mortgagees effected a partition *inter se*, and the property, the subject-matter of the suit, fell to the share of the defendant No. 1, Gopal. On the 15th January 1902 Gopal died, leaving him surviving a widow, the defendant in the present suit. On appeal to the High Court against the decree of 7th January 1902 Gopal's death was brought to their Lordships' notice. It is clear from the judgment that the question, whether any fresh representation of Gopal was needed, was argued and decided. Their Lordships held that the right to sue survived against the three other defendants, joint tenants of the mortgaged property. No mention whatever was made of the partition of the 10th January 1902. Their Lordships in second appeal reversed the decree of the District Judge and remanded the suit. Finally in 1903, the plaintiff's claim was decreed. The amount of redemption money was paid, and it appears that the plaintiff was put in possession. The widow of Gopal here intervened, claiming that the property had fallen to her husband's share, that she was his suit heir, and had never been a party to the suit for redemption. This plea found favour with the executing Court. The plaintiff was, therefore, after six or seven years' litigation relegated to a suit, to have that order set aside and to obtain the fruits of his decree. This suit was brought in 1907. The Subordinate Judge decided in favour of the plaintiff. On appeal to the District Court, the learned District Judge reversed the decree of the Subordinate Judge and dismissed the plaintiff's suit. The plaintiff preferred a second appeal to the High Court, which was heard by Batchelor, J., sitting alone. That learned Judge, though for slightly different reason, confirmed the decree of the lower Appellate Court. Against his decision, an appeal has been admitted under the Letters Patent.

The only point to be considered is whether the partition of 10th January 1902 was a transfer of or other dealing with the property in suit, within the meaning of section 52 of the Transfer of Property Act.. It is not disputed that if it was, it occurred *pendente lite*, and would, therefore, be void against the present plaintiff-appellant. It is not disputed that the partition was a transfer, or at any rate a dealing with the property in suit. But it was urged on behalf of the defendant-respondent, and both Appeal Courts accepted the contention, that it was not a transfer or dealing with the property which in any way affected the right of the plaintiff as a party to that suit. It must have been thought that the question answered itself on a first view of what has actually happened. The simple fact is that as a result of that partition, whether direct or indirect we will consider presently, the plaintiff's redemption suit has been defeated, and he has been deprived of the fruits of his decree. It is nowhere shown, and it is not even contended before us, that the plaintiff was aware of the partition. Speaking for myself, it would have made no difference in law, whether he had or had not known of this *pendente lite* trafficking in the suit property. The sole question is whether in fact it has affected the plaintiff's right as a party to that redemption suit. We think there can be no doubt, and indeed no room for any argument to the contrary, but that it has.

The ground of the District Court's decision is extraordinary. The learned District Judge holds that the plaintiff's failure to communicate the fact of the partition to the High

Court in second appeal is fatal to his present claim. The question of the array, after the death of Gopal, was, as has been said, raised before their Lordships, argued, and decided in favour of the plaintiff. Even had the plaintiff known of the partition it is hard to say why any obligation lay on him to mention the fact. Presumably it was on the part of the defendants that objection was taken to the array, as it stood after the death of Gopal. The partition was a fact within their special knowledge. It certainly seems to us that if it was any one's duty to inform the High Court of the partition, it was the defendants' and not the plaintiff's duty. But it is a much harder saying that a party is to be defeated for no other reason than that in another proceeding he did not communicate to the Court of Appeal, that which he did not know.

The conclusion of the learned Judge of second appeal appears to us to rest upon a process of reasoning too refined to be admissible in the practical administration of the law. To say that the cause of the plaintiff's defeat in this was not the partition at all, but the plaintiff's own negligence in not having noted, and taken precautions against the legal consequences of it, seems to us drawing a distinction without a difference. One reason out of many, and that, in our opinion, a conclusive reason against the correctness of any such view, is that the plaintiff did not know of the partition. A covert dealing with property in suit *pendente lite*, by any party to the suit, cannot possibly, in our opinion, cast any duty or obligation upon the opposite party. And again speaking for myself, I say that, in my opinion, that proposition is entirely unaffected by the affected party's knowledge or ignorance of the dealing. For the purpose of mere argument, however, it is clear that where the party affected is in fact ignorant of the dealing, it is impossible to make him answerable for neglecting to meet all its legal consequences assuming that it were a valid, and not a void, transfer or dealing. Another consideration which was evidently not present to the minds of either of the learned Judges in the two Courts of appeal, and indeed is only of secondary importance, is that for all the purposes of the suit terminating with the learned District Judge Mr. Crump's decree, the question of the array was *res judicata* by the decision of the High Court in appeal. In consequence of that decision Gopal's name was struck off, and, in my opinion, quite rightly struck off, the record.

Reverting to the ground of decision in the Court of second appeal now before us, and adopting for a moment the learned Judge's statement that the plaintiff has not been in any way affected by the partition, but if affected at all, then only by his own negligence in having omitted to bring Gopal's widow on the record, we would observe, that this reasoning appears to us to ignore altogether the plain facts that whatever right the widow of Gopal may have for the purpose of this suit is directly traceable to and rooted in the partition. If there had been no partition, it cannot be argued, and it never has been argued, that the widow of Gopal would have had any *locus standi* at all in the redemption suit. And the materiality of this is in no way altered or diminished by shifting the point of view a little, and saying that because of this right there arose by operation of law a duty to introduce an entirely new party into the litigation, failure to discharge which duty must now entail the dismissal of a claim in all other respects, admittedly just and certain of success. A moment's reflection ought, we think, to show that once more the difficulty is directly traceable to the partition and to nothing else. The suit was against four joint mortgagees.

Once rightly launched, the array was virtually stereotyped and could not be changed *pendente lite* by mere act of parties. The plaintiff had a perfect right to assume that his suit would end, as it had begun, upon that footing. It is true that although these four defendants have been called joint-tenants of the property in suit, they are only joint tenants as members of a joint Hindu family, and subject to the legal incidents of that status. Thus had Gopal left a son, it might have been the plaintiff's duty to bring that son upon the record after Gopal's death. But as Gopal had no son, it is convenient to look at the position as though the four defendants were joint tenants. Thus on the death of one of them, his right passed by survivorship to the other three, and the plaintiff was under no obligation whatever, as far as we can see, to make any further change in or addition to the record. All that required to be done,

after the decision of the High Court in appeal, was to strike off the name of the deceased Gopal, and this was done.

Thus regarded, it is at once clear that if indeed the plaintiff was under any obligation to bring Gopal's widow on the record, that could only have been because of the partition. And as *ex hypothesi*, that partition, being effected during the active prosecution of a contentious suit, was void against the plaintiff, it could not have cast any such obligation upon him. In using those words we do not lose sight of the learned Judge's view, that although a transfer or dealing with the property in suit *pendente lite*, it was not a dealing which in any way affected the plaintiff's right. We are rather indicating why, in our opinion, that view is incorrect. For anything which imposes a new obligation upon a party to a suit must plainly, *pro tanto*, affect his right. The learned Judge of second appeal appears to have taken a very restricted view of a party's right. We gather that in his opinion, so long as the property was left in the possession of any one of the defendants, who would in ordinary course be amenable to the decree, no dealing with it *inter se* could possibly affect the plaintiff's right. But we think that this can easily be shown to be fallacious. It is surely part of any litigant's right, so far as the subject-matter and conduct of the suit are concerned, to know precisely where he stands. He is entitled to know who his opponents are, and when that has been definitely and finally ascertained to insist that no dealing on their parts, with the property in suit, shall compel him to go further afield, and bring in new parties, who, but for such dealing, could have had no *locous standi* at all. How can it be said that a plaintiff's right is not affected by that which necessitates his abandoning his claim against all the remaining defendants on the record and bringing a virtually new claim against some one who, at the time the suit was launched, had no interest whatever in the property, and who, but for the *pendente lite* dealing with it never could, as against the plaintiff have had any right to be litigated between them? A complete right needs a person of incidence as well as a person of inherence. No party during the conduct of a suit has any power, by dealing with the property, to change the person of incidence or inherence to the detriment of the other. Here the true result of the dealing, which in the opinion of the learned Judge of second appeal did not affect the plaintiff's right, was not, as he supposes, to necessitate adding Gopal's widow to the record, but abandoning the claim as brought altogether and bringing an entirely new suit against an entirely new person. How, we ask again, can it be said that such a result does not affect and most seriously affect the plaintiff? It is obvious that if the partition was a legal and valid transfer, upon the severance of the joint tenancy by three of four joint tenants, to the fourth, then, inasmuch as the whole property which the plaintiff thus sought to recover had so passed to the transferee, he had no cause of action at all against the other three former joint tenants. His suit against them would have had to be dismissed. True, provided he could have been sure of finding the property in the hands of the fourth original joint tenant and defendant, it might not have mattered much. But that, in our opoinion, has nothing whatever to do with the principle we are discussing, or a correct interpretation of the law. For there is always in such cases a possibility which here has happened, that the transferee may die during the pendency of the suit. Should that happen, the manner in which the *pendente lite* transfer has affected a party to the suit at once becomes plain. For now, instead of being able to proceed with his suit as originally constituted, he would have to find out the heirs and representatives of the transferee. The joint tenancy being severed, nothing passes on the death of the transferee to his former joint tenants, and they might as well not be on the record at all.

It is only out of respect for the considered decisions of two learned Judges of appeal that we set forth at some length considerations which might be thought as obvious as conclusive.

Perhaps the simplest and most effective test is to ask whether, if the partition had not been made *pendente lite*, the plaintiff's suit could possibly have ended as it has. The answer to this must be—No. If there had been no partition, the widow would have had no *locus standi*, when she intervened in execution. This suit would never have needed to be brought. All his troubles during the last seven years in prosecuting

his redemption suit have been brought on the plaintiff by this partition and by nothing else. Or to put it in another way either the partition has affected the plaintiff's rights as a party, or it has not. If it has, it is admittedly void as against him under section 52. If it has not, it ought to be ignored and no considerations drawn from it ought to have any place in the decision of the suit. Taking the latter course what is the result? This, that no Court should have treated the defendant in this suit as having any right whatever against the plaintiff, so far as his suit for redemption went. For it is only on the strength of the partition that she can pretend to any such right and, *ex hypothesi*, the partition does not affect the plaintiff for all the purposes of that suit. Thus the same result is easily and immediately reached either way. It would be easy to add further illustrative considerations. But we think that what we have said warrants us in believing that we have indicated the correct lines of reasoning to be followed in cases of the kind. Applied to the facts of this case, those lines of reasoning yield a very safe conclusion. We have no doubt at all but that the partition of January 10th, 1902, falls within the mischief of section 52, Transfer of Property Act, and cannot be allowed in any way to affect the plaintiff's right, either under his redemption decree or in execution. That being so, and the partition with all its legal consequences, out of the way, it necessarily follows that the defendant in this suit has no right, nor any ground of defence at all. We must, therefore, reverse the decree under appeal and restore the decree of the Court of first instance with costs throughout.

Decree reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3035 OF 1911.

May 23, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Roy.

SYED ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAJAM ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pasturage—Right of cultivators to pasture lands—Right based on custom—Reasonableness—Grazing cattle from time immemorial—Sufficient pasturage left in village.

In a suit by certain cultivating tenants for a declaration that they have a right of pasturage over the land in suit, it was found that the land had been lying unoccupied from time immemorial and the villagers had grazed their cattle there for more than 30 years; that their user was open and peaceful without interruption and should be presumed to be as of right:

Held, that these findings did not entitle the plaintiffs to a decree; that a right of pasturage arising from immemorial user resembles a right based upon custom; that a custom must be reasonable; that it would be unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough; that immemorial grazing without more does not make waste land inviolable; and that the landlords would be entitled to plough waste land if only sufficient pasturage were left in the village, in which case the plaintiff would not be entitled to relief.

Bhola Nath Nundi v. *Midnapur Zemindari Co*, 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152, followed.

Secretary of State v. *Mathurabhai*, 14 B. 213 and *Lutchmeeput Singh* v. *Sadaulla Nushyo*, 9 C. 698; 12 C. L. R. 382, referred to.

Appeal from the decree of the Sub-Judge of Comillah, dated June 27th, 1911, reversing that of the Munsif of Bramhanberiah, dated July 23rd, 1910.

Babus *Dwarka Nath Chakravarti* and *Upendra Kumar Roy*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Sasadhar Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by certain cultivating tenants for a declaration that they have a right of pasturage over the land in suit and for consequential relief. The lower Appellate Court has decreed the suit and the defendants appeal.

The first point taken is that of limitation but in the view that we take of the case, no question of limitation really arises.

The learned Subordinate Judge says: "The land has been lying *unoccupied* from time *immemorial* and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful without interruption and should be in the circumstances of this case presumed to be as of *right* also." In our opinion these findings are hardly sufficient to dispose of the suit. We believe that throughout Bengal, where land is left waste or jungle, the cattle of the villagers graze over it and probably in most cases have done so from time immemorial. No one is interested in stopping them and the user is, therefore, open, peaceful

and uninterrupted. But it would be impossible to hold that, therefore, no landlord is entitled to bring any waste or jungle land under the plough. A right of pasturage arising from immemorial user of this kind resembles a right based upon custom. This has been laid down in Madras and Bombay [section 18, Easements Act, 1882, and *Secretary of State for India* v *Mathurahbai* (1)] and the view is in accordance with common sense. Now a custom must be reasonable and it would be wholly unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough. We may refer in this connection to the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo* (2). Nor is this view inconsistent with the decision in *Bhola Nath Nundi* v. *Midnapur Zemindary Company* (3). Their Lordships' judgment clearly proceeded on the supposition that the landlords were entitled to plough waste land if only sufficient pasturage were left, and the judgment certainly does not go so far as to lay down that immemorial grazing without more makes waste lands inviolable. Their Lordships observe: "It was certainly not the intention of the Subordinate Judge or the Munsif, that the decrees should prevent the defendants improving their property. And, indeed, the Munsif expressly states that the plaintiffs admitted the right of the defendants to improve their property, provided sufficient pasturage were left". And they thought it advisable to add a specific provisions to that effect to the decree. We think, therefore, that the lower Appellate Court must find more than that the villaga cattle have always grazed on this land before he can decree the suit. It may be the case, for instance, that the land in suit has been reserved in some particular manner for pasturage, or that the circumstances of the locality mark it out as suitable for pasture. It may be an island of waste amid a great expanse of cultivated land so that if it is cultivated the cattle of the villagers may have to be driven to an unreasonable distance in order to obtain pasture. Or it may be that the amount of waste remaining in the village is only sufficient for the needs of the cattle. In any of these cases the lower Appellate Court might be justified in holding that the custom underlying the right was reasonable in decreeing the suit. But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village the plaintiffs are not entitled to relief. The appeal is accordingly allowed and the case will go back to the Court below for re-hearing with reference to these observations. It will be open to that Court to allow fresh evidence to be taken either by himself or by the first Court. Costs will abide the result.

Appeal allowed; Case remanded.

(1) 14 B. 213.
(2) 9 C. 698; 12 C. L. R. 382.
(3) 31 C. 503; 21 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO 408 OE 1912.
November 21, 1912.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Chandavarkar.
THE TALUKDARI SETTLEMENT OFFICER—APPELLANT
versus
RIKHAVDAS PARSHOTTAMDAS —RESPONDENT.

Gujarat Talukdars Act (Bom. Act VI of 1888), *ss.* 31, 33—*Incumbrance by* jiwaidar—*Adverse possession as an incumbrancer—Inapplicability of sections* 31, 33—*Bombay Land Revenue Code* (*Bom. Act V of* 1879), *s.* 79A—Talukdari *Settlement Officer incompetent to evict the mortgagee adversely holding as incumbrancer for more than* 12 *years.*

The field in suit was originally part of the *Talukdari* estate owned by one *J.* who, in 1862, granted it to *G.*, father of the defendant, as a cadet of the *Talukdar* family for *jiwai* or maintenance. On the 19th of April 1889 *G.* mortgaged the field with possession to the plaintiff's father. In 1894 the mortgagor died and in 1895 the mortgagee died. But after the death of the mortgagor the mortgagee and subsequently his son remained in possession of the field claiming to hold as mortgagees. In 1907 the *Talukdari* Settlement Officer purporting to act under the provisions of section 79A of the Land Revenue Code, as amended by section 33 of the Gujarat Talukdars Act, summarily evicted the plaintiff, who brought a suit for possession of the field:

Held, that the plaintiff was entitled to succeed on the ground that he had been in adverse possession claiming title as an incumbrancer for more than twelve years since the death of *G.*

The plaintiff's mortgage was not an incumbrance within the purview of section 31 of the Talukdars Act, 1888, the possession of the incumbrancer claiming by virtue of adverse possession would not be an occupation in contravention of any of the provisions of the

Talukdari SETTLEMENT OFFICER *v.* RIKHAVDAS.

Act referred to in section 33 (2), clause (*cc*), for the purpose of supplementing the provisions of section 79A of the Land Revenue Code, hence, the Collector had no authority to interfere with the plaintiff's possession.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 100 of 1911, reversing that passed by the Assistant Judge of Ahmedabad, in Civil Suit No. 79 of 1908.

Mr. *Coyajee* (with him Mr. *N. K. Mehta*), for the Appellants.

Mr. *J. R. Dhurandhar*, for the Respondent.

JUDGMENT.—This is a suit by an alleged mortgagee against the *Talukari* Settlement Officer and the *Talukdar* whose estate is in his charge, for a declaration that the first defendant had no right on behalf of the second defendant to take possession of the field alleged to be mortgaged to the plaintiff, and for an order for possession of the field. The field was originally part of the *Talukdari* estate owned by Jethusangji, the uncle of the second defendant. In 1862 Jethusangji granted this field together with other lands to Gobarsangji, father of the second defendant, as a cadet of the *Talukdar* family for *jiwai* or maintenance according to the custom in vogue among *Talukdars*. Estates so granted in *jiwai* according to custom descend by inheritance to the descendants of the grantee but revert to the grantor on failure of the grantee's line. On the 19th of April 1889 Gobarsangji mortgaged the field in question with possession to the plaintiff's father. In 1894 the mortgagor died and in 1895 the mortgagee died. But after the death of the mortgagor the mortgagee and subsequently his son remained in possession of the field claiming to hold as mortgagees. In November 1907 the *Talukdari* Settlement Officer sent a notice to the plaintiff under section 202 of the Land Revenue Code calling upon him to vacate the land in question. The plaintiff then filed this suit, and after the suit the *Talukdari* Settlement Officer purporting to act under the provisions of section 79A of the Land Revenue Code as amended by section 33 of the Gujarat Talukdars Act summarily evicted the plaintiff.

The case came first before the Assistant Judge of Ahmedabad who decided it in favour of the defendants holding that plaintiff was an incumbrancer of a *Talukdar's* estate under an incumbrance made by a *Talukdar* and that, therefore, his title was invalid after 1894, the year of the death of Gobarsangji, and that the claim by the plaintiff to hold by virtue of adverse possession since 1894 could not be supported in that the *Talukdari* Settlement Officer, exercising the powers of a Collector lawfully conferred upon him, had evicted the plaintiff under section 79A of the Land Revenue Code.

The plaintiff appealed to the District Judge who held that Gobarsangji was not a *Talukdar* creating an incumbrance on a *Talukdar's* estate within the meaning of section 31 of the Gujarat Talukdars Act of 1888, and that, therefore, the plaintiff was entitled to succeed.

From his decision this appeal has been preferred and the two points decided by the Assistant Judge have been argued before us. We are of opinion that the respondent is entitled to succeed on the ground that he has been in adverse possession claiming title as an incumbrancer for more than twelve years since the death of Gobarsangji. It is not, therefore, necessary for us to consider and decide the difficult question whether a *jiwaidar* is a *Talukdar* within the meaning of the Gujarat Talukdars Act of 1888. Section 31 provides that no incumbrance on a *Talukdar's* estate made by a *Talukdar* after the Act comes in force shall be valid as to any time beyond such *Talukdar's* natural life. Assuming that the mortgage of the plaintiff's father was an incumbrance made by the *Talukdar*, the incumbrance which is claimed by virtue of adverse possession since the death of the *Talukdar* would not fall within the section, but would be an incumbrance arising from the operation of the law of limitation. It is not, therefore, an incumbrance within the purview of section 31, and the possession of the incumbrancer claiming by virtue of adverse possession would not be an occupation in contravention of any of the provisions of the Gujarat Talukdars Act of 1888 referred to in section 33 (2), clause (*cc*), for the purpose of supplementing the provisions of section 79A of the Land Revenue Code.

It was, however, held by the learned Assistant Judge that, because it has been held that under the Bhagdari Act V of

1862 adverse possession by virtue of the law of limitation cannot avail against the Collector taking possession under section 3 of the Act, the same principle must apply in the case of a Collector taking possession under section 79A of the Land Revenue Code. A reference to the provisions of section 3 of the Bhagdari Act makes it clear that it confers upon the Collector very different powers. Under the Bhagdari Act it is lawful for the Collector whenever he shall upon due inquiry find that any person is in possession of any Bhag in violation of any of the provisions of section 3, summarily to remove him from possession and to restore possession to the person whom the Collector shall deem to be entitled thereto; that is to say, that notwithstanding the provisions of section 28 of the Limitation Act, although the right of a previous proprietor of a Bhag or a share of the Bhag has become extinguished, it is lawful for the Collector, if he deems fit, to restore possession to that person. There is, however, no such provision in section 79A of the Land Revenue Code. The Collector cannot take property from one person and give it to another whom he may consider to be entitled. He can only interfere where the occupation is wrongful or in contravention of the terms of the Act in the case of Gujarat *Talukdars*, and here, as we have pointed out, the occupation of the plaintiff is legalised by the law of limitation and is not in contravention of the terms of the Talukdars Act.

For these reasons we affirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2103 OF 1909.

May 14, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Newbould.

SRIMANTA BAGDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NIRANTAR JELIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Fishery rights—Rivers tidal but not navigable, to whom belong—Government or proprietor of estate—Public navigable waters.

The Government is *prima facie* the owner of fishery rights in all waters which come within the description of public navigable waters, whether tidal or not. But the rights of fishery in small rivers which are tidal but not navigable belong to the proprietors through whose estates they run.

Sri Balusu Ramalakshmamma v. *Collector of the Godavari District*, 22 M. 464; 26 I. A. 107; 3 C. W. N 777, referred to.

Appeal from the decree of the Sub-Judge of 24-Pergannahs dated, August 6th, 1909, confirming that of the Munsif of Basirhat, dated April 5th, 1909.

Babus *Panchanan Ghosh* for Surendra *Nath Ray* and *Satyendra Nath Roy*, for the Appellants.

Babu *Atul Krishna Roy*, for the Respondents.

JUDGMENT.—This suit relates to certain fishery rights in a river. These rights are claimed by the plaintiffs on one side and the defendants on the other. The learned Judge, before whom this second appeal first came, remanded the case to the lower Appellate Court for the determination of two questions of which we need now only mention one. That question is "whether the river is a tidal and navigable river." The learned Subordinate Judge has submitted his judgment on remand in which after dealing with the evidence he has come to the conclusion that the river is tidal but not navigable. That conclusion is a conclusion of fact and cannot be now contested. What is said, however, is this. The controversy being whether the plaintiffs have proved their title to the fishery it is contended that they have not shown that they have derived any title from the Government whether by grant or by prescription, and then it is argued that a fishery in a river *prima facie* belongs to the Government not only when the river is both tidal and navigable but also when it is only tidal and that the evidence of title adduced is, therefore, insufficient and the suit ought to fail on that ground. The argument takes two forms, *firstly*, that the words "tidal" and "navigable" are really inter-changeable and *secondly*, that the true test is that of tidality and not that of navigability. We are of opinion that neither of these propositions can be supported. As we conceive, the principle is most broadly as well as most accurately expressed in the form that Government is *prima facie* the owner of the fishery rights

in all waters which come within the description of public navigable waters. The rights of the Government have been maintained by the Courts in respect of large rivers which are navigable but not tidal. The law is stated and the cases are collected by Mr. Lal Mohan Das at pages 109-113 of his "Law of Riparian Rights "(Edition 1891). Reference may also be made to the observations of the Privy Council in regard to the river Godavari in the case of *Sri Balusu Ramalakshmamma* v. *Collector of the Godavari District* (1). In Bengal the rights of Government in these large rivers depend to some extent on the wording of Regulation XI of 1825 and similar reasoning leads us to suppose that the rights of fishery in small rivers such as the river now in question which are tidal but not navigable belong to the proprietors through whose estates they run. In point of fact navigability does not necessarily follow from "tidality" so that the two terms cannot be regarded as equivalent. The loose expressions to be found in the judgments in some cases which seem to identify 'tidal' with navigable were employed, so far as we are aware, with reference to waters as to which there was no doubt that they were both tidal and navigable. The language employed must be interpreted with reference to the facts of those cases and cannot be understood as laying down a matter of law that what is tidal is always navigable or that the only test is tidality. The true test and the true distinction for purposes such as the present is as we conceive whether a river is, or is not navigable. If a river is tidal, there may be a presumption, weaker or stronger as the case may be, that it is also navigable but here, as we have said, it has been found positively that the river is tidal but not navigable. Government is not a party to the suit and it is not suggested so far as we are aware that Government ever claimed this fishery. The defence to the suit with which we have dealt seems to rest on no solid foundation. No other question of law arises and the appeal, therefore, fails and must be dismissed. The plaintiffs-respondents are entitled to their costs of the appeal.

Appeal dismissed.

(1) 22 M. 464; 26 I. A. 107; 3 C. W. N. 777.

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 455 AND 473 OF 1911.

February 17, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Rao.

SAKHARAM VISHRAM SURVE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADASHIV BALSHET LODHA AND OTHERS—DEFENDANTS—RESPONDENTS,

AND

SADASHIV BALSHET LODHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAKHARAM VISHRAM SURVE AND PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 97—Preliminary issue—Finding but no decree drawn up—Right of appeal against the finding not barred by section 97—Waiver.

A preliminary issue was raised in the first Court and a finding was recorded thereupon. But no decree was drawn up in accordance with that finding. In appeal from the decree in the suit, the finding was appealed against, an issue was framed by the Appellate Court, and it was decided against the plaintiff.

Held, that the Court of first appeal was empowered to hear and decide the preliminary issue.

Where there is only a preliminary finding and no decree is drawn up in accordance with that finding, there is no preliminary decree, and there is consequently no possibility of such an appeal as is contemplated by section 97 of the Civil Procedure Code.

Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases, this inference has come to be looked on as an inference of law.

Govind v. *Vithal*, 16 Ind. Cas. 159; 14 Bom. L. R. 560; 36 B. 536, *Bai Divali* v. *Vishnav*, 4 Ind. Cas. 829; 11 Bom. L. R. 1326; 34 B. 182, *Krishnaji* v. *Maruti*, 7 Ind. Cas. 966; 12 Bom. L. R. 762, referred to.

Cross appeals from the decision of the first class Subordinate Judge, A. P., at Ratnagiri, in Appeal No. 46 of 1910, varying the decree passed by the second class Subordinate Judge at Deorukh, in Civil Suit No. 322 of 1908.

Mr. *A. G. Desai*, for Sakharam plaintiff No. 1.

P. D. Bhide, for Sadashiv defendant No. 1.

K. H. Kelkar, for heirs of Defendant No. 6.

JUDGMENT.

APPEAL No. 455 OF 1911.

In this case the plaintiffs sued for redemption. In the first Court an issue was raised as to whether any of the plaintiffs were agriculturists. It was found that plaintiff No. 2 was an agriculturist. But no decree was drawn up in accordance with that preliminary

finding. The trial proceeded as a trial under the provisions of the Dekkhan Agriculturists' Relief Act and a decree was made for redemption.

Thereupon one of the defendants appealed to District Court, taking amongst other grounds that it was wrong to hold that plaintiff No. 2 was an agriculturist. An issue on the point was framed by the Court of appeal. It was found that plaintiff No. 2 was not an agriculturist.

He now comes in second appeal to this Court and urges that the Court of first appeal was wrong in going into this preliminary point at all. He bases his contention largely on the case of *Govind* v. *Vithal* (1).

The application of the law on the question of appeals against preliminary decrees has been to some extent confusing. In the case of *Bai Divali* v. *Vishnav* (2), after argument on the point, it was held that although there may be a preliminary finding, yet unless a formal decree is drawn up there is no preliminary decree and there is consequently no possibility of such an appeal as is contemplated by section 97 of the Code. The reasoning in that case appears to me and it seems to me that it contains the correct interpretation of the law. There are expressions in the judgment in the case of *Krishnaji* v. *Maruti* (3), which may seem to conflict with the reasoning and decision in the earlier case. In *Krishnaji's* case (3), however, the Court was dealing with a matter in revision. Speaking for myself, I am not at all clear that the reasoning in that case does override the reasoning in the ealier case, but, if it does, and if I had to choose between the two, I should certainly choose the reasoning in the earlier case. So I am quite satisfied that in law no appeal did lie against the preliminary finding.

Then I come to the case of *Govind* v. *Vithal* (1), which was particularly relied on by the appellant. That case accepts the assumption that no appeal lies where there is in fact no formal decree and proceeds on the ground that it is the duty of the person aggrieved by a preliminary finding to have a decree drawn up, and that if he fails to do this he must be taken to have waived his right to appeal. Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases this inference has come to be looked on as an inference of law. But whether so regarded or regarded as an inference of common sense it is essential to know the facts on which the inference is based. Here we have these facts : the preliminary finding was against the interest of the defendant. He did not apply to have a preliminary decree drawn up, but later on when the final decree was made he did appeal, and amongst other matters, against this preliminary finding. The plaintiff did not object to his doing this on the ground that he had waived or in any way forfeited his right to appeal. On these facts I should hold as an inference of common sense that the defendant had not waived his right to appeal ; and I do not think the case of *Govind* v. *Vithal* (1) is a decision which comes in the way of holding that the Court of first appeal was empowered to hear and decide this preliminary issue. It has been suggested that the failure to have a decree drawn up on a preliminary point, even though it may not amount in certain cases to a waiver, does amount to actual loss of the right to appeal, because, it is suggested, the duty to ask the Court to draw up a decree was so imperative that failure to perform that duty involves loss of the right to appeal. To say this would be to go much further than the Judges have gone in the case of *Govind* v. *Vithal* (1); and I think it would be going further than the law either requires or suggests. The duty to draw up a decree is the duty of the Court. That, I think, is clear enough from the provisions of the Code of Civil Procedure, and in practice it is very clearly understood by those who are conversant with the ways of our Courts in the *moffusil*. Speaking for myself, I think the duty of the litigant to remind the Court of its duty to draw up a decree is no more than the duty that devolves on any person in common every day affairs to see that there is no undue delay in the performance of matters in which he is interested. It is a duty of a very different character, if the word 'duty' is the true word to use, from the obligation which the law casts on the Court itself.

For these reasons I am unable to hold that there is any force in the objection taken by the plaintiff, and I hold that the Court of first appeal was empowered to hear and

(1) 16 Ind. Cas. 159; 14 Bom. L. R. 560; 36 B. 536.
(2) 4 Ind. Cas. 829; 11 Bom. L. R. 1326; 34 B. 182.
(3) 7 Ind. Cas. 966; 12 Bom L. R. 762.

decide the issue as to whether plaintiff No. 2 was an agriculturist. The Appeal No. 455 of 1911, therefore, must be dismissed with costs. The respondents' cross-objections are disallowed with costs.

APPEAL NO. 473 OF 1911.

In this case the plaintiffs sued to redeem certain property mortgaged to the father of defendant No. 1. Pending the suit the right, title and interest of defendant No. 1 in the mortgaged property was put up to sale in execution of a decree, and purchased by defendant No. 6, and so defendant No. 6 was added as a party to the suit. The question then arose as to whether defendant No. 1 or No. 6 was entitled to the mortgage-money. The matter was amicably settled by a compromise between defendants Nos. 1 and 6 and both of them presented an application, requiring the Court to file the compromise. Upon this application the Court passed an order directing the compromise to be recorded, but leaving the matter to be considered at the time of passing judgment. It appears that defendant No. 1 afterwards was dissatisfied with the compromise; and made an application to the Court for a review of this order. He alleged in his application for review that the compromise had been obtained from him by fraud. The Court after taking the evidence adduced by the parties came to the conclusion that the allegation of fraud was not made out, and rejected the application for review. That being the case the Court ought to have awarded to defendant No. 6 the whole of the mortgage-money as agreed upon by the terms of this compromise. But the Court of first instance directed the mortgage amount to be deposited in Court and referred defendants Nos. 1 and 6 to a separate suit to establish their right to the money so deposited.

Against this decree defendant No. 6 appealed. The District Court held that defendant No. 1 was bound by the terms of the compromise as his allegation of fraud had not been proved, and directed the whole of the mortgage-money to be paid to defendant No. 6 in accordance with the terms of the compromise.

Against this decision defendant No. 1 has preferred this second appeal. We agree with the lower Court that the matter having been compromised by a lawful agreement between the parties, and defendant No. 1 having failed to establish the fraud alleged by him, the mortgage money should be paid to defendant No. 6 in accordance with the terms of the compromise. We, therefore; confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2246 OF 1911.

April 30, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

BAZLUL GHANI MIA—PLAINTIFF NO. 1—APPELLANT

versus

ADAK PATARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Validity*—*Test*—*Substantial gift to charitable use*—*Two-thirds of income as allowances to members of settlor's family*—*Allowances to be reduced if income reduced, but amount of charity to be increased if income increased*—*Construction of* wakf *deed.*

A *wakf* deed will be valid if the effect is to give the property in substance to charitable uses. It will not be valid if the effect is to give the property in substance to the settlor's family.

Mujibunnissa v. *Abdur Rahim*, 23 A. 233 at p. 242; 28 I. A. 15; 5 C. W. N. 177; 11 M. L. J. 58; 3 Bom. L. R. 154, followed.

A *wakf* deed provided that about two-thirds of the income of the property dedicated were to be paid as allowances to the wife and children of the settlor, and only about a third was to be spent for religious and charitable purposes; and that the allowances were to be reduced or increased in the event of the income being reduced or increased but the amount to be spent for religious and charitable purposes was not to be reduced for any reason but should be increased if the income increased:

Held, that the deed cannot be said to have been designed for the aggrandisement of the family property or for keeping it perpetually in the hands of the family, and that the *wakf* was valid.

Mahomed Ahsanulla Chowdhry v. *Amar Chand Kundu*, 17 C. 498; 17 I. A. 28, *Muzhurool Huq* v. *Puhraj Ditarey Mohapatur*, 13 W. R. 235 and *Deoki Prosad* v. *Inaitullah*, 14 A. 375; A. W. N. (1892) 48, referred to.

Appeal from the decree of the District Judge of Tipperah, dated May 31st, 1911, confirming that of the Second Munsif of Chandpur, dated August 15th, 1910.

Babus *Harendra Narain Mitra* and *Upendra Kumar Roy*, for the Appellant.

Babu *Gopal Chandra Das*, for the Respondents.

BAZLUL GHANI MIA *v.* ADAK PATRAI.

JUDGMENT.—The plaintiff-appellant sued as the *mutwali* of a *wakf* estate, to eject the principal defendants from an *osat raiyati* holding. The defendants pleaded that the *wakf* was not a valid one, and both the Courts below have given effect to the contention on the ground that the main portion of the estate is devoted to the maintenance of the family of the settlors, and that the religious and charitable purposes are only subsidiary.

The question for decision in this appeal is whether the *wakf* is valid and the solution of the question depends upon the construction to be put upon the *wakfnama* and the true intention of the *wakif* Amjad Ali as appearing in it.

In the preamble of the *wakfnama* the settlor, after reciting that he had a wife and three sons and five daughters, and that his end was almost near, says:—"the most proper, nay, the real duty in life, is to do acts for the pleasure of the all merciful Providence as well as for the welfare and blessings in the next world. It is very probable, that in my absence all religious acts will cease, on account of an easy destruction of all the aforesaid properties consequent upon family dissensions amongst the numerous heirs of mine mentioned above. In these circumstances it is my duty to put things in good order even now and make arrangements which will secure the performance of religious acts and be the source of blessings in the next world. So after keeping some of my immoveable properties in my own hands for my own maintenance, as well as for other purposes, I out of my own free will, in full possession of my senses, in good health, coolly, and with sincere heart do execute this deed of *wakf* in the name of God. *i. e.*, dedicate to Him for the welfare of myself and my heirs and on the strength of this *wakfnama*, I do hereby promise and declare, that with respect to the *wakf* properties, *i. e.*, all the properties either in my own name or *benami* included in the schedule below, all the rules laid down below shall remain valid and operative for all time to come. Neither myself nor my heirs, nor any body in my place, shall ever be able to raise any objections, or make any alterations, if done, they will be rejected".

By paragraph 1 of the deed, the eldest son of the settlor who is described as educated, active, intelligent and of a religious disposition is appointed *mutwali*. Paragraph 2 provides that on the death of the eldest son his other sons in order of seniority will be *mutwalis*, and similarly among the heirs or the members in the line of the settlor, the person who will be regarded as fit, capable and of a religious bent of mind, will be *mutwali*, and failing that any one from amongst the members of the Muhammadan community of good descent whether a neighbour or gifted with good qualities shall be selected and appointed *mutwali*. The 3rd paragraph provides that if the *mutwali* be found guilty of laches or misconduct the succeeding *mutwali* shall have a right to come in as *mutwali* in his place, and if a *mutwali* be found guilty in a Court of law he will be dismissed and another appointed in his place.

The 4th paragraph is the most important. It states that the net income of the *wakf* property after deducting the collection and other charges is Rs. 464 and provides that his wife and each of his children will get an allowance of Rs. 36 annually, and that the *mutwali* shall spend Rs. 140 annually towards the expenses of supplying oil and light in the mosque of the Almighty for His pleasure, the pay of one *khateb*, and the expenses of sending of pilgrims to Mecca, and those relating to Ramzan Sarif, and other similar acts of religion and charity.

The 5th paragraph enjoins the *mutwali* to prepare an account at the end of every year, and declares that his wife and children shall be entitled to demand an account from the *mutwali*. The 6th paragraph lays down what would be considered as laches and misconduct on the part of the *mutwali*.

The 7th paragraph states who will act as guardian of his minor children and draw their allowances. The 8th paragraph provides that if any portion of the *wakf* properties be acquired by the Government or any other authority, the compensation money which may be allowed, will be invested by the *mutwali* in purchasing immoveable properties and the same will be regarded as part of the *wakf* properties. The 10th paragraph provides that if for

any reason the income of the properties be reduced, the annual allowances will be reduced in proportion to the diminution of the income, but that if the income of the *wakf* properties increase, the allowances and the amount to be spent in the service of God will also be increased in the same proportion.

It will be seen that Rs. 140 is to be spent for religious and charitable purposes, and although the allowances to the wife and children will have to be reduced in the event of the income of the estate being reduced, there is no provision that the amount to be spent for religious and charitable purposes is to be reduced for any reason, though the amount may be increased with the increase of the income of estate. The other provisions do not indicate that it was an illusory dedication. It is true about two-thirds of the income are to be paid as allowances to the wife and children of the settlor, and only about a third is to be spent for religious and charitable purposes. It is not clear whether the annuities to the members of the settlor's family were intended to be made heritable, but even if they were, they are fixed sums, and as the entire property is dedicated as *wakf*, the annuities must, in the course of time, on the extinction of the line of the children lapse into the *wakf* estate and the deed provides for increase in the expenditure for religious and charitable purposes on the income of the estate being increased. It, therefore, appears to be a real dedication of the property to *wakf* subject to a charge, upon the profits of the estate of certain annuities. In the case of *Mahomed Ahsanulla Chowdhry* v. *Amar Chand Kundu* (1), the Privy Council said as follows:—"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable use, which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India. On the one hand, their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (2). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says:—'We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse, will leave the whole property in tact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law'. On the other hand, they have not been referred to, nor can they find, any authority showing that, according to Muhammadan Law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other". In the case of *Deoki Prosad* v. *Inaitullah* (3), where the object of the *wakfnama*, was firstly to provide for the support of the descendants and kindred of the grantor who might be in great want and need of support and the surplus of the income of the property was to go to purposes which were undoubtedly religious purposes, the learned Judges held that it was a good *wakfnama*. In the case of *Mujibunnissa* v. *Abdur Rahim* (4), the rule is succinctly stated: "Their Lordships have, however, considered the question, whether,.....the deed is according to its terms a valid deed of *wakf*. It will be so if the effect is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family."

(1) 17 C. 498; 17 I. A. 28

(2) 13 W. R. 235.
(3) 14 A. 375; A. W. N. (1892) 48.
(4) 23 A. 233 at p. 242; 28 I. A. 15; 5 C. W. N. 177; 3 Bom. L. R. 154; 11 M. L. J. 58.

JAIMANGALBATI MISRAIN *v.* BADAN CHAND DAS.

It is sometimes difficult to draw the line between a substantial dedication to charitable or religious purposes and the giving of the property in substance to the testator's family. In the case of *Phul Chand* v. *Akbar Yar Khan* (5), it appeared that about Rs. 500 per annum was to be applied to charitable purposes out of an average income of Rs. 850 and this was considered sufficient to constitute a valid *wakf*. On the other hand in the case of *Mujibunessa* v. *Abdur Rahim* (4), cited above, the amount of religious and charitable expenditure was left entirely to the discretion of the *mutwali*, and was clearly subordinated to the main purpose of family endowment.

The question must, however, be decided upon a consideration of all the facts and circumstances of each case. It cannot be said in the present case that the deed is designed for the aggrandisement of the family property or for keeping it perpetually in the hands of the family. Taking all the provisions of the *wakfnama* into consideration we are of opinion that the *wakf* is vaild under the Muhammadan Law.

In this view, it is unnecessary to consider whether the provisions of Act VI of 1913 apply to the present case.

The appeal is, accordingly, allowed. The decrees of the Courts below are set aside and the case is remanded to the Court of first instance for a trial on the merits. Costs to abide the result.

Appeal allowed; Case remanded.

(5) 19 A. 211; A. W. N. (1897) 49.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 68 OF 1911.

May 6, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

JAIMANGALBATI MISRAIN—DECREE-HOLDER—APPELLANT

versus

BADAN CHAND DAS—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Mortgage decree passed when old Civil Procedure Code in force—Expiry of twelve years—Application for execution—Which Code applicable—Civil Procedure Code (Act XIV of 1882), s. 230—Civil Procedure Code (Act V of 1908), s. 48—General Clauses Act (X of 1897), s. 6 cls. (c) and (e).

A decrree-holder was entitled to execute a decree passed under the old Code of 1882 in accordance with the provisions of that Code so long as it was in force; he had no vested right in the procedure prescribed by the Code.

Therefore, if he applied for execution of the decree after the passing of the new Code, the provisions of the new Code would apply.

Section 230 of the old Code enacted that a money decree should not be executed after the expiration of 12 years from the date of the decree. That section did not apply to a mortgage decree which could, therefore, be executed at any time. But section 48 of the new Code lays down that no decree should be executed after 12 years from the date of the decree.

Therefore, an application for the execution of a mortgage decree, passed when the old Act was in force, filed after 12 years from the date of the decree cannot be entertained if the new Act has come into operation at that time.

Manjuri Bibi v. *Akkel Mahmud*, 19 Ind. Cas. 793; 17 C. L. J. 316 and *Bisseshur Sanamat* v. *Jasoda Lal Chowdhry*, 19 Ind. Cas. 391; 17 C. W. N. 622, relied upon.

Appeal from the order of the Sub-Judge of Bhagalpure, dated December 23rd, 1910.

Babu *Lal Mohan Ganguly*, for the Appellant.

Babu *Gopal Chandra Shome*, for the Respondent.

JUDGMENT.—This is an appeal by the decree-holder against an order of dismissal of an application for execution of a mortgage decree. The decree was obtained by her predecessor on the 3rd May 1895, and was affirmed on appeal to this Court on the 6th December 1897. The present application for execution was made on the 26th August 1910. The judgment-debtors contended in the Court below that under section 48 of the Code of Civil Procedure of 1908, no order for execution could be made upon this application presented after the expiration of twelve years from the date of the decree sought to be executed. The Subordinate Judge has given effect to this objection and dismissed the application. On the present appeal by the decre-holder it has been argued that the application for execution is governed, not by section 48 of the Code of 1908 but by section 230 of the Code of 1882 which was in force when the decree sought to be executed was made.

Before we examine the validity of this contention, it may be stated that the decree was made in a suit to enforce a mortgage security. The Court made the usual decree for sale, and then added that, should any

portion of the decretal money be left unsatisfied after the sale of the mortgaged properties, the balance due will be realised from the other properties of the defendant. Consequently, the decree was a combined decree for sale and a personal decree. The decree-holder took out execution and had the mortgaged properties sold which were purchased by her on the 8th August 1901. On the 23rd April 1903, she applied under section 90 of the Transfer of Property Act for a personal decree. That application was refused on the 27th April 1903 on the ground that as the original decree embodied a personal decree, no separate decree could be drawn up under section 90 of the Transfer of Property Act as laid down in the case of *Dina Nath Mitter* v. *Bejoy Krishna Das* (1). The decree-holder then proceeded to execute the personal decree, and, it is admitted that properties not included in the mortgage security were sold in 1905. The decree-holder now seeks to proceed against other properties of the judgment-debtors. If section 48 of the Code of 1908 be held applicable, the application made on the 26th August 1910, for execution of the decree made on the 6th December 1897, must obviously fail; because under rule 7 of Order XX of the Code the date of the decree is the date on which the judgment was pronounced, although the precise amount for which the decree-holder was entitled to proceed personally against the judgment-debtor in this case, was not ascertained till the mortgaged properties had been sold. To escape this difficulty the appellant contends that clauses (*c*) and (*e*) of section 6 of the General Clauses Act, 1897, indicate that section 230 of the Code of 1882 applies to the present proceeding. Before we examine this argument, we may recall to mind that with reference to section 230, it had been ruled by this Court in *Fazil Howldar* v. *Krishna Bundhoo Roy* (2) and *Kartick Nath* v. *Juggernath Ram* (3) in conformity with the decision in *Ram Charan* v. *Sheobarat Roy* (4) but contrary to the decision in *Konmachi* v. *Pakker* (5), that mortgage decrees were not within the scope of this provision of the law. The appellant has, consequently, endeavoured strenuously to attract the operation of section 230 of the Code of 1882 to her case, but we must hold that the attempt has signally failed.

Clause (*c*) of section 6 of the General Clauses Act, 1897, provides that when an enactment has been repealed, unless a different intention appears, the repeal shall not affect any right acquired under the repealed enactment. Clause (*e*) provides that such repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right as aforesaid. It is plain that clause (*e*) refers back to clause (*c*) and must be read along with it, so that the right which is not affected by clause (*e*) must be a right as described in clause (*c*). Now, it is obvious, that the decree-holder in the case before us did not acquire a right under the repealed enactment. She was entitled to execute the decree in accordance with the provisions of the Code of 1882 so long as it was in force; but she had obviously no vested right in the procedure prescribed by that Code. The right she had, was created by the mortgage-bond; that right subsequently merged in the decree made in her favour. It cannot reasonably be argued that she had a right acquired under the Civil Procedure Code of 1882. We must consequently hold that section 48 of the Code of 1908 is *prima facie* applicable to the case before us, and it cannot be disputed that the language of that section is comprehensive enough to cover it completely. Sub-section (1) of section 48 provides that where an application to execute a decree, not being a decree granting an injunction, has been made, no order for execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed. This plainly applies to a fresh application presented after the Code of 1908 came into force. We have consequently only to consider whether a different intention appears from the provisions of the Code. From this standpoint, it is worthy of note that the Code of 1908 became law on the 21st March 1908, but did not come into operation till the 1st January 1909. Consequently all decree-holders in the position of the appellant had ample opportunity to apply for execution of their

(1) 7 C. W. N. 744.
(2) 25 C. 580; 2 C. W. N. 118.
(3) 27 C. 285.
(4) 16 A. 418; A. W. N. (1894) 142.
(5) 20 M. 107; 7 M. L. J. 66.

decrees in accordance with the Code of 1882 during the interval between the 21st March and 31st December 1908. If they failed to do so, they cannot legitimately complain of hardship or unfairness. The case before us shows conclusively that the construction we adopt, does not cause any hardship to the appellant, because she would have been in time if she had applied for execution at any time before the 6th December 1909, that is, she could have applied and no objection could have been taken on the ground of limitation even long after the new Code had come into operation. We hold accordingly that the Code of 1908 applied to the present proceedings and that section 48 is a bar to the grant of the application. The view we take is in accord with that adopted by this Court in the cases of *Manjuri Bibi* v. *Akkel Mahmud* (6) and *Bisseshur Sanamat* v. *Jasoda Lal Chowdhry* (7).

The result is that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(6) 19 Ind. Cas. 793; 17 C. L. J. 316.
(7) 19 Ind. Cas. 391; 17 C. W. N. 622.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 227 OF 1912.
February 19, 1913.
Present:—Mr. Justice Heaton and Mr. Justice Rao.
BALCHAND CHATURCHAND—PLAINTIFF—APPELLANT
versus
CHUNILAL JAGJIVANDAS—DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 20—Not applicable to a person not agriculturist at the time of decree.

Section 20 of the Dekkhan Agriculturists' Relief Act cannot apply to the case of a person who was not an agriculturist when the decree was obtained, whatever his status may be thereafter when execution comes to be taken out against him.

First appeal from the decision of the first class Subordinate Judge of Nasik, in Suit No. 155 of 1910.

Mr. *R. R. Desai*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—In this case the first class Subordinate Judge of Nasik has applied section 20 of the Dekkhan Agriculturists' Relief Act to the case of a judgment debtor who was not an agriculturist when the decree was obtained, but who by discarding trade and limiting himself more exclusively to profits in land had become an agriculturist at the time of the execution. We do not think that he was empowered to do this. There has been a great deal of argument as to the meaning of section 20, in the light of the definition of the word 'agriculturist' in the Act, but it seems to us to be quite clear that section 20 cannot apply to the case of a person who was not an agriculturist when the decree was obtained, whatever his status may be thereafter when execution comes to be taken out against him. And, therefore, as the Subordinate Judge had no power to make the order which he did, granting instalments, we must set that order aside and direct that the execution proceedings should go on according to law.

The appellants must have their costs here and in the Court below.

The cross objections by the respondent are dismissed with costs.

Decree reversed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3432 OF 1910.
February 6, 1913.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
KALANAND SINGH—PLAINTIFF—APPELLANT
versus
SRI PROSAD DAS—DEFENDANT—RESPONDENT.

Principal and Agent—Settled accounts, when may be re-opened—Surety, if bound by admission of a decree against debtor—Surety entitled to have accounts taken in his presence—Set-off—Arising out of same transaction—Agent's salary due from principal to be credited in account with surety—Civil Procedure Code (Act XIV of 1882), s. 111.

As between a principal and an agent, settled accounts will not be re-opened, unless fraud or undue influence is established.

MacKellar v. *Wallace*, 5 M. I. A. 372; 8 M. P. C. 378; 14 Eng. Rep. 144; 18 Eng. Rep. 936, and *Parkinson* v. *Hanbury*, (1867) L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642; relied upon.

KALANAND SINGH *v.* SRI PROSAD DAS.

But if the principal seeks his remedy against the surety, he cannot successfully contend that the surety is bound by the admission of the debtor as to the sum due from him. A surety is not concluded even by a judgment or award against the principal: he is entitled to have the accounts taken in his presence.

A right to set off exists not only in cases of mutual debits and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross suit.

Bhagbat Panda v. *Bamdeb Panda*, 11 C. 557, followed.

Therefore, in a suit for account by a principal against his agent's surety, the surety will be allowed credit for arrears of salary due to the agent in taking the accounts.

Appeal from the decree of the District Judge of Purneah, dated August 17th, 1910, modifying that of the Munsif of Purneah, dated April 2nd, 1911.

Babu *Sailendra Nath Palit*, for the Appellant.

Babu *Nanda Lal Banerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of money due on a promissory-note executed in their favour by their agent, Sri Chand Das, on the 30th July 1905. It is alleged that on that date the accounts between the parties were settled and that a promissory-note was executed for the sum due by the agent to the principals. Sri Chand Das died shortly after and on the 28th July 1908, the plaintiffs commenced this action against his brothers, not only in their character as representatives-in-interest of their deceased agent but also as sureties inasmuch as they had made themselves liable under a surety-bond executed by them on the 9th July 1901. They disputed the amount due and claimed that a substantial sum was payable by the plaintiffs to their brother on account of salary. The Courts below have taken the accounts and made a decree in favour of the plaintiffs for a smaller sum than what is mentioned in the promissory-note. This decree has been assailed before us on behalf of the plaintiffs substantially on three grounds; namely, *first*, that it was not competent to the defendants to go behind the promissory-note: *secondly*, that they could not plead a set-off in a suit of this description: and *thirdly*, that the claim for interest from the date of the suit should have been allowed.

In so far as the first ground is concerned, we are of opinion that the contention of the appellants is wholly unfounded. No doubt, as between a principal and an agent, settled accounts will not be re-opened, unless fraud or undue influence is established, as pointed out by their Lordships of the Judicial Committee in the case of *MacKellar* v. *Wallace* (1) and by the House of Lords in *Parkinson* v. *Hanbury* (2). This principle, however, is limited in its application as between a principal and an agent. If the principal seeks his remedy against the surety, he cannot successfully contend that the surety is bound by the admission of the principal debtor as to the sum due from him. It may be a matter for controversy whether, unless by a stipulation with the surety [*Swan* v *Bank of Scotland*(3)] an admission by the principal debtor is evidence against the surety [*Abbethir* v. *Sutcliffe* (4), *Lysaght* v. *Walker*(5), but as was pointed out in the case of *Ex parte Young*; *Kitchen*, *In re* (6) where the rule laid down in *Doughlas* v. *Honland*(7) was accepted as good law, a surety is not concluded even by a judgment or award against the principal: he is entitled to have the accounts taken in his presence. In the case before us, as the plaintiffs have sued the defendants not only in their character as representatives-in-interest of their agent but also as sureties, the latter were entitled to have the accounts examined in their presence: and the very fact that they have successfully contested the claim of the plaintiffs fully justifies the course adopted by the Court. The first contention consequently fails.

In so far as the second ground is concerned, it has been argued that as the sums claimed by way of set off were not ascertained amounts, it was not competent to the defendants to plead a set off. This contention is clearly unfounded. It was pointed out by this Court in the case of *Bhagbat Pandi* v. *Bamdeb Panda* (8) that the provisions of the Civil Procedure Code section 111 of Act XIV of

(1) 5 M. I. A. 372; 8 M. P. C. 378; 14 Eng. Rep. 144; 18 Eng. Rep. 936.

(2) (1867) L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642.

(3) 10 Bligh (N. S.) 627; 6 Eng. Rep. 231; 2 Mont. and Ayr. 656.

(4) (1890) L. R. 26 Ir. 332.

(5) 5 Bligh (N. S.) 1; 5 Eng. Rep. 208; 2 Dow. and Cl. 211; 35 R. R. 1.

(6) 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90.

(7) 24 Windell 35.

(8) 11 C. 557.

1882, do not take away from parties any right to set off, whether legal or equitable, which they would have independently of that Code: and that such right exists not only in cases of mutual debts and credits, but also where cross demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross suit. The same principle had been previously recognised in the case of *Clark* v. *Ruthnavaloo Chetti* (9) and was subsequently adopted in the case of *Chisholun* v. *Gopal Chunder* (10). It has been argued, however, that the defendants were not entitled to be allowed credit for arrears of salary due to their brother. There is plainly no substance in this contention. The defendants have been sued as the representatives-in-interest of their deceased brother and every defence which was available to him would be equally available to them. The second contention consequently fails.

In so far as the third ground is concerned, we are of opinion that the plaintiffs are entitled to interest by way of damages from the date of the institution of the suit and not merely from the date of the decree of the Court of first instance. This contention must, consequently, prevail.

The result is that this appeal is allowed in part, and the decree of the Court below modified, only in respect of interest which will run not from the date of the decree of the first Court but from the date of the institution of the suit, as the appeal has substantially failed, the appellants must pay the respondents their costs of this Court.

Appeal allowed in part.

(9) 2 M. H. C. R. 296.
(10) 16 C. 711.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 230 OF 1912.

February 24, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Rao.

RAGHO CHANDRARAO KADAM —APPLICANT

versus

HANMATI CHANDRARAO KADAM —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 100 not applicable to cases where execution transferred to Collector—Wrongful dispossession by Collector—Court cannot interfere.

Order XXI, rule 100 of the Civil Procedure Code has no application to a case where the execution of decree has been transferred to the Collector. If a person is wrongly ousted or dispossessed under the Collector's order, he may apply to the Collector and not to the Court, complaining of such ouster or dispossesion.

Application from an order passed by the Subordinate Judge of Roha.

Mr. *C. A. Rele*, for the Applicant.

Mr. *W. B. Pradhan*, for the Opposite Party.

JUDGMENT.—The opponent purchased certain land at a sale held by the Collector in execution of a decree which had been transferred to him under section 320 of the Civil Procedure Code of 1882. On 8th November 1911 the Collector put the opponent in possession of the property sold. Thereupon the applicant applied to the Court alleging that he had long been in possession of the property on his own account and not on behalf of the judgment-debtor and complaining that he had been wrongly dispossessed by the auction-purchaser.

This application was rejected by the Subordinate Judge on the ground that he had no jurisdiction to interfere with the Collector's order.

It is urged by Mr. Rele on behalf of the applicant that under Order XXI, rule 100, of the Civil Procedure Code the Court is bound to make an inquiry, if a person other than the judgment-debtor complains of his dispossession by the auction-purchaser. This rule has no application to a case, where the execution of the decree has been transferred to the Collector and he has acted under the powers conferred on him by the Local Government under section 70 of the Civil Procedure Code or the corresponding section

of the Code of 1882. In the present case the Collector put the auction-purchaser in possession of the property sold under rule 14 of the rules made by the Local Government under section 320 of the Civil Procedure Code of 1882. Under this rule the Collector has the power to order delivery of possession to the purchaser, "if need be by *removing* any person who refuses to vacate the same." If a person is wrongly ousted or dispossessed under the Collector's order, he may apply to the Collector and not to the Court, complaining of such ouster or dispossession; so long as the execution of the decree is in the hands of the Collector, he alone can execute it in accordance with the rules made by the Local Government. He is not a mere ministerial officer charged with the duty of selling property under the directions of the Court but the whole execution of the decree is transferred to him and the Court cannot interfere or exercise any of the powers conferred on him: See *Keshabdeo* v. *Radhe Prasad* (1), *Muhammad Said Khan* v. *Payag Sahu* (2), and section 70, clause (2), of the Civil Procedure Code.

The Subordinate Judge was, therefore, right in holding that he had no jurisdiction to entertain the application under Order XXI, rule 100, of the Civil Procedure Code. Rule discharged with costs. The application may be returned to the applicant for presentation to the Collector.

Ruls discharged.

(1) 11 A. 94; A. W. N. (1889) 10.
(2) 16 A. 228; A. W. N. (1894) 55.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 73 OF 1913 AND RULE No. 220 OF 1913.

March 19, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KENARAM—DECREE-HOLDER—APPELLANT

versus

KAILASH CHANDRA—JUDGMENT-DEETOR—RESPONDENT.

Execution—Decree-holder, whether can discontinue execution proceedings at any stage—Order allowing execution to be withdrawn, if appealable—Appeal—Execution proceedings—Civil Procedure Code (Act V of 1908), s. 47—Bid—Offer—Finality—Acceptance—Bid, if may be withdrawn before acceptance.

A decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option.

An order allowing the decree-holder to withdraw the execution proceedings, does not determine any question between the parties to a suit relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, and is not, therefore, appealable.

Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to. Therefore, it is competent to the bidder to withdraw his bid before the sale has been completed, that is, before the acceptance of the bid.

Agra Bank v. *Hamlin*, 14 M. 235, followed.

Payne v. *Cave*, 3 T. R. 148; 1 R. R. 679; 100 Eng. Rep. 502, *Warlow or Warton* v. *Harrison*, 1 E. & E. 295; 28 L. J. Q. B. 18; 5 Jur. (N. S.) 313; 7 W. R. 133; 117 R. R. 219; 120 Eng. Rep. 920; on appeal 1 E. & E. 309; 29 L. J. Q. B. 14; 6 Jur. (N. S.) 66; 8 W. R. 95; 117 R. R. 227; 120 Eng. Rep. 925 and *Mackenzie Lyall* v. *Chamroo Singh*, 16 C. 702, referred to.

Appeal from the order of the District Judge of Manbhoom, dated December 23rd, 1912 reversing that of the Sub-Judge of that District, dated August 15th, 1912. A rule was also obtained against the said order.

Babu *Bipin Behari Ghosh* (*Junior*), for the Appellant and Petitioner.

Babu *Brojo Lal Chakravati*, for the Respondent and Opposite Party.

JUDGMENT.—We are invited in this Rule to consider the propriety of two orders, one made by the Subordinate Judge and the other by the District Judge on appeal, in the course of proceedings in execution of a mortgage decree obtained by the petitioner, on the 6th January 1912. In execution of the decree, the mortgaged property was put up for sale on the 15th August 1912. There were three bidders one Sreenath Chackrabortty who professed to bid for the decree-holder and two other persons, Asutosh Haldar and Abinash Chandra Ghose. On behalf of the decree-holders Sreenath Chackrabutty offered a bid for Rs. 1,940. The officer conducting the sale reported this fact to the Subordinate Judge. Meanwhile the decree-holder himself appeared and stated that his clerk had no authority to offer any bids on his behalf and that he himself was not prepared to take the property at a higher figure than Rs. 1,000. The Subordinate Judge, notwithstanding this repudiation, ordered that the last bid be accepted, if no higher bid was offered. Thereupon the decree-holder applied for leave to withdraw the execution proceedings. This application was granted. The judgment-debtor then appealed to the District Judge against the order of withdrawal. A preliminary

objection was taken before the Judge that the order in question was not appealable. This objection was overruled and the appeal was heard on the merits. The District Judge held, *first*, that it was necessary to determine upon evidence whether or not the clerk had authority from his master to offer bids on his behalf; *secondly*, that the Subordinate Judge should not have, without such inquiry, granted the application of the decree-holder to withdraw the execution proceedings at that stage; and *thirdly*, that if the bid was found to be wholly unauthorised, it must be deemed void, and the sale completed in favour of the next lower bidder and failing him the bidder below. In this view, the District Judge has remanded the case for re-consideration. The propriety of this order is now assailed by the decree-holder. In our opinion, the order of the Subordinate Judge as also that of the District Judge must be discharged.

It is clear that the Subordinate Judge should not have allowed the decree-holder to withdraw from the execution proceedings at the stage they had reached. The decree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option. If he was permitted to do so, the judgment-debtor might be needlessly harassed, and, seriously prejudiced. But it is equally clear that the order of the Subordinate Judge was not liable to be challenged by way of appeal. It has, indeed, been argued that the order was made under section 47 of the Civil Procedure Code of 1908, but the contention is plainly untenable. The order allowing the decree-holder to withdraw the execution proceedings, did not determine any question between the parties to the suit relating to the execution, discharge or satisfaction of the decree. Consequently the District Judge was not competent to deal with the questions raised before him on appeal. But we are further of opinion that the order of the District Judge cannot be supported on the merits.

It is needless to consider, whether the clerk had or had not authority from his master to offer bids on his behalf. If it be assumed that he was not authorised, possibly the judgment-debtor might have asked the Court to accept the bid as the bid of the clerk himself. This the judgment-debtor did not do, for the obvious reason that the clerk was not a man of substance, and if, after his bid had been accepted, he failed to make the requisite deposit, no effective steps could be taken against him. Besides, as the clerk has not been made a party to these proceedings, it is impossible for us to give any directions so as to bind him. The judgment-debtor has hitherto sought to bind the decree-holder alone, by the bid offered by his clerk, and the only point for consideration is, whether the decree-holder is so bound, even if it be assumed that the clerk had authority to offer bids to the extent he did. We are of opinion that the decree-holder is not bound by the bid, because even if it had been offered by him personally, he would have been competent to withdraw the bid any moment before acceptance. This argument is supported by the decision of *Agra Bank* v. *Hamlin* (1), where it was ruled that it was competent to the bidder to withdraw his bid before the sale had been completed. This view is well founded on principle and is in accord with that accepted in England in cases of unquestionable authority. It is well settled that a bid is a mere offer and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale by the fall of the hammer or other customary method. *Paney* v. *Cave* (2). As was explained by Lord Kenyon in the case mentioned: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed." We are not unmindful that dissatisfaction has sometimes been expressed with this view, and, the suggestion has been made that it would have been better to hold

(1) 14 M. 235.
(2) 3 T. R. 148; 1 R. R. 679; 100 Eng. Rep. 502.

that every bid constitutes "an actual sale subject to the condition that no one else shall bid higher." (Langdell, Summary of Contracts, section 19). But the rule laid down in *Payne* v. *Cave* (2) has been accepted as good law, and it was challenged unsuccessfully in *Warlow* or *Warton* v. *Harrison* (3), when Lord Campbell pointed out that the auctioneer was the agent for the owner of the property and that till he had accepted the bid, the matter was open and the bidder was at liberty to withdraw his bid. (Laws of England, edited by Halsbury, Vol. I, section 1039). A similar view was accepted by this Court in *Mackenzie Lyall* v. *Chamroo Singh* (4). In the case before us, even if it be assumed that the bid offered by the clerk was a bid offered with the assent and on behalf of the decree-holder, it was still open to the decree-holder to withdraw the bid which had not been, up to the time of repudiation, accepted by the Court. In this view of the matter, the proper course for the Subordinate Judge to adopt was to direct a re-sale of the property forthwith (see also Civil Procedure Code, 1908, Appendix E, Form No. 29, Conditions of Sale, Nos. 2 and 3). This was not done, and at this distance of time, a re-sale cannot rightly be directed without the issue of a fresh sale proclamation.

The result is that the Rule is made absolute and the order of the Subordinate Judge as also that of the District Judge discharged. The case is remitted to the Court of first instance in order that a fresh sale proclamation may be issued and a sale held in due course, on the basis of the original application for sale of the mortgaged properties, which will stand revived by virtue of this order. There will be no order for costs in this Rule.

The decree-holder has, in the alternative, preferred an appeal against the order of the District Judge which we have just discharged in the exercise of our revisional jurisdiction. The appeal is obviously incompetent and is dismissed with costs.

Rule made absolute; Case remanded:

Appeal dismissed.

(3) 1 E & E. 295; 28 L. J. Q. B. 18; 5 Jur. (N. S.) 313; 7 W. R. 133; 117 R. R. 219; 120; Eng. Rep. 920 on Appeal 1 E. & E. 309; 29 L. J. Q. B. 14; 6 Jur (N. S.) 66; 8 W.R. 95; 117 R.R. 227; 120 Eng. Rep. 925.

(4) 16 C. 702.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 5352, 5353 AND 5354 OF 1912.

February 17, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN NO. 5352.

BAWRI KHAN—DEFENDANT—PETITIONER

IN NO. 5353.

MONOHAR KHAN—DEFENDANT—PETITIONER

IN NO. 5354.

KHAIRAT KHAN—DEFENDANT—PETITIONER

versus

IN ALL.

ABINASH CHANDRA ROY—PLAINTIFF—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), *ss.* 90, *sub-ss.* (1), (3); 91, *sub-s.* (1); 158, *sub-s.* (2)—*Measurement of land—Landlord's right—Determination of incidents of tenancy made two years before application for measurement—Application whether maintainable—Local inquiry under section* 158, *if may be deemed as measurement.*

Notwithstanding the fact that a landlord had taken action under section 158 of the Bengal Tenancy Act with respect to the *mal* lands in the occupation of the tenant in 1910, it was open to him in 1912 to apply for measurement of other lands in the occupation of the tenant under section 90.

The period of ten years mentioned in sub-section (3) of section 90 has to be computed from the date of the last measurement under section 90, and the local inquiry mentioned in sub-section (2) of section 158 is not the measurement contemplated by sub-section (3) of section 90.

The term *lakheraj* is ambiguous, and is applied as well to revenue-free lands as to rent-free lands. The term *pirottor* may show that the land was revenue-free.

Rules in the matter of Miscellaneous Judicial Cases Nos. 32, 34 and 35 of 1912, respectively, of the Court of the Munsif of Dubrajpur.

Babu *Ram Taran Chatterjee*, for the Petitioner.

Babu *Mohini Mohan Chatterjee*, for the Opposite Party.

JUDGMENT.

RULE NO. 5352 OF 1912.

We are invited in this Rule to consider the propriety of an order made in favour of a landlord under subsection (1) of section 91 of the Bengal Tenancy Act. In 1910, the landlord had taken action under section 158 of the Bengal Tenancy Act with respect to the *mal* lands in the occupation of the tenant. In 1912 the landlord applied for measurement of other lands in the occupation of

the tenant under section 90. A two-fold defence was taken by the tenant, namely, *first*, that as in respect of some of the lands, the landlord had taken action under section 153, he could not proceed under section 90 by reason of its third sub-section and *secondly*, that the lands were *lekheraj* and *pirottor*, and, consequently, not liable to be measured under sub-section (1) of section 90.

In so far as the first objection is concerned, it has been overruled by the Court below. In our opinion, there is no substance in the objection. The third sub-section of section 90, upon which reliance is placed on behalf of the tenant, provides that the period of ten years within which a landlord is not allowed to measure more than once under sub-section (2), shall be computed from the date of the last measurement whether made before or after the commencement of the Act. It is plain that this period of ten years has to be computed from the date of the last measurement under section 90 or under the corresponding provisions of previous statutes, namely, sections 9 and 10 of Act VI of 1862 and sections 37 and 38 of Act VIII of 1869. The local inquiry mentioned in sub-section 2 of section 158 is not the measurement contemplated by sub-section 3 of section 90. We hold accordingly that notwithstanding the fact that in 1910 the landlord took action under section 158 of the Bengal Tenancy Act, it is open to him to proceed under section 90 in 1912.

In so far as the second objection is concerned, it is clear that a measurement can be demanded under sub-section (1) of section 90, only in respect of lands other than those exempted from the payment of revenue. Consequently if upon an application under section 90 objection is taken that the land is exempt from payment of revenue and is consequently not liable to be measured a question of jurisdiction arises, which it is incumbent upon the Court to decide upon such evidence as may be placed before it. But in the present case it has been suggested on behalf of the landlord that the objection taken by the tenant was not that the lands were exempt from the payment of revenue, but that the lands were exempt from the payment of rent. We are not prepared to hold, however, that the objection was that the lands were rent-free and not revenue-free. The term "*lakheraj*" is at best ambiguous, and is applied as well to revenue-free lands as to rent-free lands; while the term "*pirottor*" may show that the land was revenue-free. It was plainly the duty of the Court below to take evidence upon the question of the nature of the lands, and when the Court recorded in the order-sheet that no evidence was necessary, the Court erroneously refused to decide a question material for the purposes of the inquiry before it.

The result is that the Rule is made absolute, the order of the Court below set aside and the case remanded to that Court in order that the question, whether the lands are exempt from payment of revenue as alleged by the tenant, may be decided. The burden will lie upon the tenant to establish his allegation. The costs of the Rule will abide the result. We assess the hearing fee at one gold *mohur*.

It is conceded that this order will govern the other Rules (Nos. 5353 and 5354 of 1912) in which similar orders will be drawn up There will also be a similar order for costs in each case.

Rules made absolute; Cases remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1430 OF 1909.

February 6, 1913.

Present:—Mr. Justice Stephen and Mr. Justice D. Chatterjee.

JOGESH CHANDRA ROY—PLAINTIFF—APPELLANT

versus

ANANDA CHARAN CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Form of action—Lessee agreeing to give up land required by lessor—Notice by lessor to lessee to give up land—Suit by lessor for possession—Suit for specific performance, not in ejectment.

A lease contained a stipulation to the effect that the lessee should give up such quantity of land out of the land covered by the lease, as may be required at any time by the lessor and should get a proportionate remission of rent. The lessor gave notice to the lessee to deliver up almost all the lands in question. On his refusing to comply with this, the lessor brought a suit for *khas* possession:

MOTUMAL *v.* JAVHERMAL.

Held, that the form of the action should be that of an action for specific performance of the contract and not that of an action in ejectment.

Appeal from the decree of the District Judge of Chittagong, dated April 5th, 1909, affirming that of the Second Sadar Munsif, dated January 29th, 1908.

Dr. *Rash Behary Ghosh*, Babus *Dwarka Nath Chakravarti* and *Dhirendra Lal Kastgir*, for the Appellant.

Babus *Mohendra Nath Roy*, *Harendra Narain Mitra*, *Khitish Chandra Sen* and *Probodh Kumar Das*, for the Respondents.

JUDGMENT.—In this case the predecessor of the plaintiff granted a lease in the year 1855, to the predecessor-in-title of the defendants. That lease contains a clause which is translated as follows:—"I further agree that I shall, without any objection, give up such quantity of land out of the land covered by the *pattah*, that is by this *kabuliyat* as may be required at any time by the Sarkar and I shall get a remission of rent proportionately." The Sarkar in this clause is intended to indicate the lessor The plaintiff has given notice to the defendant under this agreement calling upon him to deliver up almost all the lands in question. On his refusing to comply with this the plaintiff brought this suit. The relief which he seeks for in the suit is that his *mourasi maliki* right may be declared to the land in question and that he may have a decree for *khas* possession against the defendant in respect of that land. He went to trial on these pleadings and after the suit was dismissed by the Munsif he appealed to the lower Appellate Court. In that Court, at least, it was impossible to avoid the conclusion that the suit was treated as one for ejectment and the appeal was dismissed on the ground that it was a suit for ejectment within the meaning of section 155 of the Bengal Tenancy Act, which was held to apply to the case, and that no such notice as was required by that section had been given. In this, the Judge was wrong. The plaintiff, so far as we have dealt with his case, did not attempt at ejecting the defendant, but he sued to have the clause in the contract between him and the defendant, carried out. Reading the plaint carefully, and looking into the original lease between the parties and the notice given under the lease, this appears to be clearly the case. On the other hand, looking into the plaint as framed, there is no doubt that there is a great deal of confusion in the prayers put forth by the plaintiff. They are more suitable to a suit for ejectment than they are for a suit for specific performance which this suit really was. It is, however, impossible for us to treat this suit as being one for specific performance. There are defences which would have been open to the defendant to take, had the suit been so framed; but which have not, in fact, been taken.

The result is that we set aside the judgment and decree of the lower Appellate Court and we think the fairest course for us to pursue is to remand the case to the Court of first instance, with leave to the plaintiff to amend his plaint in such manner as he may be advised, in order that the suit may be heard afresh according to law. Considering the circumstances of the case we think it right to order that each party must bear his own costs up to date in all the Courts.

If the plaintiff amends his plaint, it will be open to the defendant to file a new written statement. If the plaintiff does not amend his plaint within two months from the date of the arrival of the record in the lower Court, this appeal will stand dismissed.

This cross-appeal not being pressed, no order is necessary.

Appeal allowed; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 48 OF 1911.

November 21, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MOTUMAL *walad* DEWAN AMALRAI DEFENDANT—APPELLANT

versus

JAVHERMAL TOTIRAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement of light or air—Easements Act (V of 1882), s. 38—Agreement to release easement by one of several

NISAKAR DAS *v.* BAIRAGI SAMAL.

co-owners—Ineffectual against others—Prosecution of individual members, no necessity for alienation of family property—Blocking of light or air—No substantial difference of usefulness of house—No case for injunction.

An agreement by one of several co-owners of a dominant tenement to release an easement is ineffectual against the other co-owners.

There is no authority for the proposition that the prosecution of individual members of a joint family constitutes necessity such as would justify alienation of the joint property of the whole family.

Where the blocking of an aperture for light and air leaves the house as substantially useful as before, the case is not one for injunction but for damages only.

Holland v. *Worley*, 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7 and *Dhunjibhoy* v. *Lisboa*, 13 B. 252, followed.

Appeal from the decision of the District Judge, Hyderabad.

Mr. *Wadhumal Oodharam*, for the Appellant.

The Hon'ble Mr. *Harcharndrai Vishindas*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiff's father, Totiram, and his two brothers were prosecuted by the first defendant, Motumal, for hurt and trespass. The case was compounded on Totiram and the brothers executing an agreement allowing Motumal to erect a wall blocking an aperture in the wall of their house.

This agreement was not signed by the plaintiffs and they seek in this suit to establish that it was not binding on them and for an injunction requiring Motumal to demolish the wall.

The aperture in the wall was for the enjoyment of easements of light and air and for the passage of the ladies of Totiram's family.

The agreement was in effect a release of these easements.

Such an agreement by one of several co-owners is ineffectual against the other co-owners—see section 38 illustration (*a*) of the Easements Act.

But it is contended that Totiram executed the agreement as manager of the joint Hindu family of which the plaintiffs were members.

Now under section 38 "such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage."

Therefore Totiram's release of the easement would only be binding on the plaintiffs if the circumstances were such as to justify an alienation of the family house.

In another words the circumstances must amount to what the Hindu Law recognizes as necessity.

There is no authority for the proposition that the prosecution of individual members of a joint family constitute necessity such as would justify an alienation of the joint property of the whole family. It seems unreasonable to treat such a transaction as one in which the consent of the other co-parceners may be implied; plaintiffs are, therefore, entitled to an injunction or to damages.

The case, however, is not one for an injunction for it is clear that the house will be as substantially useful without this aperture as it was before. *Holland* v. *Worley* (1) followed in *Dhunjibhoy* v. *Lisboa* (2).

The damages should only be nominal for the Courts below have found that the suit is a vexatious one really prosecuted by Totiram in the name of his sons the plaintiffs.

We vary decree of the lower Court and award plaintiff Re. 1 as damages. Parties to bear their own costs throughout.

Damages awarded.

(1) (1884) 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7.

(2) 13 B. 252.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3680 OF 1910.

February 18, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

NISAKAR DAS—DEFENDANT No. 2—APPELLANT

versus

BAIRAGI SAMAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 317—*"Certified purchaser," whether includes his successor-in-title—Judgment-debtor purchasing his own property in* benami *to defraud creditor—His suit for confirmation of possession—Defence by transferee of auction-purchaser that plaintiff not entitled to relief as he defrauded creditor—Whether defence available to him.*

The term "certified purchaser" in section 317 of the Civil Procedure Code of 1882 must be strictly construed, and, does not include his successor-in-title.

Dukhada v. *Srimonta*, 26 C. 950; 3 C. W. N. 657, *Theyyavelan* v. *Kochan*, 21 M. 7 and *Sibta Kunwar* v. *Bhagoli*, 21 A. 196, followed.

NISAKAR DAS *v.* BAIRAGI SAMAL.

Hari Govind v. *Ramachandra*, 31 B. 61; 8 Bom.L. R. 873, dissented from.

Khuda Bakhsh v. *Aziz Alam*, 27 A. 194; A. W. N. (1904) 226, distinguished.

The plaintiff was the owner of the property in suit, and he purchased it in the name of defendant No. 1 in execution of a decree against himself obtained by defendant No. 3. The defendant No. 1 sold the property to defendant No. 2. The plaintiff brought a suit for declaration of title and confirmation of possession:

Held, that it was open to the defendant No. 2, the transferee from the certified purchaser, to avail himself of the defence that the plaintiff could not seek assistance in the Court as he had placed his property in the name of another with a view to commit fraud, that is, to defraud one of his creditors and that purpose had been accomplished.

Jadu Nath v. *Rup Lal*, 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650, and *Govinda Kuar* v. *Lala Kishun Prosad*, 28 C. 370, referred to.

Appeal from the decree of the Sub-Judge of Cuttack, dated June 25th, 1910, affirming that of the Munsif of Jajpore, dated June 26th, 1909.

Babu *Sushil Madhab Mallick*, for the Appellant.

Babu *Jotindra Nath Sen* and *Surendra Madhab Mallick*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the second defendant in a suit for declaration of title to land and for confirmation of possession. The Courts below have concurrently made a decree in favour of the plaintiff. That decree has been assailed in this Court on three grounds, namely, *first*, that the suit was barred in respect of one of the properties under section 317 of the Code of Civil Procedure of 1882, *secondly*, that as the plaintiff placed his property *benami* with a view to defraud one of his creditors, and as that purpose has been accomplished, a Court of equity will not assist him, and *thirdly*, that the appellant was a *bona fide* purchaser for value without notice from the ostensible owner and that, consequently, the plaintiff cannot enforce his secret title against him.

In so far as the *first* ground is concerned it affects only one of the properties in suit, namely, Jugannathpore. The plaintiff was the owner of this property which was put up to sale in execution of a money-decree obtained against him by his creditor, the third defendant. The plaintiff purchased the property at the sale with his own money, but in the name of the first defendant, his brother-in-law, who subsequently proved faithless and transferred it to the second defendant. The transferee from the ostensible purchaser now pleads that section 317 bars the suit. But his contention is negatived by the decision in *Dukhada* v. *Srimonta* (1), where it was ruled that the term "certified purchaser" must be strictly construed, and, does not include his successor-in-title. We are bound by this decision, which accords with *Theyyavelan* v. *Kochan* (2) and *Sibta Kunwar* v. *Bhagoli* (3), and cannot adopt the contrary view laid down in *Hari Govind* v. *Ramachandra* (4). But it has been urged that in the present case the certified purchaser also is one of the defendants. The plaintiff seeks relief, however, substantially, only against the transferee from the certified purchaser and this distinguishes the present case from that of *Khuda Bakhsh* v. *Aziz Alam* (5) and so far as such transferee is concerned, we cannot hold in view of the decision in *Dukhada* v. *Srimonta* (1) that he was entitled to plead section 317 as a bar to the suit. The first ground, consequently, fails.

In so far as the *second* ground is concerned, the Subordinate Judge does not discuss the matter fully, but reference has been made on behalf of the respondents in this Court to the judgment of the Court of first instance. That judgment is undoubtedly open to criticism. The Court of first instance appears to have held that if the question was not raised by the plaintiff or the third defendant, the execution creditor at whose instance the sale took place, it was not open to the present appellant, the transferee from the certified purchaser to avail himself of the defence that the plaintiff could not seek assistance in a Court of Equity, as he had placed his property in the name of another with a view to commit fraud and that purpose had been accomplished. This view is clearly erroneous, and, the second defendant is plainly entitled to defeat the suit by proof that the alleged fraudulent purpose had been achieved. *Jadu Nath* v. *Rup Lal* (6), *Govinda Kuar* v. *Lala Kishun*

(1) 26 C. 950; 3 C. W. N. 657.
(2) 21 M. 7.
(3) 21 A. 196.
(4) 31 B. 61; 8 Bom. L. R 873.
(5) 27 A. 194; A. W. N. (1904) 226.
(6) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.

Prosad (7). This part of the case, therefore, must be re-considered.

In so far as the *third* ground is concerned, the appellant urges that he is a *bona fide* purchaser for value without notice. This defence has not been investigated by the Subordinate Judge. There are vague references in his judgment to the question of possession of the properties as also of the title-deeds relating thereto but he does not find whether the appellant was a purchaser for value without notice. This branch of the case must be fully examined.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that the questions mentioned may be decided on the evidence as it stands on the record. The costs of this appeal will abide the result.

Appeal allowed; *Case remanded.*

(7) 28 C. 370.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 4 OF 1911.

November 21, 1912.

Present:—Mr. Pratt, J. C., Mr. Hayward, A. J. C. and Mr. Crouch, A. J. C.

NARAINDAS HASRAJMAL AND OTHERS —APPELLANTS

versus

Musammat OBHAI WIFE OF ALLAHDINO AND OTHERS—RESPONDENT.

*Muhammadan law—Minor—*De facto *guardian—Alienation of immoveable property of the minor—Powers of guardian* de facto, de jure *—Succession on the death of a Muhammadan—Universal or several.*

On the death of a Muhammadan, the heirs take an immediate estate in their shares, and hence the mere fact that one co-heir is in possession of more than his own share does not give him a right to alienate that excess portion.

The rules of Muhammadan Law which were supposed to lay down a doctrine of universal succession are merely rules of procedure now superseded by the Code of Civil Precedure, and a suit by a creditor against a single heir has no resemblance either in form or substance to an administration suit.

A Muhammadan mother cannot as a *de facto* guardian make an alienation of immoveable property that is binding on the minors.

Thandan Vallappil Easuf v. *Kotuseri Vallappil Kaya*, 15 Ind. Cas. 576; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244, criticized.

To authorize a sale of immoveable property of a Muhammadan minor even by a *de jure* guardian, there must be an absolute necessity, or else it must be for the benefit of the minor.

Appeal from the decision of the District Judge, Sukkur-Larkana.

Mr. *Isardas Oodharam*, for the Appellants.

Mr *Rupchand Bilaram*, *Amicus Curiæ*.

JUDGMENT.—The plaintiffs had a mortgage decree against Allahdino. The decree was sent to the Collector for execution against the legal representatives of the judgment-debtor after his death. These legal representatives were defendant No. 1, the widow, defendants Nos. 2, 3 and 6 the sons, and defendants Nos. 4 and 5 the daughters of Allahdino.

While the matter was pending before the Collector an arrangement was come to whereby the property was sold to the plaintiffs—the consideration for the sale being the satisfaction of the decree and the payment of Rs. 175.

The sale-deed was executed by defendant No. 1 on her own behalf and on behalf of defendants Nos. 2—5 who were said to be minors. Defendant No. 6 also executed the deed. The plaintiffs have sued to recover possession of the land under this sale-deed.

Defendant No. 1 pleaded undue influence and that the deed was not binding on defendants Nos. 2 to 5. Defendant No. 6 did not contest the suit.

The issue as to undue influence has been decided adversely to defendant No. 1.

There remains the question of the liability of defendants Nos. 2 to 5. Defendant No. 1 purported to execute the sale-deed as their guardian, but it is now proved that defendant No. 5 was not a minor at the time of the sale.

As to this it was contended.

(1) That the mother as co-heir in possession of the whole estate can make an alienation binding on the other heirs.

(2) That the mother as *de facto* guardian can make an alienation binding on the minor children.

(*i*) If the alienation is made of necessity;

(*ii*) if it is made for their benefit; and

(*iii*) if it is made to discharge an ancestral debt.

As these contentions raised questions of law of considerable importance and about which there has been much conflict of judicial decision the matter was referred under rule 3 of Chapter I of the rules of this Court for determination by a Full Bench.

The first contention is supported by a dictum in *Aman* v. *Varu* (1). But on re-consideration I do not think that that dictum is correct.

In *Hamir Sing* v. *Zukia* (2) the Allahabad High Court inclined to the opinion that under Muhammadan Law single heir in exclusive possession might make a valid alienation of the estate of a co-heir. The reason for this decision appears to be the same as that propounded by Markby, J., in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (3). It was supposed that at the death of a Muhammadan there was a vacant succession or *hereditas jacens* until the heirs came forward. During this interval any one heir taking exclusive possession could as representing the estate make an alienation binding on the co-heirs. This theory of vacant succession was repudiated in *Muttyjan* v. *Ahmed Ally* (4) but it was said that when a creditor sued an heir in sole possession the other heirs were bound as they would have been in an administration suit. This rather far fetched analogy again found favour with the Calcutta High Court in *Amir Dulhin* v. *Baij Nath Singh* (5). This analogy would only apply in the case of suits and Court sales and not to a private alienation and so in the later decisions of the Calcutta Court *Maafazzal Hosain* v. *Basid Sheikh* (6) and *Ram Charn Sanyal* v. *Anukul Chandra Acharjya* (7) it is attempted to support these alienations on the plea of justice, equity and good conscience. But there is no scope for this plea unless the Muhammadan Law is silent on the point. It seems to me that the law has been correctly laid down in *Jafri Begam* v. *Amir Muhammad Khan* (8) by the Allahabad High Court. The rules of Muhammadan Law which were supposed to lay down a doctrine of universal succession are merely rules of procedure now superseded by our Code of Procedure—and a suit by a creditor against a single heir has no resemblance either in form or substance to an administration suit.

It is not necessary to elaborate these points for they are fully discussed in the exhaustive and convincing judgment of Batty, J, in *Sobhanamal* v. *Mir* (9).

It is now settled law that on the death of a Muhammadan the heir take an immediate estate in their shares. That being so the mere fact that one co-heir is in possession of more than his own share does not give him a right to alienate that excess portion.

Coming now to the second contention it is admitted that the mother under Muhammadan Law is not the guardian of the property. But it is said that there are three circumstances which validate a sale made by her. These are (1) necessity; (2) benefit to the minor; and (3) payment of ancestral debt. As there is nothing in Muhammadan Law corresponding to the pious obligation on a Hindu to discharge ancestral debt the third circumstance can only be an instance of the first or second.

The contention, therefore, amounts to this that as regards immoveable property the *de facto* guardian has the same power of alienation as the *de jure* guardian can alienate the immoveable property of his ward only in cases of necessity or benefit.

As to the power of the *de jure* guardian in dealing with immoveable property the law is stated in Baillie's Digest, Edition of 1865, page 676: "According to the moderns the *akar* or immoveable property of a minor can be sold only (that is, when there are no debts nor general legacies) if the minor has occasion for the price of it, or a purchaser is eager to obtain it by giving double its value or the sale is otherwise for the minor's advantage, as for instance, when the *Kharaj* or land-tax and expenses exceed its income, or the property being shops or mansions is falling to decay." The reservation as to debts and legacies merely imports another occasion of justifying necessity. This passage is cited with approval by Wilson at page 192 of his Digest. The Law is stated in similar terms by Ameer Ali

(1) 1 S. L. R. 221.
(2) 1 A. 57.
(3) 4 C. 142; 2 C. L. R. 223.
(4) 8 C. 370; 10 C. L. R. 346.
(5) 21 C. 311.
(6) 34 C. 36; 4 C. L. J. 485; 11 C. W. N. 71
(7) 34 C. 65; 11 C. W. N. 160; 4 C. L. J. 578.
(8) 7 A. 822; A. W. N. (1885) 248.
(9) 2 Sel. S. C. D. 112.

at page 481 of his Work (second edition) and by Macnaghten at Ch. VIII Cl. 14, cited with approval by the Privy Council in *Kali Dutt Jha* v. *Abdul Ali* (10).

The power of the *de jure* guardian to sell moveables is admitted, but the authorities cited above place important restrictions on his power to sell immoveable property. This distinction closely resembles that made in the case of an executor dealing with the property of an absent heir. I quote the passage from the Hedaya—Vol. IV, Book LII, Ch. VII—as it gives an interesting reason for the distinction:—

"An executor has the power of selling every species of property belonging to an adult absent heir, excepting such as is immoveable, for as the father is authorized to sell the moveable property of his adult absent son, the guardian has the same power. The ground is this that the sale of the moveable property is a species of conservation as articles of that description are liable to decay and the price is much more easily preserved than the article itself. With respect, on the contrary, to immoveable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it is evident that it will otherwise perish or be lost in which case the sale of it is allowed."

The law as to sale of immoveable property by a *de jure* guardian is, I think, correctly stated in *Hurbai* v. *Hirajl* (11), where it is said that to authorize such a sale "there must be an absolute necessity for the sale or else it must be for the benefit of the minor."

That the Muhammadan Law does not contemplate a *de facto* guardian possessing even this limited power is, I think, evident from the Hedaya, Vol. II, page 262. In the discussion of the powers of the Mooltakit or taker up of a foundling, it is said:—

"It is not lawful for the Mooltakit to perform any acts respecting the property of his foundling; analogous to the restriction upon a mother:—that is, a mother has a right to the charge of her infant child, but yet is not at liberty to perform any acts respecting his property and a Mooltakit stands in the same predicament. The principle upon which this proceeds is that authority to act with respect to the property of an infant is established with a view to the increase of that property; and this is assumed only by two circumstances, *perfect discretion* and *complete affection*; now in each of these two persons, only *one* of these qualities exists; for a mother, though she entertains a complete affection for her child, is deficient in point of discretion; and a Mooltakit, though he is possessed of perfect discretion, is deficient in affection."

Is it possible that the mother to whom want of discretion is attributed should be allowed the same power of alienation as a *de jure* guardian? Not having discretion, she would not be able to judge whether the transaction was for the benefit of the minor or whether it was justified by necessity.

The only case in which an attempt has been made under Muhammadan Law to justify a *de facto* guardian alienating immoveable property is that of *Thandan Vallappil Easuf* v. *Kotuseri Vallappil Koya* (12). The judgment is that of a Muhammadan Judge, but it is based solely on the following passage from the Hedaya, Vol. IV, Book XLIV, section 7:—

"Acts in regard to infant orphans are of three descriptions:—

"I. Acts of guardianship such as contracting an infant in marriage or selling ro buying goods for him, a power which belongs solely to the *valee* or natural guardian, whom the law has constituted the infant's substitute in those points.

"II. Acts arising from the wants of het infant; such as buying or selling for him on occasions of need; or hiring a nurse for him or the like which power belongs to the maintainer of the infant whether he be the brother, uncle or (in case of a foundling) the Mooltakit, or taker up, or the mother provided she be maintainer of the infant and as these are empowered in respect of such acts, the *valee* or natural guardian is also empowered with respect to them in a still superior degree;—nor is it requisite with

(10) 16 C. 627; 16 I. A. 96.
(11) 20 B. 116.
(12) 15 Ind. Cas. 5 76; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.

respect to the guardian that the infant be in his immediate protection.

"III. Acts which are purely advantageous to the infant such as accepting presents or gifts and keeping them for him; a power which may be exercised either by a Mooltakit, a brother or an uncle and also by the infant himself provided he be possessed of discretion, the intention being only to open the door to the infant receiving benefactions of an advantageous nature."

Now of these three classes of acts, class I need not be considered, for it refers to acts of the *de jure* guardian, so also class III, for it does not refer to sales, but to the acceptance of gifts. This class of acts is further described in the Chapter on Executors as acts which "come under the description of aid and assistance, not of the exercise of a power. Neither do any of these acts require thought or consideration." In the same Chapter—Book LII, Ch. VII—there is in regard to these acts, the following significant passage:—"These acts, moreover, being permitted to a mother and nurse are proof that they are not exertions of power." Class II, however, refers to acts which may be performed by the *de facto* guardian, although the *de jure* guardian possesses the same power in a superior degree. They are acts necessary for supplying the wants of the infant and may be performed by the mother or by the Mooltakit. But the powers of the Mooltakit are the subject of a special disquisition in Vol. II, Book X. It is there said that if the Mooltakit finds moveable property—"such as bracelets and so forth"—upon a foundling, he may expend this property in supplying the wants of the foundling upon an order of the Qazi, though it is admitted that some say he may do so without such order. Then follows the passage quoted above, placing the same absolute restriction on the Mooltakit dealing with the property of the foundling as there is on the mother dealing with the property of her infant. How is this absolute prohibition to be reconciled with the preceding paragraph allowing the Mooltakit to sell "property upon a foundling such as bracelets and so forth?" Clearly the first paragraph refers to moveables and the succeeding paragraph to immoveables.

Therefore, the power of the Mooltakit or of mother to sell property to supply the wants of the infant is restricted to moveables. This also explains why the reference to the power in acts under class II described it as a power which may be exercised by the *de jure* guardian in a superior degree. The powers of the *de iure* guardian are superior for in order to supply the wants of the infant, he may sell not only moveable but immoveable property.

In the case already referred to, Abdur Rahim, J., points out that the doctrine of necessity is recognised by Muhammadan Law. This is, no doubt, true. It is recognized as justifying a sale of immoveable property by a *de jure* guardian or a sale of moveable property by a *de facto* guardian or one of several joint executors acting singly. But I am unable to find that this doctrine has been carried to the extent of justifying a sale of immoveable property by a *de facto* guardian.

The decision of the various High Courts as to the alienations of immoveable property by a mother or female relative acting as *de facto* guardian have been conflicting. The Allahabad High Court upheld such an alienation in *Hasan Ali* v. *Mehdi Husain* (13) on the doctrine of universal succession and on the principles of justice, equity and good conscience. This case was followed in *Majidan* v. *Ram Narain* (14) and *Ummi Begam* v. *Kesho Das* (15). The Calcutta High Court in *Moyna Bibi* v. *Bunku Bihari* (16) held such an alienation to be void, but again, in *Mafazzal Hosain* v. *Basid Sheikh* (6) and *Ram Charan* v. *Anukul Chandra* (7), supported the alienation on the same so called principle of equity. The Madras and Bombay High Courts have held such alienations to be void in *Durgozi Row* v. *Faheer Sahib* (17) and *Baba* v. *Shivappa* (18). The point was recently raised before the Privy Council in the case of *Mata Din* v. *Sheikh Ahmad* (19). Their Lordships did

(13) 1 A. 533.
(14) 26 A. 22; A. W. N. (1903) 183.
(15) 30 A 462; A. W. N. (1908) 220; 5 A. L. J. 474.
(16) 29 C. 473; 6 C. W. N. 667.
(17) 30 M. 197; 17 M. L. J. 9; 1 M. L. T. 433.
(18) 20 B. 199.
(19) 13 Ind. Cas. 976: 14 Bom. L. R. 192: 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6.

not decide the question, but the following passage from the judgment is suggestive. Lord Robson said:—"It is difficult to see how the situation of an unauthorized person is bettered by describing himself as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

In our opinion, the mother cannot, either as co-heir in possession of the whole estate or as *de facto* guardian, make an alienation of immoveable property that is binding on the other heirs or on the minors.

This being so, the plaintiffs by their sale-deed have only acquired title to those shares of the estate which belonged to the mother herself and to defendant No. 6, the other executant. They may recover these shares in a properly constituted suit for partition, but this suit in ejectment must fail.

The defendants have not filed a cross-appeal against the order of compensation made by the lower Court.

We accordingly confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL NO. 172 OF 1911 AND MISCELLANEOUS CIVIL APPEAL NO. 229 OF 1911.
May 9, 1913.
Present:—Mr. Justice Chitty and Mr. Justice Teunon.
DEBENDRA NARAIN SINHA—DEFENDANT—APPELLANT
versus
NARENDRA NARAIN SINHA—PLAINTIFF—RESPONDENT.

Compromise decree—Compromise between appellant and defendant who appeared—Right reserved in favour of defendant not appearing—Whether right enforceable by that defendant in separate suit—Execution of compromise decree by defendant who appeared—Objection by defendant who did not appear—Whether the fact estops him from enforcing right in suit.

In an appeal, *D.* was the appellant, and *R.*, *N.* and *S.* were respondents. *N.* and *S.* did not appear, and the case was compromised between *D.* and *R.* by which certain shares in certain properties were given to *N.* and *S.* A decree was passed in accordance with the compromise. *D.* applied to execute the decree, but *N.* objected on the ground that not having been a party to the compromise he could not be made liable for anything to be done or paid by him under the decree. The execution was eventually thrown out on other grounds. *N.* now sued for the share to which he was entitled under the compromise decree:

Held, that *N.* was entitled to the property claimed although he was not a party to the *solehnamah* and that he could enforce the decree upon it in this suit: the mere fact that he objected to the execution could not preclude him from now asserting the right which the decree gave him.

Appeal from the decree of the Sub-Judge of Krishnaghar, dated April 12th, 1911.

Babus *Ram Chandra Majumdar* and *Upendra Narain Bagchi*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—In this case, one Tarini Charan Sinha died on 5th November 1899, leaving him surviving his widow Rangini Dasi and three sons, Narendra, Debendra and Surendra. Tarini Charan left a Will dated 4th March 1881, of which Probate was granted to his widow on 27th April 1901. In 1903, Debendra filed a suit against his mother and brothers for administration of his father's estate. In that suit, Rangini Dasi appeared and claimed as her *stridhan* property the businesses which are in question in the present suit and the properties which had been bought out of the proceeds of those businesses. On 28th November 1905, the Subordinate Judge passed a decree holding that those properties were her *stridhan*. Against that decree, Debendra appealed to this Court making his mother and brothers parties respondents. Rangini Dasi appeared in this Court, but the two brothers Narendra and Surendra did not. Pending that appeal, Surendra died and his sons were brought on the record as his representatives. On 13th March 1906, Debendra and his mother Rangini effected a compromise in the case. It was then settled that Debendra should get a sum of Rs. 5,000 for his maintenance for the two years preceding the suit to be recovered from the Sudder Tahsil and another sum of Rs. 15,000 to be recovered from all the Tahsils of the money-lending and trading businesses and that all the businesses should remain in the possession and control of Debendra for a period not exceeding five years to enable him to realise those amounts.

It was, however, arranged by that decree that the properties should be considered as the *stridhan* of Rangini Dasi. After Debendra had been re-paid the Rs. 20,000, he was to get one-third share of the businesses, the other two-thirds going to Narendra and the heirs of Surendra respectively. The decree passed on that compromise was passed as against, or in favour of, all the parties to the appeal including Narendra and his nephews who did not enter appearance. The present appellant Debendra made an application for executing that decree against the immoveable properties charged in order to recover the sum of Rs. 5,000. Narendra put in an objection to that execution on various grounds, one of which was, no doubt, that not having been a party to the compromise he could not be made liable for anything to be done or paid by him under the decree. The execution case, however, was thrown out not on that ground but on the ground that a separate suit would have to be filed to enforce the charge for Rs. 5,000 against the hypothecated properties. Narendra then filed this suit against Debendra who admittedly has been and still is in possession of these various businesses and the properties in question, claiming his one-third share. The Subordinate Judge has passed a decree in favour of the plaintiff after discussing the various issues raised in the case.

The only point which has been argued before us is that raised by issue No. 3—whether the plaintiff has acquired any title to the properties in suit by the *solehnamah* as claimed, although he was not a party to it. The issue could perhaps have been more correctly framed had it been worded.—Has the plaintiff acquired any title to the properties in suit by the decree? The *solehnamah*, it is true, was brought about by an arrangement between Debendra and his mother Rangini, but the decree, as passed, was in favour not only of Debendra but also of his brother Narendra and the sons of Surendra. The decree being in that form, there seems to be no reason why Narendra should not enforce it, as he is seeking to enforce it in this suit. The mere fact, that he objected to the execution, possibly wrongly, cannot preclude him from now asserting the right, which the decree gives him. As to the compromise decree, it does not lie in the mouth of Debendra to say that, so far as the decree is in his own favour, he will uphold it and, so far as it is in favour of his brother, he will regard it as not enforceable.

There appear to be no merits whatever in this appeal and it is regrettable that this family dispute should have been so long protracted.

The appeal is dismissed with costs to Narendra Narain Sinha the plaintiff-respondent.

Miscellaneous Appeal No. 229 of 1911, which arises out of the execution proceeding in the suit, the subject of Appeal No. 172 of 1911 is not pressed, and is accordingly dismissed. In this appeal, we make no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2027 AND 2028 OF 1910.

April 29, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BAUL CHAND SEN—PLAINTIFF—APPELLANT

versus

SIRISH CHANDRA SEN—DEFENDANT—RESPONDENT.

Court—Inherent power—Preservation of accuracy of record—Appeal—Bengal Tenancy Act (VIII of 1885), ss. 108A, 109A - Correction of entries—Bona fide *mistake of Settlement Officer.*

Every Court has the inherent power to take steps for the preservation and the accuracy of its records, and to amend them when it is found that what has been recorded does not accurately represent what has been directed by the Court.

Lawrie v. *Lees*, 7 App. Cas. 19 at p. 34; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, and *Hatton* v. *Harris*, (1892) A. C. 547 at p. 560; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722, relied upon.

In a case where what was ordered by the Court was correctly recorded but was subsequently altered without authority and the alteration was sought to be supported by forged initials of the Judicial Officer of the Court so as to make detection difficult if not impossible, the Court has inherent authority to set the record right.

A Record of Rights had been prepared accurately, but an unauthorised interpolation had been made in it, which the Settlement Officer corrected :

Held, that the entry had not been made owing to a *bona fide* mistake of the Settlement Officer or of any of the parties within section 108A of the Bengal Tenancy Act; that no appeal lay to the special Judge under section 109A; that, therefore, no second appeal

lay to the High Court, and that the High Court could interfere in revision.

Held, further, that, if it be held that as the Settlement Officer purported to act under section 108A, an appeal lay to the special Judge, then he having purported to act under section 109A, sub-section 2, a second appeal lay against his order to the High Court.

Bindeswari Prosad v. *Thakur Lakhpat Nath*, 8 Ind. Cas. 26; 15 C. W. N. 725, relied upon.

Appeal from the decree of the Special Judge of Cuttack, dated April 4th, 1910, reversing that of the Settlement Officer of Balasore, dated June 12th, 1909.

Babus *Mohendra Nath Ray* and *Manmatha Nath Ray*, for the Appellant.

Dr. *Rash Behary Ghose* and Babus *Mohini Mohan Chatterjee*, for the Respondent.

JUDGMENT.—The circumstances, under which this appeal has been preferred, are not in controversy before this Court. The appellant made an application to the Settlement Officer of Balasore for amendment of a Record of Rights prepared under Chapter X of the Bengal Tenancy Act. His allegation was that the name of one Jadunath Sen had been interpolated in the Record of Rights, and that what purported to be the initials of the Assistant Settlement Officer placed against the interpolation, were forgeries. The Settlement Officer entertained the application and made an inquiry in the presence of the representative of Jadunath Sen who, it was found, had died some time previously. He came to the conclusion that the interpolation was entirely unauthorised, and that the Assistant Settlement Officer had not attested the interpolation; what purported to be the initials of that officer were clear forgeries. In this view, the Settlement Officer directed the name of Jadunath Sen to be struck out of the record; and he added that he took this action under section 108A of the Bengal Tenancy Act. The representative of Jadunath Sen thereupon appealed to the Special Judge. A preliminary objection was taken on behalf of the respondent that the appeal was incompetent. This objection was overruled. As regards the merits, no attempt was made before the Special Judge to controvert the conclusion of the Settlement Officer. But it was contended for the appellant that the order of the primary Court was without jurisdiction, as section 108A authorises a specially empowered Revenue Officer to correct an entry in a finally published Record of Rights, only when he is satisfied that the entry has been made owing to a *bona fide* mistake. The Special Judge has accepted this contention as well founded and has set aside the order of the Settlement Officer as made without jurisdiction. The propriety of the order of the Special Judge is now called in question before us, and the petitioner, who moved the Court of first instance, has, by way of caution, preferred an appeal as also taken out a Rule, so that no question may arise as to the nature of the jurisdiction invoked. In our opinion, the order of the Special Judge cannot possibly be supported, and, indeed, no serious endeavour has been made on behalf of the respondent to justify it.

Section 108A of the Bengal Tenancy Act authorises the correction of entries in a Record of Rights, which have been made owing to a *bona fide* mistake; the scope of the section was explained by this Court in *Raj Mohan Guha* v. *Alam Gazi* (1). It need not be disputed that in the case before us, the entry had not been made owing to a *bona fide* mistake on the part of the Settlement Officer or of any of the parties. What had happened in substance was that the Record of Rights had been drawn up accurately, but an unauthorised interpolation had been made in it. This plainly is not a case of correction of an entry made in the Record of Rights owing to a *bona fide* mistake. To this extent, we agree with the Special Judge. But it does not follow that the action of the Settlement Officer was without jurisdiction. It is a power inherent in every Court to take steps for the preservation of the accuracy of its records. That the Court has power to amend its record when it is found that what has been recorded does not accurately represent what has been directed by the Court, is unquestioned. Lord Penzance said, in *Lawrie* v. *Lees* (2), that every Court has the power to vary its own order, when drawn up mechanically in the office of the Court so as to carry out its own meaning. In *Hatton* v. *Harris* (3), Lord Watson said that it is always within the competency

(1) 17 Ind. Cas. 279; 16 C. L. J. 339; 17 C. W. N. 625.

(2) 7 App. Cas. 19 at p. 34; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185.

(3) (1892) A. C. 547 at p. 560; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722.

of a Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce. The position is very much stronger when what has been ordered by the Court has been correctly recorded and has subsequently been altered without authority and the alteration has been sought to be supported by forged initials of a Judicial Officer so as to make detection difficult if not impossible. In our opinion, in a case of this description, not only has the Court inherent authority to set the record right, but it is incumbent upon the Court to take the necessary action as soon as it has been apprised of what is in essence a grand fraud upon the Court. In this view, the order of the Settlement Officer was made in the exercise of his undoubted jurisdiction. It is further plain that from this standpoint, no appeal really lay to the Special Judge against the order of the Settlement Officer because an appeal lies to him under section 109A, only if the order has been made under section 108A. But if we apply the principle recognised in *Bindeswari Prosad Singh* v. *Thakur Lakhpat Nath Singh* (4), it may be held that as the Settlement Officer purported to act under section 108A, an appeal against his order did lie to the Special Judge, and as the Special Judge himself purported to act under section 104A, sub-section 2, a second appeal lies to this Court under sub-section 3 of section 109A. It is competent to the Court, consequently, to hear the appeal and to set aside the decision of the Special Judge. On the other hand, if the respondent insist that no second appeal lies to this Court, because the appeal to the Special Judge was incompetent, the order of the Special Judge must, on that ground alone, be set aside in the exercise of our revisional jurisdiction, for which purpose a Rule has been granted. The respondent is consequently in a dilemma from which there is no escape. The result is that this appeal is allowed, the order of the Special Judge discharged and that of the Settlement Officer restored. This order will carry costs in all the Courts; we assess the hearing fee in this Court at two gold *mohurs*.

It is conceded that this judgment will govern the other appeal (Second Appeal No. 2028 of 1910), in which a similar order will be drawn up.

Appeal allowed.

(4) 8 Ind. Cas. 26; 15 C. W. N. 725.

CALCUTTA HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 1993 OF 1909.

January 14, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Richard Harington, Bart., Mr. Justice Stephen, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

ABDUL AZIZ—PLAINTIFF—APPELLANT

versus

RAZAK ALI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 99—*Written statement—Set off—Whether Court-fee to be paid on written statement according to value of set off claimed—Appellate Court—Error not affecting merit or jurisdiction—Interference by Appellate Court, ground of.*

In a case, the defendant claimed a set-off in his written statement but did not pay any Court-fee for the amount of the set-off. The Court accepted the written statement and allowed the set-off. The plaintiff, in a cross-appeal before the lower Appellate Court, took an objection, which was disallowed, to the effect that the defendant was bound to pay Court-fees for the amount of the set off;

Held, that the error, if error there was, did not affect the merits of the case or the jurisdiction of the Court, and so afforded no ground for reversal, substantial variation or remand, under section 99 of the Civil Procedure Code.

Appeal from the decree of the District Judge of Chittagong, dated June 26th, 1909, reversing that of the Munsif of Hathazaria, dated February 27th 1909.

The appeal came for hearing before Mr. Justice D. Chatterjee and Mr. Justice N. Chatterjea on July 20th 1911, who referred the case to a Full Bench by the following

ORDER OF REFERENCE.

In this case, the only question in controversy is whether the defendant, who claimed a set off of Rs. 29-15-0 in his written statement, was bound to pay Court-fees for the said amount. The learned Munsif accepted the written statement and allowed the set-off as a payment in part satisfaction of the claim. The plaintiff took an objection to this in a cross-appeal in the lower Appellate Court, which said:—"I do not think this point can

be raised now." It is contended in second appeal by the plaintiff that the Courts below were wrong in not insisting upon the payment. If the case had been governed by the new Civil Procedure Code, there can be no doubt that Court-fees would be payable, as the new Code has amended the Court Fees Act to that effect, see fourth Schedule, Act V of 1908. The written statement was, however, filed on the 8th October 1908, whereas the new Code came into force on the 1st January 1909. The question must, therefore, depend upon the law of Court-fees as it stood before the amendment. The very fact that an amendment has been considered necessary is, we think, a legislative recognition of the want of such a provision in the old Act. There is, however, some conflict of authority on the point. In the case of *Fakir Chandra Dutta* v. *Gisborne & Co.* (1), Mr. Justice Banerjee expressed a strong and well reasoned opinion that no such Court-fee was required to be paid for a written statement claiming a set-off. In arriving at this opinion, the learned Judge differed from the High Court of Allahabad, Madras and Bombay. See *Amirzama* v. *Nathu Mal* (2); *Bai Shri Majirajbai* v. *Narotam Hargovan* (3); *Chennappa* v. *Raghunatha* (4). The question was raised before another Bench of the Court in the case of *Nawbut Pattak* v. *Mohesh Narayun Lal* (5) but Mr. Justice Mookerjee distinguished the case of *Fakir Chandra Dutta* v. *Gisborne & Co.*, (1), and did not think it necessary to express any opinion on the point which he thought was not free from difficulty. The matter, however, was directly raised in the case of *J. J. Guise* v. *Ananta Ram Rathi* (6), and the learned Judges (Pratt and Pargiter, JJ.,) differed from the opinion expressed by Mr. Justice Banerjee as an *obiter dictum* opposed to the prevailing practice of the Moffusil Courts in this Province and held that Court-fees must be paid for such written statements. The learned Judges do not attempt to meet the arguments of Mr. Justice Banerjee and rely upon Moffusil practice as an additional reason to the authority of the other High Courts. With great deference to the learned Judges, we cannot follow that decision. The law having been amended since those decisions, the matter is not of much practical importance but as this case is not governed by the new Code and we differ from the decision of Pratt and Pargiter, JJ., reported as *J. Guise* v. *Anantha Ram Rathi* (6), we must refer the following point to the Full Bench.

Whether under the law as it stood before the coming into force of the New Civil Procedure Code of 1908, a written statement claiming a set off was liable to the payment of Court-fees as if it were a plaint in a cross-suit:

We rely for this reference on the reasons given by Mr. Justice Banerjee in *Fakir Chandra Dutt's* case (1) and on the additional reason that the amendment made by the new Code is an indication that there was no provision for the matter in the Court Fees Act before its amendment by Act V of 1908. We do not think there is any force in the reference to Moffusil practice which may have arisen from the decisions of other High Courts and which on the view that we take of the law was erroneous.

As this is a second appeal, the whole case will be dealt with by the Full Bench. It may be noted that the defendant admits an arrear of Rs. 12-1 and this will be taken account of in passing the final decree.

Babu *Dhirendra Lal Kastgir*, for the Appellant.

JUDGMENT OF THE FULL BENCH.

We are of opinion that no reference should have been made in this case. The error, if error there was, did not affect the merits of the case or the jurisdiction of the Court and so afforded no ground for reversal, substantial variation or remand. Section 99, Civil Procedure Code.

We, therefore, confirm the decree of the lower Appellate Court. We make no order as to costs, inasmuch as no one appears for the respondents.

Order confirmed.

(1) 8 C. W. N. 174.
(2) 8 A. 396; A, W. N. (1886) 159.
(3) 13 B. 672.
(4) 15 M. 29.
(5) 32 C. 654; 1 C. L. J. 364.
(6) 10 C. W. N. 199.

Re TIRATHDAS NATHUMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION No. 9 OF 1910.

December 17, 1912.

Present:—Mr. Pratt, J. C.

Re TIRATHDAS NATHUMAL AND ANOTHER—INSOLVENTS

Ex parte SETH GIDUMAL FATEH CHAND AND OTHERS—RECEIVERS.

Provincial Insolvency Act (III of 1907)—Receiver—Right to apply for instructions.

A Receiver appointed under the Provincial Insolvency Act III of 1907 is entitled to apply for instructions from the Court.

Mr. *Ruxchand Bilaram*, for the Receivers.

JUDGMENT.—This is an application for instructions by the Receivers appointed of the estate of the two insolvents, Tirathdas and Utumal.

The question for decision is whether the Receivers are entitled to apply for instructions. The general right of a Receiver to apply to the Court for direction is undoubted. Farran, C. J., said in *Balaji* v. *Ramchandra* (1): "In all important matters, the Receiver should apply for and obtain the direction of the Judge who appoints him". A Receiver appointed under the Code of Civil Procedure is, by such a direction when properly obtained, protected from the personal liability declared in Order XL, rule 4. The personal liability of the Receiver in insolvency is enacted in the same words in section 18 (4) of the Provincial Insolvency Act, 1907, and he is, I think, entitled to the same protection. Section 22 of the Provincial Insolvency Act, which gives a right of appeal from the order of the Receiver, does not lead to the contrary inference—for the act of a Receiver under the Civil Procedure Code may also be challenged by a petition to the Court that appointed him or by a suit filed by leave of the Court. The English Bankruptcy Act contains an express provision in section 89 (3) allowing a trustee to apply to the Court for directions and yet section 90 gives the party aggrieved a right of appeal to the Court. The Provincial Insolvency Act has no such express provision, but I have no doubt that the Receiver under that Act has a similar privilege.

Instructions given.

(1) 19 B. 660.

AMIRUDDI KARIKAR *v.* JADAB KARIKAR.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 106 OF 1913.

May 13, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Roy.

AMIRUDDI KARIKAR—INSOLVENT—APPELLANT

versus

JADAB KARIKAR—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 43—Bad faith, act of, committed by debtor—Imprisonment—Criminal case—Charge—Opportunity to answer charge to be given.

So far as an order under section 43 of the Provincial Insolvency Act results in a sentence of imprisonment, the case must be treated as a criminal case.

In all criminal cases, it is necessary that there should be a charge, a finding, and a conviction, as a foundation for the sentence; and if in any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. An opportunity should be given to the alleged delinquent of answering the charge against him after it has been distinctly stated.

In re Vallabhdas, 27 B. 394 at p. 399; 5 Bom. L. R. 343, followed.

Appeal from the order of the District Judge of Nadia, dated February 8th, 1913.

Babu *Peary Mohan Sikdar*, for the Appellant.

JUDGMENT.

JENKINS, C. J.—In my opinion, the order under appeal cannot stand. It purports to be under section 43 of the Provincial Insolvency Act, and in so far as it resulted in a sentence of imprisonment, it must be treated as a criminal case.

But in all criminal cases, it is necessary that there should be a charge, a finding, and a conviction, as a foundation for the sentence. Everything should be strictly and accurately pursued and if in any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. Moreover an opportunity should be given to the alleged delinquent of answering the charge against him after it has been distinctly stated [*In re Vallabhdas* (1) and the cases there cited].

When a consequence so serious as imprisonment may result, the Court should ordinarily require clear proof of personal service of the application and, if possible, require the presence of the person against whom it is directed. These conditions have

(1) 27 B. 394 at p. 399; 5 Bom. L. R. 343.

not been observed in this case and we must, therefore, reverse the order under appeal.

ROY, J.—I agree. The proceeding is, undoubtedly, of a criminal nature. What the learned District Judge ought to have done was to issue a Rule like this:—"Whereas it appears on the petition of a creditor, Jadab Kankar, that you have concealed among others the following properties, I direct that you show cause why you should not be dealt with under clause 2, Section 43 of the Provincial Insolvency Act and sentenced accordingly." Then on [the day fixed the Court was to inquire into the matter and pass orders. In the present case, that was not done. It was not brought home to this insolvent that the Court meant to proceed under this clause.

Order reversed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 640 OF 1911.

October 30, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Beadon.

Bakhshi MATHRA SINGH—DEFENDANT—APPELLANT

versus

Musammat KHUSHAL DEVI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale of judgment-debtor's property—Objection by judgment-debtor—Separate suit not allowed—Hindu widow—Right of residence against creditors of husband.

The objection of two Hindu widows to the sale of certain house property without reserving rooms for their residence having been disallowed, they filed a declaratory suit to establish their right. One of the widows was a party to the decree in execution of which the houses were sought to be sold:

Held, that the plaintiff, who was a party to the decree, was not competent to file the suit, for section 47 of the Civil Procedure Code lays down that the execution Court only is competent to determine the claim.

First appeal from the order of the District Judge, Rawalpindi, dated the 16th December 1910, decreeing the plaintiffs' claim.

Bhagat *Govind Das*, for the Appellant.

JUDGMENT.—The plaintiffs-respondents are two ladies belonging to the well-known family of the late Sir Nihal Singh Chachi of which an account is given at pages 242 to 245 of "Chiefs and Families of Note in the Punjab", Vol. II, Edition 1910.

So far as is material, the pedigree concerned is as follows:

GOPAL SINGH,
=
(*Widow*, S. Khushal Devi Plaintiff 1).

Tek Singh (*Widow*, S. Maya Wanti,) plaintiff No. 2.		Amar Singh (*Widow*, S. Maya Wanti)	
Gurdit Singh (defendant No. 2.)	Makhan Singh. (defendant No. 3).	Ajab Singh.	Dalip Singh.

On the 23rd December 1903, the present defendant-appellant obtained a decree for Rs. 4,752 with costs and interest against (1) Gurdit Singh, (2) Makhan Singh, (3) Sardarni Maya Wanti, widow of Tek Singh and (4) to (6), the widow and sons of Amar Singh. The decretal money was recoverable in part from certain house property mortgaged, as by the terms of the judgment which is printed at pages 3 to 6 of the present paper-book.

In the course of execution proceedings for the sale of the house, two rooms are said to have been reserved for the residence of Sardarni Maya Wanti, widow of Amar Singh, but objections filed by the present plaintiffs (widows of Gopal Singh and Tek Singh) were disallowed. Thereupon these two plaintiffs have instituted the present suit for declaration of their rights of maintenance and residence. It will be observed that one of the plaintiffs, namely Sardarni Khushal Devi, widow of Gopal Singh, was no party to the original suit.

The nominal plaintiffs have all along taken little interest in the proceedings and are apparently being put forward by the *pro forma* defendants Nos. 2 and 3 in order, if possible, to defeat the effect of the decree of 23rd December 1908. The objections of the plaintiffs in execution proceedings failed because they produced no evidence to support them, and they have produced none in the present case. In the appeal before us, they appear to have received notice on the 20th March and 13th April 1912 respectively, but there has been no appearance on their behalf and the appeal is heard *ex parte* against them.

The District Judge has given the plaintiffs a decree declaring that they have a right of residence in two rooms each of the house attached with costs. This decree is obviously wrong as regards the plaintiff, Sardarni Maya Wanti, who was party to the original suit. By section 47, Civil Procedure Code, (old section 244), her objections to sale of the house could be dealt with by the executing Court only. When these were dismissed, her remedy lay by appeal from the order of dismissal and not by fresh suit. The District Judge's finding under issue No. 2 is incorrect, so far as she is concerned, as Order XXI, rule 63, Civil Procedure Code, which he quotes as his authority, deals with the objections of third parties only and not of judgment-debtors.

The appeal is, therefore, bound to succeed as against Sardarni Maya Wanti.

There is not the same legal error in respect of the other plaintiff-respondent, Sardarni Khushal Devi, who was no party to the original suit, but here the appeal must succeed on the merits. The house in dispute may or may not be ancestral property of the family. We can find no trace on the English or Vernacular records of the admission of its being ancestral, said to have been made by appellant's Counsel in the lower Court, but as no issue was framed on the point, we express no opinion. Sardarni Khushal Devi was, however, bound to prove her case under issue No. 3, irrespective of the question whether the house was ancestral, the burden of proving that she had a right of residence having been rightly thrown upon her. She failed to produce any evidence whatever and we are quite at a loss to understand upon what ground any decree was granted to her. The first ground of appeal in this Court has been given up, but the appeal must succeed against her on ground No. 3 as amplified by grounds Nos. 4 to 7. It does not follow that the lady has a right of residence merely because the house may be ancestral. It is not established that the family have no other house to live in.

The appeal is, accordingly, accepted *ex parte*.

The District Judge's decree is set aside, and plaintiff's suit is dismissed with costs to the real defendant Mathra Singh in both Courts. Pleader's fee Rs. 50 in the lower Court and Rs. 32 in this Court.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1911.

December 18, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

UDHARAM DAYARAM—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 96, O. XLI, r. 1—Decree—Suit for damages—Set-off claimed—Suit decided to be barred—No decree—No appeal—Preliminary decrees enumerated.

The plaintiff sued for damages for breach of contract. The defendant claimed a set-off.

The lower Court decided on a preliminary issue that the plaintiff's claim was barred by limitation:

Held, on appeal by the plaintiff,

(*i*) that the suit was one embracing both the claim and the set-off, and hence the decision of the plaintiff's claim was not a decision of the suit and, therefore, no decree could be passed;

(*ii*) that, no appeal lay under section 96 of the Civil Procedure Code (Act V of 1908) and it was also incompetent for want of compliance with the provisions of Order XLI, rule 1.

Preliminary decrees are passed when after the decision of the suit, the Court has to stay its hand in order to work out the consequences on which the complete disposal of the suit depends. They are enumerated in Order XX, rules 12 to 16 and 18, and in Order XXXIV, rules 2 to 5, and 7 and 8.

Appeal against the decision of the District Judge, Hyderabad.

Mr. *Wadhumul Odharam*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—The plaintiff sued the Secretary of State for Rs. 4,770 as damages for breach of a contract. The defendant claimed a set off at Rs. 6,000 for damages in respect of fraud alleged to have been committed by the plaintiff with reference to the same contract.

The lower Court decided on a preliminary issue that plaintiff's claim was time-barred by limitation.

The plaintiff has filed this appeal against the decision of the lower Court and a preliminary objection is raised that the decision appealed against is not a decree and that, therefore, no appeal lies under section 96, Civil Procedure Code.

The plaintiff relies on the definition of decree in section 2 (2) of the Code. Under that definition, 'a decree is the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.' The very wide words 'all or any of the matters in controversy in the suit' do lend colour to the contention that the decision of an issue is a decree. And, no doubt, the decision of a single issue may in certain cases lead to a decree, *e. g.*, when a suit—*i. e.*, a whole suit and not part of a suit—is dismissed as time-barred.

But an essential part of the definition is that the decision or adjudication must have received formal expression. It is necessary, therefore, to refer to the Code and to the rules in the first Schedule which have effect as if embodied in the Code, in order to ascertain when the Court gives formal expression to its adjudication. Section 33 enacts that decree follows upon judgment and that judgment is passed after the case is heard. Judgment is defined in section 2 (9) as the statement of the grounds given by the Judge for his adjudication. Order XX, rules 4 and 5 make it clear that the judgment shall give a decision on all issues necessary for the decision of the suit. Rule 6 of the same Order further requires that the decree shall specify clearly the relief granted or other determination of the suit. The Court, therefore, does not give its adjudication the formal expression of a decree until judgment has been given on all issues necessary for the decision of the suit, with the result that the suit is determined.

The expression 'conclusively determines' points to the same conclusion, for a finding on an issue cannot be conclusive; for until judgment is given and the suit determined, it does not operate as *res judicata* as it is not always certain that the Court will act upon the decision or that it will be necessary to the determination of the suit.

The distinction between the preliminary and final decrees is one that is suggested by the case of *Dulhin Golab Koer* v. *Radha Dulari Koer* (1). The Calcutta High Court there held that an order declaring the rights of the parties in a partition suit decided the suit and was, therefore, a decree. It was held that the suit was decided although the actual partition had not been worked out. The Court adopted the argument of Mr. Evans, Counsel for the appellants, that "the fallacy lies in treating the words deciding the suit in section 2 (of the old Code) as equivalent to finally disposing of the suit." It is interesting to note that the Legislature has adopted the very word used by the learned Counsel. The same distinction was drawn by the Privy Council in *Rahimbhoy* v. *Turner* (2) and in *Hodges* v. *The Delhi and London Bank* (3).

Preliminary decrees are passed when after the decision of the suit, the Court has to stay its hand in order to work out the consequences on which the complete disposal of the suit depends. These consequences may be arithmetical as in an account suit, ministerial as in a partition suit or contingent as in a mortgage suit. They are enumerated in Order XX, rules 12 to 16 and 18 and in Order XXXIV, rules 2 to 5 and 7 and 8.

I concur with the construction put upon section 2 (2) by Rattigan, J., in the judgment of the Punjab Chief Court reported as *Kashi Nath* v. *Nathu Ram* (4). I differ entirely from the recent decisions of the Bombay High Court in *Govind Ramchandra* v. *Vithal Gopal* (5) and *Sidhanath* v. *Ganesh Govind Garud* (6). In these cases, it was held that decisions on issues which fall short of deciding the suit were conclusive determinations of the rights of the parties and that the Court should give formal expression to them

(1) 19 C. 463.
(2) 15 B. 155; 18 I. A. 6.
(3) 23 A. 137; 27 I. A. 168; 5 C. W. N. 1; 2 Bom. L. R. 967; 10 M. L. J. 279.
(4) 9 Ind. Cas. 1019; 115 P. L. R. 1911; 41 P. R. 1911; 179 P. W. R. 1911.
(5) 16 Ind. Cas. 159; 36 B. 536; 14 Bom. L. R. 560.
(6) 17 Ind. Cas. 637; 14 Bom. L. R. 916; 37 B. 60.

as decrees. With much respect, I am of opinion that a two fold error underlies these decisions (1) that such adjudications are conclusive and (2) that the Court is bound to give formal expression to such adjudications. That interpretation leads to the mischief condemned by the Privy Council in *Maharaja Moheshur Singh* v. *The Bengal Government* (7). I quote the passage:—"We are not aware of any Law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities."

In the present case, it is contended that the plaintiff's claim and the defendant's set-off are practically two cross-suits and that plaintiff's suit having been decided, he is entitled to have a decree passed on his claim. But the very words of Order VIII. rule 6 (2), that the set-off 'shall have the same effect as a plaint in a cross-suit' show that it is not in fact a cross-suit. The suit is one embracing both the claim and the set-off and the same rule enjoins that the judgment shall be on the claim and set-off. Again Order XX, rule 19, requires the decree to state what is due to each party and to be for the recovery of the difference. It is clear, therefore, that the decision of plaintiff's claim is not a decision of the suit and, therefore, no decree can be passed.

The decision appealed is, therefore, not a decree nor does it profess to be a decree. The appeal is further incompetent as it does not comply with the provisions of Order XLI, rule 1.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(7) 7 M. I. A. 283; 3 W. R. (P. C.) 45; 19 Eng. Rep. 316.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2485 OF 1910.

May 1, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Newbould.

GUNENDRA NATH CHOWDHURY—DEFENDANT—APPELLANT

versus

RAJENDRA KUMAR SINGH—PLAINTIFF—RESPONDENT.

Appeal—Bengal Tenancy Act (VIII of 1885), *ss.* 52, 109, *sub-s.* (3)—*Second appeal—Question whether excess land liable to rent—Contract by landlord not to measure land or enhance rent—Right to additional rent for excess land added to tenure by alluvion—Landlord and tenant—Alluvion—Regulation XI of* 1825, *s.* 4.

Where the question is not merely what amount of rent should be settled for the excess land in the tenant's possession, but also whether the excess land is liable to rent or not, a second appeal is not barred under section 109 sub-section (3) of the Bengal Tenancy Act.

Where there is a contract between a landlord and a tenant to the effect that the rent of the permanent sub-tenure shall never be liable to be reduced or increased, and the landlord shall have no right to measure the lands or enhance the rental of the *taluk* on any account, the landlord is not entitled to any additional rent for the excess land added to the original area of the tenancy by alluvial action.

Appeal from the decree of the Special Judge of Backergunge, dated April 12th, 1910, reversing that of the Assistant Settlement Officer of Backergunge, dated December 22nd, 1909.

Babus *Dwarka Nath Chakravarti*, *Sarat Chandra Roy Chowdhury* and *Gobinda Chandra Chakravarti*, for the Appellants.

Babu *Harendra Narain Mitra* and *Birbhushan Dutt*, for the Respondents.

JUDGMENT.—A preliminary objection was taken in this case that no second appeal lies under the terms of sub-section 3, section 109 of the Bengal Tenancy Act. In our opinion, this objection cannot be sustained in view of the observations made in the case of *Pirthi Chand Lal Chowdhry* v. *Sheikh Basarat Ali* (1), which came before a Full Bench. The question involved is not merely what amount of rent should be settled for the excess land but also whether the excess land is liable to rent or not. In our opinion, upon the authorities, this appeal is competent.

(1) 3 Ind. Cas. 449; 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343.

J. LENZ *v.* LALCHAND.

On the merits, the controversy between the parties depends in the first instance on the construction of the consent decree, dated the 2nd March 1869, which incorporates two petitions of compromise filed by the parties to the suit in which the decree was made. The clauses on which the defendant mainly relies are to the following effect: "The said rent shall never be liable to be reduced or increased." "The plaintiff or his representatives shall have no right to measure the lands or enhance the rental of the aforesaid *nim osat taluk* on any account." These two clauses in the contents in which they occur certainly seem to us sufficient to show that the plaintiffs in this suit are not entitled to any additional rent for the excess lands to which the suit relates. It is argued for the plaintiffs that the excess lands are lands added to the original area of the tenancy by alluvial action and that they have a statutory right to have rent assessed from these lands under section 52 of the Bengal Tenancy Act. The answer to that plea is that we are dealing with a permanent *mokurari* sub-tenure. There has never been anything in the law, before or after the passing of the Tenancy Act, to prevent a proprietor or a permanent tenure-holder from granting a sub-lease of a permanent and *mokurari* character in such a way as to deprive himself of such a right, as that conferred by paragraph 3 of the first sub-section of section 4 of the Alluvion and Diluvian Regulation of 1825 or section 52 of the Bengal Tenancy Act, to additional rent for lands added to the sub-tenure by alluvion. In other words, the contract embodied in the consent decree is a sufficient answer to any claim which the plaintiff might otherwise have been able to put forward under either of the sections to which we have referred. In support of this view, reference may be made to the cases of *Gopal Lall* v. *Kumur Ali* (2); *Ramnidhee* v. *Parbutty Dassee* (3); *Nunda Lal* v. *Kymuddin* (4).

Another objection to the decree in the Court below was suggested but somewhat faintly that the plaintiffs are entitled to the relief claimed as the proprietors of the estate in which the sub-tenure is situated. It appears that the predecessor-in-interest of the plaintiffs deliberately consented to the compromise which was arrived at in 1869 and filed a petition which is referred to in the decree. He thus made himself a party to the decree. But apart from that, no claim on the basis suggested was ever put forward in the Courts below and we are not aware of the circumstances in which the rights of the tenure-holder came to be vested in the plaintiffs. On the record as it stands, it is clear that the plaintiffs cannot in the present suit claim any rights beyond those possessed by the tenure-holder by whom the sub-tenure was created.

In the view we take, the appeal must be allowed and the suit dismissed with costs in all Courts.

Appeal allowed.

(2) 6 W. R., Act X Rulings, 85.
(3) 5 C. 823; 6 C. L. R. 362.
(4) 9 C. W. N. 886.

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT NO. 324 OF 1912.
November 28, 1912.

Present:—Mr. Crouch, A. J. C.

J. LENZ AND ANOTHER—PETITIONERS

versus

LALCHAND KEWALRAM AND OTHERS

RESPONDENTS.

Arbitration Act (IX of 1899), s. 4—Submission—Written agreement to refer—Document embodying terms of agreement not signed by both parties—Not written agreement—Assent of each party need not be on same paper—Entry of agreement by broker without signature of parties—Office dhara *(office term).*

A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties, does not come within the purview of a submission as defined in section 4 of the Indian Arbitration Act.

There is an essential difference between a written agreement and a document which merely embodies the terms of an agreement. Such document may be evidence of the agreement, but is not the agreement itself. If one party only attaches his signature, then it is a document embodying the terms of an agreement to which one party has expressed his assent in writing, but it is not a written agreement in writing unless the assent of both parties has been so expressed.

Ex parte Munro, In re Lewis, (1872) 45 L. J. Q. B. 816; 1 Q. B. D. 724; 35 L. T. 857; 24 W. R. 1017 and *Caerleon Tinplate Company* (*Limited*) v. *Hughes*, 60 L. J. Q. B. 640; 65 L. T. 118, referred to.

It is not, however, necessary that the assent of each party shall be written on the same piece of paper. It is sufficient if each party sign a separate document,

provided that each contains the complete terms of the agreement.

Aitken v. *Batchelor*, 62 L. J. Q. B. 193; 5 R. 218; 68 L. T. 530, referred to.

An entry by a broker in the '*noond*' of each contracting party embodying the terms of the contract signed by the broker is nothing more than a written intimation by the broker to each party that a contract has been effected.

The words 'office *dhara*' ('office terms') do not constitute a written agreement to submit differences to arbitration. They are merely symbols to denote that such an agreement had been made, and the use of such symbols does not justify the Court in accepting oral evidence of the agreement.

Messrs. *Hassaram* and *A. M. Shah*, for the Petitioners.

Mr. *Rupchand Bilaram*, for Respondents Nos. 1 and 2.

Mr. *Dipchand Chandumal*, for Respondent No. 3.

Mr. *Wadhumal Oodharam*, for Respondents Nos. 4 to 7.

JUDGMENT.—This is an application by the arbitrators to file an award. It is objected, *inter alia*, that there was no "submission" within the meaning of section 4 of the Indian Arbitration Act, and that consequently the arbitrators had no jurisdiction.

The admitted facts are that Messrs. Chandumal Hotchand agreed to purchase a quantity of sugar from Messrs. Ganshamdas Satramdas under three several contracts. The contracts were effected in the ordinary way through brokers, and in each case an entry was made by the broker in the "*noond*" of each contracting party.

The following entry, Exhibit A, was made in English in the *noond* of Chandumal Hotchand.

"You purchased—Seth Gandumal Satramdas sold 25 tons, 250 bags, 500 cwts., white Java sugar—January or February shipment —Each lot Rs. 12 per cwt.—office terms—Duty current on sellers—difference more or less on buyers—per broker Ludhumal."

The other two entries in the *noond* of Chandumal Hotchand are in vernacular, and are in practically the same terms, the expression "office terms" being represented by "office *dhara*". Exhibit B ends:—"Sold by Bhai Satramdas Ghandumal and purchased by you through Tursio Puj Ratanchand." Exhibit C ends:—"Purchased by you, sold by Satramdas Ghandumal through the broker Tursio and Ramdas; brokerage, therefore, will be taken by Tursidas."

The entries in the *noond* of Chandumal Satramdas are similar, except that in two of the entries the very important words "office *dhara*," or "office terms," do not appear.

On the 17th June 1912, Chandumal Hotchand executed a reference to Messrs. Ellinger and Lenz. The following paragraphs in the reference are important:—

"And whereas the agreements state on 'office *dhara*,' and whereas all offices at Karachi, selling sugar, have a clause in their agreements that differences arising between the parties shall be referred to the arbitration of two European merchants of Karachi.

"And whereas differences within the meaning of the said provisions have arisen and are still subsisting between the said parties regarding the failure of the said firm of Ghandumal Satramdas to tender and to deliver to Messrs. Chandumal Hotchand the aforesaid quantity of sugar within the contracted time and to pay to Messrs. Chandumal Hotchand the losses, commission, interest and expenses claimed by them for the purchase of the sugar.

"And whereas the said firm of Messrs. Ghandumal Satramdas have failed, after due notice of seven days having been given to them, to appoint their arbitrator, whereas Messrs. Chandumal Hotchand have appointed their arbitrator Mr. J. Lenz, now we the said Chandumal Hotchand do hereby under the provisions of the said agreements appoint Mr. J. Ellinger to act on behalf of the said firm of Ghandumal Satramdas and refer the matters under difference to the award of Mr. J. Lenz, merchant, Mr. J. Ellinger, merchant, both of Karachi."

"The arbitrators undertook the reference and published their award, ordering Ghandumal Satramdas to pay to Chandumal Hotchand Rs. 1,877-5-0, with interest, and all costs of the arbitration."

Mr. Rupchand, on behalf of Chandumal Hotchand, contends that the "submission" was contained in the three several entries made in the *noond* of his clients by the brokers, as agents for Satramdas Ghandumal.

Now "submission" is defined in section 4 of the Indian Arbitration Act as "a written

agreement to submit present or future differences to arbitration" and the question raised is whether these entries are written agreements within this section.

An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them (Pollock on Contracts, page 2). And a written agreement is an instrument whereby this act is performed through the process of writing. There is an essential difference between a written agreement, and a document which merely embodies the terms of an agreement. Such document may be evidence of the agreement, but is not the agreement itself; unless it be also the instrument whereby the assent of each party has been expressed. If one party only attach his signature, then it is a document embodying the terms of an agreement to which one party has expressed his assent in writing, but it is not a written agreement in writing unless the assent of both parties has been so expressed.

The leading case on the point is *Ex parte Munro, In re Lewis* (1). In that case, the question at issue was whether there had been an agreement in writing respecting the amount of costs to be charged by a Solicitor within section 4 of the Attorneys and Solicitors Act, 1870. In giving judgment, Lord Coleridge, Chief Justice, stated it as his opinion that the 4th section intended that the agreement must be an agreement in writing by both parties, that is, both parties must state in writing what is the agreement they have come to. The object of the Act was to prevent parties contradicting each other as to what was agreed and understood, by requiring that the terms agreed to should be ascertained in a writing, to which the signatures of both parties should be attached. This case was approved and followed in *Caerleon Tinplate Company (Limited)* v. *Hughes* (2), a case in which the precise question now before me for decision was considered. Willes, J., held that there was no written agreement to submit present or future differences to arbitration within section 27 of the Arbitration Act, 1899, unless there were an agreement in writing by both parties; both parties must sign their names to it. It is not, however, necessary that the assent of each party shall be written on the same piece of paper. It is sufficient if each party sign a separate document, provided that each contain the complete terms of the agreement. Thus, in *Aitken* v. *Batchelor* (3), there was held to be a good submission where Counsel on each side had signed an endorsement on his own brief containing the full terms of the agreement.

Some doubt as to the general application of the rule laid down in *Ex parte Munro* (1) was expressed in *Baker* v. *Yorkshire Fire and Life Assurance Company* (4). In that case, plaintiff sued on a policy of Fire Assurance, whereupon the defendants took out a summons to stay proceedings under the Arbitration Act. Plaintiff contended that, as he had not signed the Policy, he was not bound by the submission contained in it. It was held that plaintiff could not disaffirm a part of a written contract on which he was suing, and that even if the contention that the submission was not binding within the Act until plaintiff had signed it were good, the Court would meet it by staying the action until plaintiff had signed. In a later case, unreported, but cited in Halsbury's Laws of England, Volume I, page 441, it was held that the signature of both parties or their agent was necessary, and this is the view of the law adopted by the writer of the article on Arbitration in the work referred to.

We cannot, therefore, under the circumstances, treat Exhibits A, B and C by themselves as submissions; for admittedly, they, are not signed by or on behalf of both parties and if we turn to the relative documents in the hands of the other party, we find that in two of them the words "office *dhara*" are absent, and there is nothing in them which can even, by implication, be regarded as a submission. The parties, therefore, were not *ad idem* and there was no complete agree-

(1) (1876) 45 L. J. Q. B. 816; 1 Q. B. D. 724; 35 L. T. 857; 24 W. R. 1017.

(2) (1891) 60 L. J. Q. B. 640; 65 L. T. 118.

(3) (1893) 62 L. J. Q. B. 193; 5 R. 218; 68 L. T. 530.

(4) (1892) 1 Q. B. 144; 65 L. T. 161; 61 L. J. Q. B. 838.

ment and the award must be bad at any rate as regards two of the contracts.

But Exhibits A, B and C are not agreements, and do not purport to be agreements; nor do they purport to be signed on behalf of Ghandumal Satramdas. Mr. Rupchand contends, on the authority of certain passages in the judgment of *Caerleon Tinplate Company* v. *Hughes* (2), that bought and sold notes may constitute a written agreement to refer within the Arbitration Act. But a perusal of the whole report will make it clear that both learned Judges were careful to avoid committing themselves to any admission that bought and sold notes constituted the agreement of the parties. Denman, J., says—"In my judgment, there can be no written agreement unless in writing signed by the parties *as their agreement*," and Willes J., speaks of each note as a memorandum. The history of bought and sold notes is well known, and is to be found fully recorded in the last edition of the Encyclopædia Britannica. On the Statute of Frauds coming into operation, every London broker kept a contract book in his office in which he entered up every contract effected by him and attached his signature as agent for both parties. This entry was deliberately made to constitute a memorandum of the contract in writing signed by an agent of the parties within the Statute of Frauds. A copy of this entry was sent to each party. In 1884, in consequence of certain alterations in the Law, brokers ceased to make these statutory memoranda in contract books kept by themselves, but the practice of sending bought and sold notes, which are recognised as memoranda of the contract under the Statute of Frauds, still obtains.

In my opinion, Exhibit A is nothing more, and purports to be nothing more, than written intimation by the broker to the purchaser that a contract has been effected. It is intended to be written evidence of the fact that a contract has been made. But it is not an agreement. It is not signed as such; it is not the act by which the parties express their consent to be bound. It is nothing more than a subsequent memorandum signed by a broker as such, and not as agent.

Nor am I prepared to hold that the words "office *dhara*" can constitute a written agreement to submit differences to arbitration. They are not such an agreement; they are, at the most, merely symbols to denote that such an agreement had been made. To hold that the use of such symbols justifies the Court in accepting oral evidence of the agreement, would be to defeat the object of the Legislature. The indents of the various European offices differ in a great many respects, and it would be practically impossible to ascertain with any accuracy what the precise terms of the contract were intended to be.

The application is rejected. Chandumal Hotchand must bear all costs of the proceedings.

Application rejected.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 811 OF 1911.

May 21, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Agnew.

GURDIT SINGH AND ANOHTER—PLAINTIFFS—APPELLANTS

versus

Musammat PARMESHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908)—Pleadings—Amendment of plaint—Suit for possession by reversioners against widow and daughter—Suit dismissed as premature in presence of widow—Plaintiff asking for declaration against daughters—Amendment allowed.

G., a nephew of one *R.*, deceased, sued *R.*'s daughters and his alleged widow for possession of the property left by the deceased. In his replication, the plaintiff stated that if the alleged widow was proved to have been lawfully married to the deceased, he would be entitled to a declaration that he had a right to succeed after her death in preference to the daughters. The lower Court, deciding in favour of the widow on the question of legality of her marriage, dismissed the suit as premature:

Held,

(*i*) that the decree must be set aside and the case sent back for fresh decision;

(*ii*) that the suit for possession was, no doubt, premature, but, in the interests of justice, it was eminently desirable, since the parties had adduced whatever evidence they wanted to produce as regards the respective rights of the plaintiffs, the daughters of the deceased; that the lower Court should have given its decision one way or the other on those rights

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by asking the plaintiff, if necessary, to amend his plaint;

(*iii*) that the Court should allow the plaintiff to amend his plaint by inserting therein a prayer for a declaration of his right of succession after the death of the widow.

First appeal from the decree of the District Judge, Ferozepur, dated the 16th March 1911, dismissing plaintiffs' suit.

Mr. *Pestonji Dadabhai*, for the Appellants.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Respondents.

JUDGMENT.—The pedigree-table which is given in the judgment of the lower Court shows the relationship of the parties. The plaintiffs, who are the nephews of one Ram Bhaj Mal, deceased, a *Khatri* of *Mauza* Dhandian, Tahsil Zira, District Ferozepur, brought the present suit against the three daughters of Ram Bhaj Mal and his alleged widow, *Musammat* Gujri, for possession of his property, moveable and immoveable, alleging that they, as nephews of the deceased, were entitled to succeed to the property left by him in preference to his daughters, and that *Musammat* Gujri, not being the widow of the deceased, had no right to take possession of the said property. In the last paragraph of the plaint, the plaintiffs prayed for any other relief to which they might be entitled. In their written statement, the defendants pleaded that in matters of inheritance they were governed by Hindu Law and not by custom; that under the Hindu Law, the plaintiffs had no right of succession to the property in dispute as against the daughters of the deceased; and that in any case, the plaintiffs could not sue for possession in the presence of *Musammat* Gujri, who was entitled to retain possession of the deceased's property for her life by reason of her being his widow. In their replication, the plaintiffs stated that if *Musammat* Gujri is held to be the widow of the deceased, they were entitled to a declaration that they would have a right to succeed to the property in dispute after her death in preference to the daughters of the deceased. In reference to this part of the replication, the defendant's Pleader stated that on the plaint as it stood, a declaratory decree could not be given to the plaintiffs because no amendment of the plaint had been asked for.

The District Judge framed 10 issues which arose out of the pleadings of the parties, the 10th issue being in the following terms:—"If *Musammat* Gujri is found to be the lawful widow of Ram Bhaj Mal, and if the plaintiffs are found to be the next heirs of the deceased after the death of the widow, can plaintiffs obtain a declaration of their right in the property on the plaint as framed or with such amendment as the Court may direct." The parties went to trial on the issues drawn by the District Judge and adduced all the available evidence on the matters in dispute between them with special reference to the second and third issues. These issues were:—

No. 2. Is the family of Ram Bhaj Mal not bound by Hindu Law? If not, by what law of succession is it bound, and what are the provisions of that law with respect to the position of the daughters and widow?

No. 3. Was *Musammat* Gujri not the lawfully married wife of Ram Bhaj Mal?

The District Judge heard arguments on both these issues, but he recorded no finding on issue No. 2, because in his opinion, in view of his finding on issue No. 3, the determination of issue No. 2 was unnecessary. On issue No. 3, he held that *Musammat* Gujri had been the lawfully married wife of Ram Bhaj Mal, and that after his death, she was entitled, as his widow, to remain in possession of his property for her life, the plaintiffs and the deceased not having been members of a joint Hindu family. The suit of the plaintiffs was accordingly dismissed as premature.

The plaintiffs have appealed to this Court, and on their behalf the finding of the lower Court that *Musammat* Gujri is the widow of Ram Bhaj Mal and is entitled as such to a life-interest in his estate is accepted as correct; but it is urged that the lower Court should have adjudicated upon issue No. 10 and should have granted the plaintiffs a declaration to the effect that they are entitled to succeed to the deceased's property after *Musammat* Gujri's death in preference to his daughters. The appeal has been filed on a Court-fee stamp of Rs. 10 and we overrule the preliminary objection urged by Mr. Shadi Lal that this Court-fee is insufficient. The relief asked for the plaintiffs in appeal is covered by Article 17, clause 6, of the second Schedule to the Court

Fees Act, and a Court-fee of Rs. 10 is the proper fee which the plaintiffs had to pay on their memorandum of appeal.

On the merits of the appeal, we have no hesitation in holding that the lower Court acted improperly in not taking up and adjudicating upon issue No. 10. The evidence, which was adduced by the parties with reference to issue No. 2, was, as the lower Court observes in its judgment, quite sufficient to enable it to record a finding as to whether the plaintiffs had or had not a right to succeed to the property of Ram Bhaj Mal, deceased, in preference to his daughters after the death of his widow, *Musammat* Gujri; and in order to prevent further litigation between the parties, if for no other reason, the lower Court should have given the plaintiff, an opportunity of amending their plaint by asking for a declaration of their right of succession in the property in dispute after the death of the widow as against his daughters. The suit for possession was, no doubt, premature as the widow of the deceased was still alive; but in the interests of justice, it was eminently desirable, since the parties had adduced whatever evidence they wanted to produce on the second issue as regards the respective rights of the plaintiffs and the daughters of the deceased, that the lower Court should have given its decision one way or the other on that issue by asking the plaintiffs, if necessary, to amend their plaint. The present Code of Civil Procedure gives a Court ample power to allow an amendment of the pleadings in order that the matters in dispute between the parties should be effectually adjudicated upon, and this is precisely one of those cases in which that power could be exercised with great advantage.

We accept this appeal and, setting aside the decree of the lower Court, send the case back for a fresh decision with reference to the second issue. The Court will allow the plaintiffs to amend their plaint by inserting therein a prayer for a declaration of their rights of succession in the property of the deceased after the death of *Musammat* Gujri. The finding of the lower Court that *Musammat* Gujri is the widow of the deceased stands uncontested, and it is conceded that the lower Court's decision that she is entitled to hold possession of the property for her life is correct. The finding of the lower Court on this point will rema in undisturbed. In the circumstances, we think that the parties should bear their own costs in this Court and we direct accordingly.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3244 OF 1911.

April 2, 1913.

Present:—Mr. Justice Chapman and Mr. Justice Mullick.

KRISHNA CHANDRA JOGATI—DEFENDANT—APPELLANT

versus

ABHIRAM NAIK—PLAINTIFF—RESPONDENT.

Landlord and tenant—Agricultural tenancy—Kabuliat, *execution of, by tenant and acceptance of, by landlord—Sufficient to prove tenancy—Evidence of tenancy.*

For the purposes of an agricultural tenancy, it is sufficient for the person who claims to be the tenant to prove that he executed a *kabuliat* and that the *kabuliat* was accepted by the landlord.

Appeal from the decree of the Special Judge of Cuttack, dated August 28th, 1911, affirming that of the Revenue Officer of Kendraparrah, dated April 20th, 1911.

Babu *Satish Chandra Bose*, for the Appellant.

Babu *Narendra Chandra Bose*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for correction of an entry in the Record of Rights. The defendant's name had been entered in the record as a tenant in possession of the land. The plaintiff sued for correction of that entry asserting that he should have been recorded as the tenant. The suit has been decreed by the lower Courts and the defendant appeals.

The learned District Judge based his decision upon a finding that the *kabuliat*, upon which the plaintiff rested his case, was genuine and that the plaintiff had been in possession under that *kabuliat* and for a long period prior thereto. The decision has been assailed upon the ground that the *kabuliat* by itself is not a lease and does not confer any right upon the person who executed it. It is not necessary in this case to consider whether the *kabuliat* is a lease within the terms of the Transfer of Property Act, for

the tenancy being admittedly an agricultural tenancy, section 107 of the Transfer of Property Act does not appiy. There can be no doubt that for the purposes of an agricultural tenancy, it is sufficient if the person who claims to be the tenant proves that he executed a *kabuliat* and that the *kabuliat* was accepted by the landlord. Now the plaintiff's evidence about the *kabuliat* was that he had previously been in possession of the land on a produce rent and that the person who, both sides admit, was the manager of the Estate and was empowered to settle lands with tenant told him that he must execute a *kabuliat* on a cash rent. He accordingly agreed to execute such a *kabuliat*. He did execute it and handed it into the office of the estate. Now that story, if believed, was quite sufficient to establish the plaintiff's right. It is true that there is no express finding by the learned District Judge in regard to the acceptance of the *kabuliat*. Both the Courts below have dealt with the matter as if the decision depended upon whether the *kabuliat* tendered by the plaintiff or the *dakhalnama* relied on by the defendant was genuine. But we think that in treating the case in that way, the Courts meant to decide which story was true, each story being taken as a whole, namely, whether the plaintiff's story was true or the defendant's, the test in each case being the genuineness of the document produced. Reading the judgment in that way, we are satisfied that the learned District Judge meant to say that he believed the plaintiff's story. That story, if believed, was enough to establish the plaintiff's claim.

We are, therefore, of opinion that there is no sufficient reason to interfere. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 505 OF 1911.

April 10, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Walmsley.

RAKHAL CHANDRA GHOSH MOZUMDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ASHUTOSH GHOSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Second appeal—Order dismissing appeal as barred by limitation, whether decree—Decree—Civil Procedure Code (Act V of 1908), ss. 2, 100—Limitation Act (IX of 1908), s. 5—"Sufficient cause"—Bona fide miscalculation by Pleader of period of limitation, whether sufficient cause—"Sufficient cause" to be liberally construed.

An order dismissing an appeal as having been filed beyond time is a decree within the meaning of section 2 of the Civil Procedure Code, passed in appeal from which a second appeal is allowed under section 100.

Ganga Dass v. *Ramjoy Dey*, 12 C. 30, referred to.

The expression "sufficient cause" in section 5 of the Limitation Act, 1908, should be liberally construed so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant.

In re Manchester Economic Building Society, 24 Ch. D. 488 at p. 503; 53 L. J. Ch. 115; 49 L. T. 793; 32 W. R. 325, referred to.

A *bona fide* mistake committed by a Pleader in calculating the period of limitation, in consequence of which an appeal is filed out of time, may constitute a sufficient cause within the meaning of section 5 of the Limitation Act. Whether the miscalculation of the period of limitation by a Pleader does constitute a sufficient cause in any particular case, must be decided by the Court having regard to all the facts and circumstances of the case.

Bishen Dut Tewari v. *Nandan Pershad Dubey*, 12 C. W. N. 25 and *Sundar Koer* v. *Lala Raghunath*, 12 Ind. Cas. 677, relied upon.

Appeal from the decree of the District Judge of 24-Pergannahs, dated January 13th, 1911, rejecting an appeal from the decree of the Second Munsif of Baraset, dated September 20th, 1910.

Babu *Manmotha Nath Mukherjee*, for the Appellants.

Babu *Shiba Prosonna Bhattacharyya*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the District Judge of 24-Pergannahs, rejecting an appeal on the ground that it was filed out of time. A preliminary objection has been taken on behalf of the respondents that no appeal lies against such an order. The decision of this

question depends upon whether an order dismissing an appeal as having been filed beyond time is a decree passed in appeal from which a second appeal is allowed under section 100 of the Code. We are of opinion that it is such a decree within the meaning of section 2 of the Code. It was held by Wilson and Beverley, JJ., in the case of *Gunga Dass Dey* v. *Ramjoy Dey* (1), that, reading the definition of a decree under section 2, which includes an order rejecting a plaint, with section 582, an order rejecting or dismissing an appeal is a decree of the Appellate Court under the terms of the definition. However that may be, the order passed by the lower Appellate Court confirmed the decree of the Court of first instance and thereby conclusively determined the rights of the parties with regard to the matters in controversy in the suit. Had the appeal been admitted and then dismissed on a preliminary objection raised at the hearing that the appeal was filed out of time, there could be no question that the order dismissing the appeal, though on a preliminary point, would be a decree and we do not see why an order dismissing an appeal before it is admitted should not be considered a decree. In either case, the decree of the Court of first instance is confirmed and the rights of the parties with regard to the matters in controversy in the suit are finally determined by the order dismissing the appeal. We are accordingly of opinion that a second appeal lies.

The next question is whether a miscalculation of the period of limitation by a Pleader, in consequence of which an appeal is filed after the expiry of the period of limitation, may constitute "sufficient cause" within the meaning of section 5 of the Limitation Act for admitting the appeal filed out of time. The learned Judge was of opinion, having regard to the authorities referred to by him, that a miscalculation by a Pleader is not a sufficient cause within the meaning of section 5. The learned Judge referred to the case of *Gopaul Chunder Lahiry* v. *Solomon* (2), and the same case on appeal reported as *Gopal Chunder Lahiri* v. *Soloman* (3). The facts of that case, however, are different. There, in a suit, the Counsel for the defendant accepted the statement made by the Counsel for the plaintiff in respect to the contents of a conveyance (the Counsel for the defendant not having read it) that under it the plaintiff in that suit was entitled to the whole of the property and a decree was accordingly made in favour of the plaintiff on the 5th February 1885 and the decree was signed on the 25th February. Subsequently, a suit was instituted by the defendant to set aside the conveyance on the ground of fraud and, in the course of that suit, on the 30th March 1885, it was discovered by the Counsel for the defendant that the title to a portion of the property was in the defendant under the conveyance and thereupon an application for review of the judgment in the first suit was filed out of time and it was held by the first Court that there was "sufficient cause" for not presenting the application for review within the period prescribed. The Court of Appeal pointed out that if this were to be deemed a sufficient excuse for the application not being made in due time, it would be an equally good excuse for delaying the application for a year or any longer time whenever the learned Counsel might happen to read its contents.

The question whether a *bona fide* mistake on the part of a Pleader in calculating the period of limitation for preferring an appeal can constitute "sufficient cause" within the meaning of section 5 of the Limitation Act has been considered in two recent decisions of this Court. In the case of *Bishen Dut Tewari* v. *Nandan Pershad Dubay* (4), there was a miscalculation by the Pleader for the appellant as regards the period within which the appeal was to be filed, and upon an application for the admission of the appeal which was filed out of time by two days, an order was made admitting the appeal. At the hearing of the appeal, an objection was raised that the appeal was barred by limitation and the case of *Gopal Chunder Lahiry* v. *Soloman* (3) and certain other cases were cited, but the learned Judges, under the circumstances of that case, came to the conclusion that the order admitting the appeal should not be

(1) 12 C. 30.
(2) 11 C. 767.
(3) 13 C. 62.
(4) 12 C. W. N. 25.

discharged. It is true that importance was attached to the fact that an order (though *ex parte*) had already been made admitting the appeal and to the delay in raising the question of limitation after costs had been incurred; but Mr. Justice Woodroffe considered the question of *bona fide* mistake of the Pleader in calculating the period of limitation and held that each case must be decided upon its own facts. In another recent decision of this Court in *Sundar Koer* v. *Lala Raghunath Sahai* (5), decided by Mukerjee and Carnduff, JJ, the learned Judges considered this question and after referring to the authorities on the point, came to the conclusion that they were not prepared to lay down as an inflexible rule of law that in no case can the circumstance that a litigant has under the erroneous advice of Counsel or Pleader presented an appeal out of time be deemed a sufficient cause within the meaning of section 5 of the Limitation Act and that the true rule is whether under the special circumstances of each case the appellant acted under an honest, though mistaken, belief formed with due care and attention or there was any negligence or inaction or want of *bona fides* on the part of the appellant.

There are authorities in which a contrary view has been taken, specially in some English cases. In the last case of *In re Coles and Ravenshear* (6), however, the learned Judges felt themselves bound by the current of decisions in that Court but two of the learned Judges observed that, if the matter were free from authority, they would have approved of a rule different from that which they laid down. No doubt, as pointed out by James, L. J., in *International Financial Society* v. *City of Moscow Gas Co.* (7), the limitation of the time to appeal is a right given to the person in whose favour a Judge has decided and that time should not be enlarged except under very special circumstances. Section 5 of the Limitation Act gives the Court power to admit an appeal, if the Court is satisfied that there was sufficient cause for not presenting the appeal within the time limited. It is neither necessary nor desirable that any attempt should be made to find precisely and exhaustively the meaning of the expression "sufficient cause", which should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant. It was observed by Lord Justice Bowen in *In re Manchester Economic Building Society* (8):—"It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances and in a defined way, would be very perilous. The rules leave the matter at large. Of course, it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case, otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered." We think that a *bona fide* mistake committed by a Pleader in calculating the period of limitation may constitute a sufficient cause within the meaning of section 5 of the Limitation Act. Whether the miscalculation of the period of limitation by a Pleader does constitute a sufficient cause in any particular case must be decided by the Court having regard to all the facts and circumstances of that case.

It has been contended on behalf of the respondents that the learned Judge of the lower Court has, as a matter of fact, exercised his discretion and has come to the conclusion that the appeal should not be admitted under the circumstances of this particular case. Had that been so, we would not have interfered with the judgment of the lower Appellate Court, as in fact in that case, we would have no power to

(5) 12 Ind. Cas. 677.

(6) (1907) 1 K. B. 1; 5 S. E. C. (N. S.) 194; 76 L. J. K. B. 27; 95 L. T. 750; 23 T. L. R. 32; 51 S. J. 45.

(7) (1887) 7 Ch. D. 241; 47 L. J. Ch. 258; 37 L. T. 736; 26 W. R. 272.

(8) (1883) 24 Ch. D. 488 at p. 503; 53 L. J. Ch. 115; L. T. 793; 32 W. R. 325.

do so. But we think that upon the judgment there can be no doubt that the learned Judge thought that, having regard to the authorities, a miscalculation by a Pleader could not be a sufficient cause within the meaning of section 5 and that he had no option but to reject the appeal. We are of opinion, therefore, that the order of the lower Appellate Court should be set aside and the case sent back to that Court in order that it may consider whether having regard to the circumstances of the case and the facts stated in the affidavit of the Pleader for the appellant, there was sufficient cause for admitting the appeal out of time. Costs will abide the result.

The Rule is discharged.

Appeal allowed; Case remanded.

BOMBAY HIGH COURT.

CIVIL APPEAL NO. 35 OF 1912.

January 23, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Justice Sir N. G. Chandavarkar, KT.

AISHABAI—PLAINTIFF—APPELLANT

versus

ESSAJI TAJBHAI—DEFENDANT—RESPONDENT.

Arbitration through Court—Stipulation in submission—Adjusted accounts not to be taken into consideration—Interpretation—Taking in evidence as a statement of account acknowledged to have been signed by defendant—No misconduct—Award not vitiated—Honest, though mistaken admission of document—When no ground for setting aside award.

A suit was referred to arbitration with a stipulation that the arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiffs be not taken into consideration by them. During the arbitration proceedings the question arose whether the debt of a particular item was proved. An adjusted account was tendered in evidence by the plaintiff in which account the item appeared, and the signature on which had been admitted by the other side in his written statement. The defendant objected, but the adjusted account was accepted in evidence in proof of the debt. The defendant, however, did not seek the interposition of the Court for a proper construction of the terms of the reference; he withdrew from the case, and allowed the inquiry to go on, and it was only when the award had been made, that he asked the Court to interfere and set the award aside as a nullity:

Held, that the arbitrator's action did not amount to misconduct and the award was valid.

The honest, though mistaken, admission by arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* would not be a ground for setting aside an award.

Mr. *Raikes*, with him Mr. *Strangman*, Advocate-General, Messrs *Inverarity* and *Mose*, for the Appellant

Mr. *Setalvad*, (with him Mr. *Kanga*), for the Respondent.

JUDGMENT.

SCOTT, C. J.—This is an appeal from a judgment of Davar, J.,* whereby he set aside an award upon motion of the respondent on the ground of misconduct on the part of the umpire named in an order of reference.

The reference was made in a suit filed by the appellant against the respondent to recover the amounts alleged to be due on a mortgage and two deeds of further charge.

In the plaint, an adjustment of account, dated the 31st of August 1910, was alleged from which it appeared that the sum of Rs. 5,71,770-2-0 was found to be due to the plaintiff which sum had been slightly reduced by payments made by the defendant prior to the date of suit, namely, the 11th of October 1910.

The defendant by his written statement pleaded that his signature to the said adjustment was obtained by fraud and that accounts should be taken.

On the 16th of March 1911, a consent order was obtained whereby the suit and all matters in dispute therein were referred to the determination of two arbitrators and in the event of their failing to make their award to Mr. K. F. Modi as umpire.

The defendant's case is that his Solicitor made it an indispensable condition of the reference that all alleged adjustments of account should be set aside; and that the plaintiff's attorneys agreed to this and it was accordingly provided by the consent order as follows:—

"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration."

It appears from the plaintiff's affidavit of documents, dated the 2nd of December 1910, that he relied upon two statements of account adjusted and signed by the defendant, one of which was the basis of and contemporaneous with the earlier of the two deeds of further charge and the other was the ad-

*See *Haji Ahmad Haji Hassam* v. *Essaji Tajbhoy*, 17 Ind. Cas. 696; 14 Bom. L. R. 1007.—*Ed.*

justment referred to in the plaint and written statement.

The defendant thus describes the proceedings before the arbitrators and the initial proceedings before the umpire in paragraphs 12, 13 and 14 of his affidavit in the motion.

"12. The arbitrators appointed by the said order of reference took up the reference on the 6th day of April 1911, directed the plaintiff to allow me, this deponent, inspection of all the entries in his own personal books of account relating to the dealings and transactions between us and also directed him to give me inspection of the books of account relating to the plying of said steamers on my account, all which inspection the plaintiff had theretofore refused to give me because of the said adjustment of 31st August 1910 and others before it. Thus as directed by the said consent order of reference the alleged adjustments were set aside. The arbitrators further directed the plaintiff to bring in his accounts. Accordingly, the plaintiff brought in two accounts one of which contained all the several sums with interest thereon which were alleged by him to have been lent and advanced to me on the mortgage of my properties and were included in the said adjustment of the 31st day of August 1910 and included in addition a sum of Rs. 17,529 for further interest from the date of the said adjustment to 30th December 1910 and an altogether new sum of Rs. 68,251 alleged to be due by me to the plaintiff in respect of the plying of the said steamers. This last mentioned sum was not included in the adjustment of 31st August 1910, nor in the second deed of further charge which was executed on 17th June 1909 in respect of the alleged losses in the plying of the said steamers. It was also not claimed by the plaint and is entered on 21st December 1910 in a fraudulent account got by the plaintiff after the filing of this suit. This account has, in the proceedings before the arbitrators and the umpire, been referred to as the 'mortgage account.' The plaintiff was also directed to bring in an account of the plying of the said steamers by him on my account. To both these accounts, I, this deponent, was directed to bring in my objections and surcharges. In this manner the accounts between me and the plaintiff were opened up as if there had been no adjustments of account between me and the plaintiff and the same were not taken into consideration.

"13. The arbitrators having omitted to extend the time for making their award at the proper time and there being no possibility of their agreeing owing to a strong bias betrayed in favour of the plaintiff by the arbitrator appointed by him, they had to give up proceeding further and the reference was taken up by the umpire on the 8th day of September 1911, under the provision in that behalf contained in the order of reference.

"14. The umpire accepted the accounts brought in by the plaintiff and the objections and surcharges brought in by me, this deponent, and the proceedings before him thus commenced on the footing of there being no adjustments. My objections to the mortgage account brought in by the plaintiff were first taken in hand and they were proceeded with in accordance with the usual practice, the burden of proving the items objected to being considered to be on the plaintiff."

It is thus conceded by the defendant that the proceedings were commenced before the umpire on the footing of there being no adjustments.

If the accounts had been taken as settled subject to surcharge and falsification, the burden of proof in regard to the items objected to would have lain upon the objector: See *Gething* v. *Keighley* (1). The first item dealt with was an objection that a sum of Rs. 7,053-8 was not due but only Rs. 7,000, because the Rs. 53-8 was attributable to interest, if calculated, at 9 per cent. In proof of the item objected to, the plaintiff's Solicitor put in without objection the earlier of the adjusted accounts, which had also been put in before the arbitrators, as an admission that the sum claimed had been transferred to the defendant on the 13th of March 1903. The same item also appears in the adjusted account of the 31st of August 1910. The defendant then led evidence to show that the interest should have been calculated at 6 per cent. only. In the course of that evidence, the adjusted account of the 31st of

(1) (1878) 9 Ch. D. 547 at p. 552; 48 L. J. Ch. 45; 27 W. R. 283.

August was referred to by the defendant's Solicitor and was marked for identification at his instance and the same account was afterwards used in cross-examination of the defendant by the plaintiff's Solicitor without any objection.

At a later stage of the proceedings when all the items of objection but two, relating to a sum of Rs. 1,300 and to certain bills of costs, had been dealt with or transferred to other accounts for investigation, the plaintiff's Solicitor put in the second adjusted account of the 31st August 1910 as proof of an admission that a sum of Rs. 1,300 was due by defendant upon a transfer to the plaintiff of a debt due to the defendant by one Mulla Fazalalli, and contended that the onus of proving that the plaintiff had not relinquished his claim against Mulla Fazalalli for this amount with the consent and at the request of the defendant was by the admission shifted on to the defendant.

Although this was merely a repetition of the procedure adopted with reference to the sum of Rs. 7,053-8, some months earlier, it gave rise to lively protests on the part of the defendant's Solicitor and the umpire was asked to submit a special case for the opinion of the Court, under clause 11 of Schedule II of the Civil Procedure Code. The umpire said he was doubtful whether that would apply but postponed further consideration of the item of Rs. 1,300 in order to give the defendant's Solicitor an opportunity to move the Court if so advised for leave for the umpire to state a special case. This was on the 20th of March 1912. On the 22nd, the defendant's Solicitor appeared before the umpire and stated that as the umpire had admitted the document containing the adjustment notwithstanding the defendant's objection, the arbitration fell through and that the defendant was no longer bound to go on with it. He also said that as the umpire had acted in contravention of the order of reference, the defendant put an end to the umpire's authority and retired.

The umpire then requested the plaintiff's Solicitor to give notice to the defendant's Solicitor that the reference would be proceeded with next day and if he did not attend, the reference would be proceeded with *ex parte*. This notice was accordingly given by letter of the same date. The following day the reference was proceeded with *ex parte* and the defendant's Solicitor being absent, the surcharges remaining to be dealt with were disallowed. The plaintiff was called and gave evidence of the correctness of the steamer account which had been the subject of 222 objections by the defendant after inspection of the account books relating to it.

The plaintiff's Solicitor then withdrew his claim to the Rs. 1,300 and interest thereon so that the defendant's objections were allowed. He also withdrew a claim with regard to certain bills of costs.

This completed the inquiry and an award followed whereby the sum of Rs. 7,06,639 was awarded to the plaintiff with interest at 9 per cent. and costs.

The learned Judge was of opinion that the adjusted account could, once it was admitted on the record, be used as a deadly and destructive piece of evidence against the defendant, and that, as the defendant had specifically stipulated in the reference that it should not be so used, its admission by the umpire was misconduct and sufficient ground for setting aside the award. In considering whether this view is correct, the first question which arises is whether the reference contained any unmistakable stipulation which has been disregarded by the umpire.

It appears to me that the passage in the reference relied upon by the defendant is reasonably susceptible of two constructions. It was either a particular and specific, following upon a general, exclusion of all adjustments *qua* adjustments; or a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose. If the defendant's Solicitors intended to provide for complete exclusion of these documents, they did not choose words placing their intention beyond dispute. It is possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. Thus in *Middleditch* v. *Sharland* (2), a general account was decreed against a steward notwithstanding a receipt in full signed by the principal, which was only allowed as proof of a particular payment and

(2) (1799) 5 Ves. 87; 31 Eng. Rep. 485.

not of a general release or discharge upon an account stated.

The acquiescence of the defendant's Solicitor in the admission, as *prima facie* proof of the item of Rs. 7,053-8-0, of the account containing the adjustment of the 18th of August 1908, and in the cross-examination of the defendant upon the account containing the adjustment of the 31st of August 1910, suggests that the defendant's Solicitor did not then think that the documents had been excluded for all purposes by the terms of the reference.

It appears from an argumentative paragraph in the defendant's affidavit that the umpire, when he committed the act of misconduct charged against him, conceived an adjustment to be the totalling up of the two sides of an account and the striking of a balance. There is authority for this view. It is stated in Daniell's Chancery Practice (Ch. VIII, section 13), on the authority of *Burk* v. *Brown* (3) that "a plea of stated account must show that it was in writing, and likewise the balance in writing, or at least set forth what the balance was."

If the defendant's construction of the order of reference is correct, the stipulation relied on was a rule of evidence introduced *pro hac vice*, and the honest, though mistaken, admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award: see *Ghoolam Jilani* v. *Muhammad Hassan* (4). The scope of the reference was not affected by the mistake.

It appears to me that the action of the defendant was incorrect. The umpire, when asked to state a case, offered to adjourn consideration of the items under discussion for a week in order to give the defendant an opportunity of obtaining the leave of the Court for the statement of a case under clause 11 of the second Schedule of the Code. I do not think there would have been any difficulty in framing an award so as to raise the point in dispute as was done in *Scott* v. *Van Sandau* (5).

The defendant's rejection of this course and his decision to withdraw from the reference without the leave of the Court suggests uncertainty as to his position, and doubts as to the strength of his case on the remaining items of surcharge and steamer account.

In consequence apparently of the strong line taken by the defendant's Solicitor, the plaintiff's Solicitor to avoid all disputes gave up the items of Rs. 1,300 and Rs. 26-10 for interest thereon and the award in effect allows the defendant's objections to these items. I doubt whether the admission of the adjusted account in evidence was so fatal to the rest of the defendant's case as the learned Judge thinks. It is pure speculation that it would have been used with fatal effect in resisting the defendant's surcharges. No attempt was made so to use it in the long inquiry into the surcharge of Rs. 5,000. I fail to see also that it would have been of any value on the steamer account items of Rs. 1,270 (objection 30); Rs. 70,893 (objection 32); and Rs. 68,251 (objection 50).

The item of Rs. 1,270 was composed of Rs. 800 for stamp charges and Rs. 470 for transfer fee on 940 shares of the Bombay Steam Navigation Company, as to which evidence must have been easily obtainable.

The items of Rs. 70,893 and Rs. 68,251 were the totals of all items claimed on steamer account for two different periods and the account Exhibit H brought in by the plaintiff showing all the items included in those totals was the subject of 222 objections resulting from inspection of the steamer account books. The items of Rs. 68,251 did not appear in the adjusted account at all and the transfer of the objection as to Rs. 70,893 to the steamer account inquiry shows that it was recognised that it must, if the defendant wished, be dealt with item by item on the defendant's steamer account objections.

For the above reasons, I am of opinion that the umpire's action does not amount to misconduct and that the interests of justice do not require that his award should be set aside.

The judgment appealed from must be reversed and the motion dismissed with costs throughout on the respondent.

CHANDAVARKAR, J.—This is an appeal from an order of Davar, J., setting aside the award made by Mr. Kaikhashru Framji Modi, as umpire on a reference to arbitra-

(3) (1742) 2 Atk. 397; 26 Eng. Rep. 640.
(4) 29 I. A. 51 at p. 60 (P. C.); 12 M. L. J. 77; 29 C. 167; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902.
(5) (1844) 6 Q. B. 237; 8 Jur. 1114; 115 Eng. Rep. 92.

tion by order of the Court in Suit No. 917 of 1910.*

The suit had been brought by the appellant to recover from the respondent the sum of Rs. 5,00,000 and odd due on certain mortgages and other adjusted accounts. In defence the respondent pleaded *inter alia* that the adjustments were vitiated by fraud and misrepresentation and prayed that "proper accounts should be taken by and under the directions of this Hon'ble Court of all the dealings and transactions" between the parties.

The cause was, however, referred to arbitration with the consent of the parties by an order of the Court and the material portion of the terms of the reference, with which we are concerned in this appeal, is contained in the provisions in the submission that "the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration by them".

The arbitrators named in the reference having failed to arbitrate, Mr. Modi, appointed umpire thereby, took their place, and the inquiry before him commenced on the 8th of September 1911. At the sitting on the 19th of March 1912, one of the questions before the umpire related to an item of Rs. 1,300 debited by the appellant to the respondent. The question was whether the debit was proved. The onus at the outset lying on the appellant, his Solicitor sought to discharge it by tendering in evidence an adjusted account, in which the item appeared, and the signature on which the respondent has admitted in his written statement.

The respondent's Solicitor objected to the admissibility of the said adjusted account on the ground that the umpire had no authority, under the terms of the reference, to look at and take into consideration any adjustment between the parties which had been relied upon by the appellant in his suit.

The umpire overruled the objection of the respondent's Solicitor and admitted as A18 the "account purely as a statement of account acknowledged to have been signed by defendant."

In so admitting the statement, Davar, J., has held that the umpire "was guilty of what in law is called misconduct," inasmuch as the statement, having been an adjustment relied upon by the appellant (plaintiff) in this suit, had been deliberately excluded from the umpire's consideration by the express terms of his authority contained in the reference.

The question before us turns upon the proper interpretation of the clause in the reference which provided that "the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration" by the umpire.

It is contended for the appellant that under that clause every adjustment or settled account in the suit was made inadmissible and outside the jurisdiction of the umpire.

On the other hand, the contention for the appellant is that all the clause in question provided was that the umpire should not treat the account stated as an *adjustment* and give it the operation it would have in law as such; but that it did not prevent him from receiving it as an ordinary piece of evidence and considering its weight in that character.

In valuing the comparative force of these rival contentions, we must start with the fact that as the suit had been framed, it was on an account stated, so that had it gone to trial in the usual course, it was the respondent who would have had to begin his case at the outset and establish his pleas of fraud and misrepresentation before he could get rid of the binding character of the account and become entitled to go behind it and re-open the whole account between the parties. If those pleas were not proved, it was open to him to prove some one mistake at least in the account stated before he could get the right to surcharge and falsify. In the latter case, notwithstanding the mistake proved, the account stated would have continued to retain its character as such in law and the only liberty allowed to the respondent would have been to prove that certain items had been wrongly credited or wrongly omitted in the account; but he would not have been allowed to go into the general account. In either case, the account stated would have been a bar to all discovery and relief unless the respondent had first established his right to open the account either wholly or partially.

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* See *Haji Ahmed Haji Hussam* v. *Essaji Tajbhoy*, 17 Ind. Cas. 696; 14 Bom. L. R. 1007.—*Ed.*

AISHABAI *v.* ESSAJI TAJBHAI.

[See Story's Equity, 2nd Edition, English, section 523, p. 346; *Gething* v. *Keighley* (1)]. The law on the subject is even more tersely but clearly stated in Coote's Law of Mortgage (5th Ed.): "In every case, the account stated is liable to be opened for fraud, or, the party will be allowed, in case of specific error alleged and proved, to surcharge and falsify. He cannot, however, in the latter case go into the general account, though fraud will be a sufficient ground to open the whole account."

When, therefore, the suit was referred to arbitration, the terms of the reference relieved the suit from its nature as an action on an account stated and directed the arbitrators, and on failure of them, the umpire, to treat it as a suit for a general account between the parties. The respondent became entitled to go behind the account stated, without any restrictions as to proof of fraud or specific error and to get discovery. The reference required the umpire not to take "the adjustments" into consideration, *i. e.*, not to look at them *qua* adjustments; and not to give them the legal character and operation which an account stated has. But that did not prevent him from looking at them in any other light, so long as he did not, by treating the adjustments as accounts stated, deprive the respondent of his right under the terms of the reference to go into the general account and to discovery.

In my opinion, therefore, the language of the terms of the reference is in favour of the respondent's construction that all the umpire was restricted to was the consideration of the accounts stated in the suit in the light of *adjustments*. The language used is apt for the purposes of that construction, when the reference says that the umpire shall not take into consideration "the adjustments". In plain English, it means, he shall not consider the fact that there has been any adjustment. The submission does not say that he shall not receive the account in evidence and consider it at all, whether as an adjustment or otherwise.

In any case, the language used may fairly be said to be ambiguous, and extrinsic evidence can be admitted to explain the real meaning. We have that evidence afforded by the conduct of the parties in the earlier stage of the inquiry before the umpire to show what meaning they all attached to the term of the reference, which has led to the present dispute.

We find from the proceedings that the inquiry before the umpire having begun on the 8th of September 1911, on the 4th of October 1911 an *adjustment* or account stated (statement marked B) was tendered in evidence by the appellant's Solicitor on the ground that by means of the adjustment and his written statement, the respondent had admitted the execution and receipt of consideration and that under those circumstances, the *onus* of proving that the respondent had not received the moneys of the item then under discussion lay on the respondent. Respondent's Solicitor did not then object to the statement B, which was an adjustment relied upon by the appellant in this suit, going in on the ground that by the term of the reference the umpire had no authority to receive it as piece of evidence and treat it as such. On the other hand, he said he could not dispute the proposition of law, urged by the plaintiff's Solicitor. The result was that, the respondent's Solicitor not objecting, the statement B. was put in. Further in examining his client, respondent's Solicitor put questions to him with reference to some of the adjustments (see page 20 of part II of the Paper Book); and respondent admitted having signed "another statement of account," besides B. The appellant's Solicitor then produced another statement but in answer to his Solicitor respondent could not say whether that was the other statement which he had signed. The statement was then marked M. I for the identification; and respondent was asked questions with reference to it. And it is this very statement which on the 19th of March was objected to by respondent's Solicitor as outside the umpire's authority and jurisdiction when the appellant's Solicitor tendered it in evidence as a mere admission. The objection came very late then; and the previous conduct of the respondent at the inquiry is sufficient to show what meaning he in common with the plaintiff had attached to the term of the reference which is now in dispute. And if that meaning is admissible, we should accept it in preference to the other, which, if acted upon, makes all the proceedings held, and the expenses incurred at the inquiry before the umpire, abortive.

But it has been urged for the respondent before us that the result of the admission in

evidence of the adjustment A13 was practically such as to give it the character and operation of an account stated, the very thing which the terms of the reference had prohibited, inasmuch as the moment the adjustment went in, as a piece of evidence it might be, the umpire was at liberty to consider it and hold that it shifted the onus of proof as to the item of Rs. 1,300, for which it was admitted or any other item in the said account, on to the respondent. That was so no doubt; but there was still an important difference between the character of the onus so shifted had the account retained the aspect of an account stated, and the nature of the onus thrown on the respondent by the admission of the account as an ordinary piece of evidence. In the former case, the respondent could not have sought discovery and the right to go into the whole account without laying the foundation for his right thereto by proving fraud or misrepresentation. Or, if fraud and misrepresentation failed, he could have, in the event of any specific error in the account stated proved, only secured the right to surcharge and falsify but not the right to go into the general account. He could not have called upon the appellant to produce his books and discover his documents before removing the preliminary bar in his way in either case. But for the purposes of the reference that bar stood entirely removed; when the account stated (A 18) went in, there was nothing to prevent him from at once calling for discovery and going into the general account, without regard to proof of fraud or misrepresentation or mistake concerning the account stated.

Had the parties intended to shut out the adjustments absolutely even as mere admissions, not having the operation of an account stated, they could have taken care to say so and ought to have said so in the submission in distinct terms and refrained from dubious language, which laid a trap, as it were, for the umpire and made it open to either party to repudiate the reference after all the labour and expense of arbitration had been undergone. If, again, respondent felt that the umpire was exceeding his authority by misconstruing an important term of the reference, he could have sought the help of the Court and asked it to construe the term and facilitate the arbitration.

I think the circumstances of this case are such as to make applicable to it the observations of Alderson, J., in *Faviell* v. *Eastern Counties Railway Co.* (6). There the claims referred to arbitration were "an action of debt". But the plaintiff claimed before the arbitrator a sum for extra expenses which could be recovered only as damages, not debt. The arbitrator, in spite of defendant's protest, received the evidence of the extra work, and gave an award in respect of it in plaintiff's favour. The Court declined to set aside the award and treat it as a nullity, and Alderson, J., one of the Judges who composed the Court, said:— "When the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a Judge for the purpose of being allowed to revoke the submission, which no doubt, would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the submission would then have been raised before the Judge; but instead of doing that, the defendants, though they find the arbitrator going on, do not interpose but make the question one for his determination and he has determined it." Similar was the case here. The respondent's Solicitor objected before the umpire that the account stated could not be looked at, whether as an adjustment or otherwise and that by admitting it the umpire would exceed his jurisdiction. But the Solicitor did not seek the interposition of the Court for a proper construction of the term of the reference; he withdrew from the case; and allowed the inquiry to go on; and it was only when the award had been made that the respondent asked for the interposition of the Court to interfere and set aside the award as a nullity. I think it would be bad law and injustice if under the circumstances of the case and having regard to the language of the reference defining the umpire's jurisdiction, we were to hold that the award was void and the inquiry before the umpire was all infructuous.

(6) (1848) 2 Ex. 344; 6 D. & L. 54; 17 L. J. Ex. 223; 76 R. R. 615.

On these grounds, I concur in holding that the appeal should be allowed and the order appealed from should be set aside with costs.

Order set aside.

Attorneys for the Appellant: Messrs. *Payne & Co.*

Attorneys for the Respondent: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 96 OF 1913.

April 21, 1913.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SABITREE DABI—DEFENDANT—APPELLANT

versus

PROMODA PROSAD CHATTERJEE—PLAINTIFF—RESPONDENT.

Arbitration—Private arbitration—Award—Decree—Award deciding questions not referred and leaving undecided, questions referred, whether good—Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 20, 21—Remitting private award, if within power of Court.

A private award, that is, one made on a reference out of Court, is bad, if it decides questions not referred to the arbitrators and leaves undecided questions which they were authorised to decide.

In re Morphett, 2 D. & L. 967; 14 L. J. Q. B. 259; 10 Jur. 546, referred to.

If an award is open to objection in material particulars, the entire award must be deemed null and void.

Duke of Buccleuch v. *Metropolitan Board of Works*, L. R. 5 Ex. 221, at p. 229; 39 L. J. Ex. 130, at p. 136; *Ganes Narain Singh* v. *Malida Koer*, 10 Ind. Cas. 450; 13 C. L. J. 399 and *Ramji Ram* v. *Salig Ram*, 11 Ind. Cas. 481; 14 C. L. J. 188, relied upon.

But the invalid portion may be separated from the objectionable part, if this is possible, and enforced.

Muhammad Mumtaz Ali Khan v. *Farhat Ali*, 23 A. 394; 28 I. A. 190; 5 C. W. N. 881 and *Buta* v. *Municipal Committee of Lahore*, 29 I. A. 163; 29 C. 854; 7 C. W. N. 82; 87 P. R. 1902; 4 Bom. L. R. 673, relied upon.

Under paragraph 21 of Schedule II of the Civil Procedure Code of 1908, a Court is competent to direct a private award to be filed if the grounds mentioned in paragraphs 14 and 15 are not established. If such grounds are established, the Court is bound to refuse to file the award. A private invalid award cannot be remitted to the arbitrators to enable them to make a proper award.

Mana Vikrama v. *Mallicherry Kristnan*, 3 M. 69; *Tiruvengadathiengar* v. *Vaidinatha Ayyar*, 29 M. 303; *Dandekar* v. *Dandekars*, 6 B. 663 and *Mustafa Khan* v. *Phulja Bibi*, 27 A. 526; 2 A. L. J. 416; A. W. N. (1905) 86, referred to.

Appeal from the decree of the Sub-Judge of Burdwan, dated February 26th, 1913.

Babus *Bipin Behari Ghose* (Junior) and *Bankim Chandra Mukherjee*, for the Appellant.

Babus *Mohendra Nath Roy* and *Sajani Kant Sinha*, for the Respondent.

JUDGMENT.—This is an appeal against an order directing an award to be filed in Court. The award was made on the 4th July 1911 on the basis of a reference alleged to have been made out of Court on the 26th June 1911. The circumstances under which the reference was made may be briefly stated. One Mohesh Chandra Chatterjee died about the year 1890, leaving a widow Baroda Sundari, three sons by her Kumeda, Jnanoda and Promoda, and another son Kuloda by a predeceased wife. Jnanoda died in 1895 and left a minor widow, Sabitree, who is the first defendant in these proceedings and the appellant in this Court. Promoda is the plaintiff, Kumeda is the second defendant, and Baroda Sundari is the third defendant; Kuleda has not been joined as a party. The case for the plaintiff-respondent is that on the 26th June 1911 Sabitree agreed to have the matters in controversy between her and her brother-in-law and her mother-in-law referred to the arbitration of three persons and that the arbitrators have made an award in accordance with the terms of reference. He consequently commenced the present proceedings, on the 18th September 1911 to have the award filed and a decree drawn up in conformity therewith. The application was resisted by Sabitree on various grounds amongst which two only need be specified for our present purpose; namely, *first*, that the reference is not binding upon Sabitree as she did not execute the deed of submission; and *secondly*, assuming that there was a valid reference, the award is bad, as it decides questions not referred to the arbitrators and leaves undecided questions which they were authorised to decide. The Subordinate Judge has overruled these objections, directed the award to be filed, and made a decree in accordance therewith. Sabitree has appealed against the order directing the award to be filed and has also obtained a Rule to set aside the decree consequent thereon. In the appeal, all the points decided against Sabitree have been controverted but it is needless to

consider whether or not Sabitree did, as a matter of fact, agree to the submission; in our opinion, assuming there was a valid reference, the appeal must succeed on the ground that the award is bad as it does not decide questions referred to the arbitrators and decide questions which were not referred to them.

The first paragraph of the reference was in these terms: "Srimati Sabitree Debi has not as yet paid any portion of the amount which was payable to Srimati Baroda Sundari Debi under the award passed in the previous arbitration. Provision is to be made for realising from Sabitree Debi the amount to be found to be due to her on adjustment of account." When we turn to the award we find that there is no decision upon the question of arrears. The arbitrators proceed, on the other hand, to determine in what manner the maintenance will be paid in future. The reference was limited to the question of the recovery of the arrears; the award regulates the payment of sums to become due in future; this is plainly a case where the arbitrators have exceeded their authority [*In re Morphett* (1)], and it cannot be seriously disputed that the award, in so far as this particular clause is concerned, is not in conformity with the reference.

The third paragraph of the reference recites that it was settled by a previous award regarding the rent-paying and rent-free immoveable properties situated in the Districts of Mozafferpore, Darbhanga, Bankura and Burdwan, that the matters in relation thereto were to be settled thereafter; that various disputes had taken place regarding the aforesaid properties, and that, accordingly, provisions should be made for their present preservation and future partition, for settlements and collections of rent, for sales, and for expenditure on improvements and finally for distribution of the profits amongst the proprietors in equal shares. When we turn to the award on this point, we find it stated that Sabitree is to receive Rs. 300 a year out of the income of all the properties which are to be placed entirely under the management of her brothers-in-law, who have absolute authority to deal with the properties in any manner they choose and to spend entirely at their discretion, the balance of income left after payment of this sum of Rs. 300. It is plain that this does not make provision for distribution of the profits of the properties amongst the owners in equal shares. It is further clear that the obvious intention of the parties was that a scheme should be drawn up by the arbitrators for the management of the estate. This the arbitrators have not done; they have merely vested the properties entirely in the hands of two out of three owners, subject to the payment of an annuity to the appellant, this was clearly beyond their authority [*Wood* v. *Wilson* (2)].

The fourth paragraph of the reference recites that a sum of money had been kept in deposit in the Bank of Bengal for preservation of the estate, and that as heavy debts had been incurred, it was necessary to pay off those debts and for this purpose to withdraw the money in deposit. When we turn to the award, we find there, not merely a provision for the withdrawal of the money, but also directions given as to the mode in which the money was to be spent. Rupees 1,000 was to be given to Sabitree for the purchase of a house in the sacred city of Benares and the remainder would be applied in satisfaction of three-fourths share of the debts alleged to be due by the estate. The effect of this portion of the award is that the brothers-in-law of Sabitree have become entitled to use her money for their purposes. This was clearly beyond the authority of the arbitrators to direct under the fourth clause, and the award is, in this respect, essentially on a matter not submitted to the arbitrators, namely, the question of the distribution of the amount in deposit after its withdrawal. [*Morgan* v. *Mather* (3)].

The fifth paragraph of the reference states that various sums are due from the tenants, that large sums are in deposit on account of awards made in Land Acquisition cases and, that, consequently, provisions must be made in respect of these monies. When we turn to the award, we find the direction given that all these monies will practically be at the absolute disposal of Promoda. This is plainly without jurisdiction, because the

(1) 2 D. & L. 967; 14 L. J. Q. B. 259; 10 Jur. 546.

(2) 2 C. M. & R. 241; 4 L. J. Ex. 193.
(3) 2 Ves. J. 15; 2 R. R. 163; 30 Eng. Rep. 560.

parties never intended to authorise the arbitrators to give away admittedly joint funds to one of the joint owners.

From an examination of the reference and the award, it is plain that the arbitrators have acted in excess of their authority and have also left open questions intended to be determined by them. This is a fatal objection to the validity of the award: the submission furnishes the source and prescribes the limits of the authority of the arbitrators and the award, both in substance and form, must conform to the submission. In the present case, the award is open to objections in material particulars and the entire award must be deemed null and void. [*Duke of Buccleuch* v. *Metropolitan Board of Works* (4); *Ganes Narain Singh* v. *Malida Koer* (5); *Ramji Ram* v. *Salig Ram* (6)]. This is not a case in which the invalid portion may be separated and enforced apart from the objectionable part. [*Muhammad Mumtaz Ali Khan* v. *Farhat Ali* (7); *Buta* v. *Municipal Committee of Lahore* (8)].

We have finally been asked by the respondent to remand the case to the Court below so that it may be remitted to the arbitrators to enable them to make a proper award, and reliance has been placed upon paragraphs Nos. 20 and 21 of the second Schedule of the Code of Civil Procedure of 1908 to justify the adoption of this course. Now paragraph 21, provides that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraphs 14 or 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. The learned Vakil for the respondent has argued that it is open to the Court to remit the award because by implication the provisions of paragraph 14 may be deemed incorporated in paragraph 21. In our opinion, this contention is entirely unfounded. Under paragraph 21, the Court is competent to direct a private award to be filed if the ground mentioned in paragraphs 14 and 15 are not established. If such grounds are established, the Court is bound to refuse to file the award. This was the view taken under the Code of 1882 in the cases of *Mana Vikrama* v. *Mallicherry Kristnan* (9); *Tiruvengadathiengar* v. *Vaidinatha Ayyar* (10); *Dandekar* v. *Dandekars* (11) and *Mustafa Khan* v. *Phulja Bibi* (12) and upon the terms of paragraph 21, it is reasonably plain that in this respect the pre-existing law has not been altered by the new Code.

The result is that this appeal is allowed and the order of the Court below discharged. The application to file the award will stand dismissed with costs in both the Courts. We assess the hearing fee in this Court at Rs. 300.

Appeal allowed.

(4) 5 Ex. 221 at p. 229; 39 L. J. Ex. 130 at p. 136.
(5) 10 Ind. Cas. 450; 13 C. L. J. 399.
(6) 11 Ind. Cas. 481; 14 C. L. J. 188.
(7) 23 A. 394; 28 I. A. 190; 5 C. W. N. 881.
(8) 29 C. 854; 29 I. A. 168; 87 P. R. 1902; 7 C. W. N. 82; 4 Bom. L. R. 673.
(9) 3 M. 68 at p. 69.
(10) 29 M. 303.
(11) 6 B. 663.
(12) 27 A. 526; 2 A. L. J. 416; A. W. N. (1905) 86.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 2055 OF 1910.

February 29, 1912.

Present:—Mr. Justice Kensington.

FAZAL HUSSAIN—DEFENDANT—PETITIONER

versus

MRS. HOLMES—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Small Cause Court judgment—Finding of fact.

A suit was based on a document which was neither a pro-note nor an acknowledgment of debt. It was merely a receipt.

A decree was passed on the mere statement of the plaintiff that the receipt was for money advanced as a loan. It appeared that the parties were at one time partners in business and it was impossible to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business:

Held, that the case was a fit one for interference on revision and that the suit must be dismissed.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge of the Small Cause Court, Amritsar, dated 30th March 1910, decreeing the claim.

Mr. *Muhammad Din*, for the Petitioner.

Mr. *Vishnu Singh*, for the Respondent.

JUDGMENT.—The decision of the Small Cause Court in this case appears to me quite indefensible. The document on which plaintiff has sued is a simple receipt for money paid in May 1907. It does not constitute a pro-note or even an acknowledgment of debt.

The mere statement of the plaintiff that the money was advanced to defendant as a loan is not sufficient proof to enable her to recover the money years afterwards from defendant, especially as it is admitted that

the parties were at one time partners in a business in hides. It is impossible to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business.

The revision is allowed and the decree of the Small Cause Court is set aside. The plaintiff's suit is dismissed, but the parties will pay their own costs in both Courts as the defendant's version of the transaction is also unsatisfactory.

Suit dismissed; Revision allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 268 OF 1910.

May 28, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

CHITU—DEFENDANT—APPELLANT

versus

JAWAND SINGH AND OTHERS—PLAINTIFFS

LEHNA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Appointed heir does not succeed to collaterals of the adoptive father.

Among *Jat Sikhs* of the Tarn Taran Tahsil, Amritsar District, an heir appointed under Customary Law does not acquire a right to succeed to the collateral relatives of the person who appoints him.

Makhan Singh v. *Dula*, 4 P. R. 1906; 55 P. L. R. 1906; *Dial Singh* v. *Sewa Singh*, 103 P. R. 1909; 169 P. W. R. 1909; 15 P.L. R. 1910; 4 Ind. Cas. 857, distinguished.

Second appeal from the decree of the Divisional Judge, Amritsar, dated the 7th December 1909, confirming that of the Subordinate Judge, 1st Class, Amritsar, dated the 6th August 1909, decreeing plaintiff's claim in part.

Mr. *Nand Lal*, for the Appellant.

Mr. *Gokal Chand*, for the Respondents.

JUDGMENT.—The facts are stated in the judgment of the lower Appellate Court. The question for consideration is whether the appellant, who was adopted by his paternal great uncle, is entitled to succeed to collaterals, as representative of his adoptive father who has died, during the life-time of his natural father.

The parties are *Jat Sikhs* of the Tarn Taran Tahsil, Amritsar, and the adoption was the usual customary appointment of an heir. There is no force in the contention for the appellant that the adoption was a formal adoption under the Hindu Law. The Will of the adoptive father, dated August 1888, does not support the contention and there is no evidence of any value in support of it.

The general rule, for which ample authority is cited in Article 49 of Rattigan's Digest of Customary Law, is that an heir appointed under Customary Law does not acquire a right to succeed to the collateral relatives of the person who appoints him inasmuch as the relationship established between him and the appointer is purely personal.

Of the authorities cited for the appellant, *Jowala Singh* v. *Musammat Luchmi* (1) lays down the rule that although a formal adoption would give a right of succession to collaterals, the mere appointment of an heir would not have that effect. In *Makhan Singh* v. *Dula* (2) it was held that the custom among the *Chima Jats* of the Daska Tahsil, Sialkot, as proved by the *Riwaj-i-am* and some instances, entitled the adopted son to succeed to his adoptive father's collaterals.

This adoption was apparently a customary appointment of an heir but in *Ram Ditta* v. *Takht Mal* (3), this ruling was differed from and it was held that the weight of authority was against the right to collateral succession. In *Dial Singh* v. *Sewa Singh* (4), it was held that the Record of Rights supported by instances established the right among *Jat Sikhs* of the Moga Tahsil, Ferozepore, of an adopted son, who was of the *got* of the adoptive father, to succeed collaterally in the family of the adoptive father.

In the present case, neither the Record of Rights nor the Customary Law of the Tahsil or District nor instances have been cited in support of the right set up by the appellant and on the record as it stands, it cannot be held that that right has been established.

Counsel for the appellant has failed to establish any case for further inquiry and even if on the day on which judgment was delivered in the Court of first instance, the one or the other of the respondents told the appellant that the case should be compromised, the appellant had had ample opportunity of producing evidence in support of his case and, in our opinion, no further opportunity of adducing evidence should be allowed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 14 P. R. 1884.
(2) 4 P. R. 1906; 55 P. L. R. 1906.
(3) 50 P. R. 1908; 104 P.W.R. 1908; 67 P.L.R. 1908.
(4) 4 Ind. Cas. 857; 103 P. R. 1909; 169 P. W. R. 1909; 15 P. L. R. 1910.

ABDUL MAJID KHAN *v.* NOROL HAQUE.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1619 OF 1912.
January 17, 1913.
Present:—Mr. Justice Sharfuddin and Mr. Justice Richardson.
ABDUL MAJID KHAN—ACCUSED —PETITIONER
versus
Munshi NOROL HAQUE—COMPLAINANT OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), s. 195—Fabricating false evidence—Fabricating document—Lodging suit on same—Calling original to be produced—Offence, whether committed in relation to judicial proceeding—Sanction for prosecution, whether necessary.

One *A. M.* fabricated a document and caused it to be registered: he brought a suit on the basis of this document filing a certified copy with the plaint and asked that the defendant be summoned to produce the original; this the defendant was unable to do so, an application was made to have the document produced from the Sub-Registry Office. A complaint was then made against *A. M.* of an offence under section 193 of the Penal Code without obtaining the sanction of the Civil Court in which the suit was brought; the complaint was dismissed upon the ground among others that no sanction had been accorded:

Held, that the offence imputed was committed in relation to a judicial proceeding in Court and that previous sanction for the prosecution must be obtained from the Court under clause (*c*) of section 195 of the Criminal Procedure Code.

Rule against the order of the Additional District Magistrate of Tipperah, dated September 11th, 1912, directing a further inquiry into the case which was dismissed by the Deputy Magistrate of Comillah, on August 24th, 1912, under section 203 of the Criminal Procedure Code.

Moulvi *A. K. Fazlal Huq*, for the Petitioner.

Babu *Sasadhar Roy*, for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Comillah to show cause why the proceeding against the petitioner, dated the 11th September 1912 directing a further inquiry into the case, should not be set aside on the 2nd ground mentioned in the petition.

The 2nd ground mentioned in the petition is as follows:—"For that the learned Additional District Magistrate has erred in practically ignoring the fact that the offence, if any, committed by the petitioner came under the first part of section 193, Indian Penal Code, which is a graver offence than that referred to in the latter part, and as this graver offence requires sanction under section 195, Code of Criminal Procedure, the present prosecution is bad in law".

The facts antecedent to the present proceedings are these :—One Abdul Majid Khan, the present petitioner, had married one Abida Khatun, the elder daughter of the present complainant. This girl died some time in 1313 in her husband's house. The complainant and his wife thereupon instituted a suit in the local Civil Court against Abdul Majid Khan for recovery of their share of the dower and the ornaments left by Abida Khatun. It was then alleged that the present petitioner fabricated a false *kabinnama* alleging that he had married Tajunnessa Khatun, another daughter of the complainant, in 1317. The complainant alleges that no such marriage had ever taken place. This *kabinnama* appears to have been registered in the local Sub-Registry Office on the 20th of October 1910. On behalf of the prosecution it is alleged that Abdul Majid fabricated this document with the intention of using it in a judicial proceeding. On the strength of this *kabinnama* the present petitioner, Abdul Majid, instituted a suit for restitution of conjugal rights against Tajunnessa and her father, the complainant. Along with the plaint a certified copy of the *kabinnama* was filed by the petitioner, as a proof of his marriage with Tajunnessa; and he asked the Court to summon Tajunnessa to produce the original. But as Tajunnessa alleged that she was not in possession of that document and that no marriage had ever taken place, the petitioner applied to the Court to have the document produced from the Sub-Registry Office. When that suit had progressed thus far the petitioner applied to the Court for permission to withdraw the suit, with liberty to bring a fresh suit on the same cause of action. Permission was, however, refused; and thereupon an appeal was preferred to the Appellate Court against the order of the Munsif refusing permission.

The complainant then instituted the present case, without having obtained any sanction under section 195, Code of Criminal Procedure, from the Munsif. The Deputy Magistrate, who was in charge of this criminal case, dismissed the complaint under section 203, Code of Criminal Procedure, on the ground, among others, that no sanction

having been accorded by the Munsif, the prosecution of the petitioner could not be allowed. An application was then made to the Additional District Magistrate by the present complainant for a further inquiry into this case. This officer held that sanction was not necessary, on the ground that the offence under section 193, Indian Penal Code, that is, fabricating false evidence, was completed as soon as the document was fabricated, if it could be shown that it was the intention of Abdul Majid at the time to use it in a judicial proceeding. That this must have been his intention was, he further held, proved by his own conduct in instituting a suit for restitution of conjugal rights; and by the fact that in that suit he produced a certified copy of the *kabinnama* in question. He held that the offence under section 193, Indian Penal Code, was not in the circumstances committed in any Court, or in relation to any judicial proceeding and an order for further inquiry was passed by him.

The petitioner then moved this Court and obtained the present Rule. For the purposes of the Rule we assume that the *kabinnama* was forged.

The point of law involved is, whether, in the circumstances, sanction by the Munsif's Court was necessary or not. If it was necessary the present proceeding must be set aside: if not, the case against the petitioner should proceed. If the petitioner had not instituted a civil suit for restitution of conjugal rights and had not in that suit relied upon the *kabinnama* no sanction would have been necessary. But when, after fabricating that document he lodges a suit, files a certified copy of the *kabinnama*. and asks the Court to cause the original to be produced we must hold that the offence imputed was committed in relation to a judicial proceeding in the Munsif's Court. That being so, under section 195, clause (*b*), of the Code of Criminal Procedure, no Court can take cognizance of the offence, except with the previous sanction, or on the complaint, of the Munsif's Court, or of some other Court to which the Munsif's Court is subordinate.

That being our view we make the Rule absolute, and set aside the order directing a further inquiry into the case. The proceedings taken under that order are quashed.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 32 OF 1913.

March 8, 1913.

Present:— Sir Henry Drake-Brockman, KT., J. C.

SARWA—PETITIONER

versus

EMPEROR— PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 190, 191, 537—Chalan *case—Accused added by Magistrate—Not bound to act under section* 191—*Evidence to be taken afresh—Irregularity not to take evidence again—Curable by section* 537.

L. was chalaned by the Police, and the Magistrate, after examining the investigating officer, considered that *S.* should be joined as an accused person. Process was accordingly issued to *S.* and he was tried along with *L.* Both were convicted:

Held, that the Magistrate took cognizance of *S.*'s offence under clause (*b*), not under clause (*c*) of sub-section (1), section 190, Criminal Procedure Code, and was, consequently, not bound to act under section 191 of the Code;

Qutba v. *Emperor*, 32 P. R. 1904 Cr.; 1 Cr. L. J. 511; 68 P. L. R. 1904, *Charu Chandra* v. *Narendr*, 4 C. W. N. 367, referred to.

That the Magistrate committed an irregularity in simply reading over the investigating officer's deposition to *S.* who then cross-examined, instead of examining the witness again.

That the mistake having not prejudiced *S.* it might, therefore, be taken as cured by section 537 of the Criminal Procedure Code.

Revision against the order of the District Magistrate, Bhandara, dated the 20th February 1913, confirming the conviction and sentence passed by the Tahsildar and Magistrate, second Class, Tirora, dated the 11th February 1913.

Dr. *H. S. Gour*, for the Petitioner.

JUDGMENT.—In this case one Lachman Singh was *chalaned* by the Police to the Court of the Tahsildar, Tirora, a Magistrate of the 2nd class, for having voluntarily caused grievous hurt to Ramlal. After examining the investigating officer the Magistrate considered that Sarwa, the present applicant, should be joined as an accused person. Process accordingly issued to Sarwa and he was tried along with Lachman Singh. Both men were eventually convicted, Lachman Singh under section 325, Indian Penal Code, and Sarwa under that section read with section 114 *ibid*. Sarwa appealed to the District Magistrate, one of his contentions being that the trying Magistrate had taken

cognizance of the case against him under clause (*c*), sub-section (1) of section 190, Criminal Procedure Code, and so ought not to have tried him without first taking action under section 191 *ibid.* This objection was overruled by the Appellate Court on the strength of the decisions of *Iagat Chandra* v. *Queen-Empress* (1) and *Emperor* v. *Sakhia* (2). It is now repeated in this Court.

The case from the Central Provinces above cited is not precisely in point, inasmuch as there action was taken by the Court under section 351, Criminal Procedure Code. Decisions more apposite are those of *Qutba* v. *King-Emperor* (3), *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (4), and the Calcutta one referred to by the District Magistrate. In all these the proceedings began on receipt of a complaint, *i.e.*, under clause (*a*) of sub-section (1), section 190, Criminal Procedure Code. In the first the evidence disclosed that the person complained against was innocent but that possibly another person was guilty and the Magistrate accordingly directed the trial of that other. In the second the persons complained against were tried and convicted: the evidence showing that others were also concerned in the same offence, those others were proceeded against by the Magistrate and separately tried. In the third the complaint implicated only three persons but a preliminary inquiry revealed the complicity of a fourth and processes were issued simultaneously against all four. The *ratio decidendi* was that the Magistrate, having cognizance of the offence, was bound to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence. This principle seems to have been expressly embodied in section 351 of the Code and it applies equally whether proceedings started on a complaint or on a Police report. I hold, therefore, that the Magistrate took cognizance of Sarwa's offence under clause (*b*), not under clause (*c*) of sub-section (1), section 190, Criminal Procedure Code, and was, consequently, not bound to act under section 191 *ibid.*

(1) 26 C. 786; 3 C. W. N. 491.
(2) 3 Ind. Cas. 568; 5 N. L. R. 113; 10 Cr. L. J. 303.
(3) 32 P. R. 1904 Cr.; 11 Cr. L. J. 511; 68 P. L. R. 1904.
(4) 4 C. W. N. 367.

An irregularity not complained of here was, however, committed by the Magistrate. When both the accused persons were placed before him he did not again examine the investigating officer, but read over that witness's deposition to Sarwa who then cross-examined. As it was decided to try both Lachman Singh and Sarwa together, the proceedings should have commenced afresh. This mistake did not prejudice Sarwa, for the Police officer's evidence contains practically nothing but a history of the investigation, it may, therefore, be taken as cured by section 537 of the Code.

On the merits it is urged on the applicant Sarwa's behalf that he is not shown to have contemplated the infliction of grievous hurt by Lachman Singh. The evidence, however, makes it perfectly clear that he was backing Lachman Singh in an effort to rescue cattle which had been lawfully seized by Bisheshar (P. W. No 3) for trespass, and that when Ramlal intervened to support Bisheshar in a claim to impound the animals Ramlal was held by Sarwa while Lachman Singh beat him with a *lathi* fracturing his shoulder and two bones in his right leg. The applicant's intention was certainly to make resistance by Ramlal impossible, and he cannot but have known that repeated blows with a *lathi* were likely to fracture a bone. I agree, therefore, with the Courts below in holding that the applicant intentionally aided Lachman Singh in voluntarily causing grievous hurt to Ramlal.

I would add that the sentence of three months' rigorous imprisonment with fine of Rs. 100 would be legal and not excessive even if Sarwa contemplated no more than the infliction of simple hurt. Forcible rescue of cattle seized for trespass is described by the trying Magistrate as becoming common in his Tahsil, so that deterrent sentences are necessary.

The application for revision is accordingly dismissed.

Application dismissed

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 434 OF 1913.
May 7, 1913.
Present:—Mr. Justice Imam and
Mr. Justice Chapman.
PANCHU MANDAL AND OTHERS—ACCUSED —PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195, sub-s. (1) cls. (a) and (b)—Sanction of Court—Application made by some body, if necessary—Police report, whether sufficient application—Penal Code (Act XLV of 1860), s. 180—Disobedience of order.

Sanction to prosecute a person under section 180 of the Indian Penal Code was given by a Magistrate on a Police report setting forth the facts of the disobedience of the order and also containing a request that the accused should be prosecuted under the section:

Held, that the Police report was a sufficient application for the purposes of the law to justify the Magistrate in giving the sanction under section 195 of the Criminal Procedure Code if an application was needed at all.

Per *Chapman, J.*—Even if a Court ought not to proceed except upon an application when acting under section 195, sub-section (1), clause (*b*), an application is not necessary in cases which come under section 195, sub-section (1) clause (*a*) of the Criminal Procedure Code.

Mr. *Z. R. Zahed*, Counsel and Moulvi *Wahed Hussain*, for the Petitioners.

Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.

IMAM, J.—This was a Rule calling on the District Magistrate of Nadia to show cause why the sanction to prosecute the petitioner for disobedience of the order passed by the Sub-Divisional Officer should not be set aside on the ground that the order complained of is neither under section 195 nor a direction to prosecute under section 476, Criminal Procedure Code.

We find no substance in this Rule. The order was clearly made under section 195, clause (*a*) of the Criminal Procedure Code. It is pressed on us that a sanction under section 195 (*a*) cannot be good without an application made on behalf of some body for sanction to be granted. It is admitted that the sanction was given by the Magistrate on a Police report setting forth the facts of the disobedince of the order and also containing a request that the petitioner should be prosecuted under section 180, Indian Penal Code. We see in the report a sufficient application

for the purposes of the law to justify the Magistrate in giving the sanction under section 195 if an application were needed at all.

We, therefore, discharge the Rule.

The due promulgation of the order in respect of which the disobedience is alleged, is disputed by the petitioner. We express no opinion on the point but leave it to the Magistrate who will try the case to decide it.

CHAPMAN, J.—I agree, but desire to add that in so far as the provisions contained in section 195 (1) (*a*) are concerned, I do not see the necessity of any application for sanction. The cases in which it has been said that a Court, acting under section 195 (1) (*b*), ought not to proceed except upon an application are no authority for saying that an application is necessary in cases which came under section 195 (1) (*a*).

Rule discharged.

SIND JUDICIAL COMMISSIONER'S COURT.
CRIMINAL APPEAL No. 73 OF 1912.
December 18, 1912.
Present:—Mr. Pratt, J. C.
IMPERATOR—PROSECUTOR
versus
MULO—ACCUSED—APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 345—(6)—Composition of an offence—Out of Court—Magistrate to inquire into when pleaded—Proof ousts jurisdiction.

The provisions of section 345 (6) indicate that the composition of an offence has the same effect in a criminal trial as it would have in a civil suit. It operates as a complete bar to the prosecution.

The composition need not be effected in Court, and the plea by the accused that the offence charged has been compounded out of Court, must be inquired into by the Magistrate trying the accused, and, if proved, would bar the jurisdiction of the Magistrate to go on with the trial.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellant.

JUDGMENT.—The accused has been convicted under section 498, Indian Penal Code, for enticing away the wife of the complainant. In the course of the trial the accused pleaded that the offence had been

compounded by himself and the complainant who was the husband of the woman and offered to give evidence in support of the plea. The Magistrate made the following order:—

"The complainant is present and he says that he had never compounded with the accused and is not prepared to effect a compromise with them. In that case under no law could the inquiry be held as required by accused's Counsel to be done. The application is rejected."

The Magistrate appears to have considered that the composition under section 345 must necessarily be a proceeding in Court.

The principle of English Law is that the composition of an offence is illegal if the offence is one which is of public concern, but that if the offence is of a private nature and one for which the complainant might have recovered damages in a civil action the composition is lawful. *Keir* v. *Leeman* (1) and *Windhill Local Board* v. *Vint* (2). This principle is adopted in India, but here the test for deciding whether the offence affects the individual rather than the State is section 345 of the Criminal Procedure Code—*Dalsukhram* v. *Charles De Bretton* (3).

The agreement of composition pleaded in this case is, therefore, a perfectly legal agreement. If the complainant had instead of taking criminal proceedings sued for damages for the tort, the composition could have been pleaded as accord and satisfaction; and it would have been a complete bar to the suit.

The provisions of section 345 (6) indicate that the composition has the same effect in a criminal trial as it would have in a civil suit. It operates as complete a bar to the prosecution as if the accused had been acquitted.

There is no necessity for the composition to be effected in Court in the criminal trial any more than in the civil suit. The section of the Criminal Procedure Code does not imply any such necessity—at any rate in cases which can be compounded without the sanction of the Magistrate. This was the view of the Calcutta High Court as expressed in the case of *Murray* v. *Queen-Empress* (4). The accused in that case pleaded a composition out of Court and the Judges said that if that were proved the Magistrate would have had no jurisdiction to go on with the trial.

I think that is the correct view and, therefore, direct the Magistrate to take such further evidence as may be offered by the accused and the complainant on the issue whether the offence has been lawfully compounded.

The evidence to be taken in the presence of the accused and to be certified to this Court within a month.

Appellant admitted to bail on his own recognizance in Rs. 200 and one surety in the same sum to appear at the further hearings of the case in the Magistrate's Court and in this Court.

Appeal remanded.

(1) (1844) 66 R. R. 392; 6 Q. B. 308; 13 L. J. Q. B. 259; 8 Jur. 824; 115 Eng. Rep. 118.
(2) (1890) 45 Ch. D. 351; 59 L. J. Ch. 608; 63 L. T. 366; 38 W. R. 738.
(3) 28 B. 326; 6 Bom. L. R. 73.
(4) 21 C. 103.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 18 OF 1913.

February 15, 1913.

Present:—Mr. Stanyon, A. J. C.

SHEIKH MOTI—APPLICANT

versus

EMPEROR—PROSECUTOR.

Public Gambling Act (III of 1867), ss. 3, 4, 5, 10—Criminal Procedure Code (Act V of 1898), s. 239—Keeping a common gaming house, and playing therein—Different offences committed in the same transaction—Joint trial valid—Presumption of credible information—Police report credible information—Police not chalaning some persons found in the house and producing them as witnesses—Section 10 inapplicable—Fine primarily to be the punishment—Offence under section 3 more serious than offence under section 4.

Under the Public Gambling Act III of 1867 the offences of the keeper of a common gaming house and players therein arise out of facts so inseparably connected together as to form a single transaction, and, therefore, the house-keeper who commits one offence in that transaction, and his customer, who commits another (the house-keeper being in substance an abettor of the gambling) are clearly within the purview of section 239 of the Criminal Procedure Code, 1898, for joint trial as persons accused of different offences committed in the same transaction.

SHEIKH MOTI *v.* EMPEROR.

Makhan v. *Emperor*, 5 Ind. Cas. 720; 5 P. W. R. 1910 Cr.; 11 Cr. L. J. 211, referred to and doubted.

Where a warrant issued under section 5 of the Gambling Act, is duly signed, and shows upon the face of it that it was issued on credible information, it must be presumed that the Magistrate signing the warrant had such information.

A Police report is *prima facie* credible information.

If the prosecution choose to proceed only against some of the persons found gaming or present in a common gaming house, that does not prevent the officer conducting the prosecution from calling as witnesses persons who are not proceeded against. Section 10 has no application to such persons. It applies to persons converted by the Magistrate into witnesses out of the persons brought before him for trial.

The wording of sections 3 and 4, where, contrary to the usual rule, the punishment of fine *precedes* the alternative of imprisonment, suggests that the Legislature intended that primarily fine should be used as the mode of punishment, and imprisonment awarded in aggravated cases only.

An offence under section 3 is more serious than one under section 4.

Criminal revision against the conviction and sentence passed by the Magistrate, 1st class, Khandwa, dated the 21st January 1913.

Dr. *H. S. Gour*, for the Applicant.

JUDGMENT.—This application arises out of the same case as the application in Criminal Revision No. 24 of 1913, and this order will govern the disposal of both applications. The present applicant, Sheikh Moti, has been convicted under section 4 of Act III of 1867 (Gambling) and sentenced to rigorous imprisonment for 15 days. He was jointly tried with Sheikh Hayat, the other applicant for revision, who was convicted, under section 3 of the said Act, for keeping the common gaming house in which Sheikh Moti's offence was committed. Sheikh Hayat was also convicted under section 4, and for each of his two offences he was ordered to undergo rigorous imprisonment for 15 days, or one month in all. These convictions were had after summary trial on the 21st January 1913.

In the present case the first objection taken is that the trial is illegal because the two applicants could not be jointly tried, the one for gambling, and the other for keeping a gaming house. This contention finds support from the view taken by a Judge of the Punjab Chief Court in *Makhan* v. *Emperor* (1). That case certainly lays down that the keeper of a common gaming house cannot be jointly tried with a person accused of being found gambling in such house, but no reason is given for this view except by reference to some previous unpublished order of the same Court.

With due respect I am of opinion that the above view is too widely stated. Where the charge against the keeper is a general one, based on evidence that, on several occasions, gambling had taken place in the house kept by him for the purpose it may be that he could not be jointly tried with one of the gamblers; though even as to this I have some doubt But the usual procedure in a gambling case is to proceed upon the evidence of a single transaction. A warrant is issued, in pursuance of which a raid is made. It results in discovering a number of persons gambling with, or in the presence of, the owner or occupant of the house who, if not gambling himself; engaged in levying his toll for the use of the premises in some form—generally a percentage on the money invested or a fee per game. Thereupon the house occupant is arrested with his customers, and while they are charged with gambling, he is charged with finding the premises without which their gambling would not be criminally punishable. It is only because the gambling is carried on in a common gaming house that it is an offence: and it is only because of the facts discovered in that particular raid that the house is presumed to be a common gaming house. The offences of the keeper and players arise out of facts so inseparably connected together as to form a single transaction, and, therefore, the house-keeper who commits one offence in that transaction and his customer, who commits another, (the house-keeper being in substance an abettor of the gambling), are clearly within the purview of section 239 of the Criminal Procedure Code, 1898, for joint trial as persons accused of different offences committed in the same transaction. Therefore, the objection as to the validity of the trial, on the ground of misjoinder of accused breaks down.

It is then objected that the warrant, under which the raid of Sheikh Hayat's house was made, is not shown to have been issued on credible information, as required by section 5 of Act III of 1867, and that, therefore, no pre-

(1) 5 Ind. Cas. 720; 5 P. W. R. 1910 Cr.; 11 Cr. L. L. J. 211,

sumption under section 6 could legally be made. This objection was not seriously pressed, and is obviously untenable. The warrant, duly signed, shows upon the face of it that it was issued on credible information, and it must be presumed that the Magistrate signing the warrant had such information. A Police report is *prima facie* credible information.

Objection is next taken to the examination of some of the gamblers as witnesses without the previous sanction of the Magistrate. The objection is based on a misconception of section 10 of the Gambling Act. If the prosecution choose to proceed only against some of the persons found gaming or present in a common gaming house, that does not prevent the officer conducting the prosecution from calling as witnesses persons who are not proceeded against. Section 10 has no application to such persons. It is a further enabling section which empowers the Magistrate, out of the persons brought before him for trial, to convert any he may think fit into witnesses, and upon his doing so, and subject to their deposing truthfully, such persons are treated as approvers, and pardoned under section 11 of the Act.

Finally objection is taken to the sentence, and this objection must prevail. The Magistrate has wholly ignored the repeated orders of this Court, and Criminal Circular No. 1/23 against the imposition of short terms of imprisonment. The Magistrate's explanation as to some previous conviction under sections 3 and 4 is unintelligible, as the case was summarily tried, and there is no charge or other mention of any previous conviction. If there was any such conviction the present case would have come under section 15 of the Act. The further explanation that the section provides imprisonment is no explanation at all.

The wording of sections 3 and 4, where, contrary to the usual rule, the punishment of fine *precedes* the alternative of imprisonment, suggests that the Legislature intended that primarily fine should be used as the mode of punishment, and imprisonment only inflicted in aggravated cases. The present applicant must be treated as a first convict, and the sentence of 15 days' *rigorous* imprisonment inflicted upon him was most unjustifiable. The learned District Magistrate should warn the Magistrate concerned to exercise his powers with better discretion in future. A fine of Rs. 10 would have been sufficient, but, as the applicant underwent some days of rigorous imprisonment before he was released by the order of this Court, I uphold the conviction and remit the unserved portion of his sentence.

An offence under section 3 is more serious than one under section 4: but, in any case under this Act, a Magistrate must have, and must state in his judgment, special reasons for inflicting a substantive sentence of imprisonment. No such reasons are forthcoming in the present case, and the two sentences of 15 days' rigorous imprisonment against Sheikh Hayat are arbitrary, excessive and objectionable. He has already served one of them and a part of the second. In Criminal Revision No. 24 of 1913 I will confirm the convictions and must confirm the sentence of 15 days under section 3, as it has already been undergone. Under section 4 the sentence will be reduced to the term already suffered. In short, the unexpired portion of this prisoner's sentence is remitted, and he will forthwith be released.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1018 OF 1912.

August 14, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

BABURAM RAUT AND OTHERS—ACCUSED—PETITIONERS

vereus

EMPEROR—OPPOSITE PARTY.

Criminal appeal—Finding inconsistent with conclusion—Re-hearing, ground for—Right of private defence—Pure point of law--Penal Code Act (XLV of 1860), ss. 99, 100, 101, 148.

If the finding of a Sessions Judge on appeal is inconsistent with his conclusion, that is only a ground for re-hearing of the appeal.

It is open to the High Court to deal with the point, as a pure question of law, whether on the findings of the Sessions Judge on appeal the accused had a right of private defence.

The accused grew certain crops which the complainant's party cut, carried away and stacked in a neighbouring field belonging to another person.

The accused, forty or fifty in number then arrived armed with *lathis*, merely to take away their crops

and not to use any force unless they were opposed or attacked. While they were removing the crop, they were attacked by the complainant's party first by clods of earth and then with spear. This resulted in a free fight and persons of both parties were more or less injured:

Held, that the accused were acting within their rights in collecting their own crops with a view to taking them away, and they had the right to defend their persons from the attack of the complainant's party, which reasonably caused apprehension that death would be the result, and they had, therefore, a right to cause any injury short of death.

Rule against the order of the Deputy Magistrate of Chapra, dated March 15th, 1912, confirmed on appeal by that of the Sessions Judge of Saran, dated June 24th, 1912.

Mr. *Huq*, Counsel, and Babu *Surendra Kumar Bose*, for the Petitioners.

Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Saran to show cause why the convictions of the petitioners and the sentences passed upon them should not be set aside on the ground that the said convictions of the petitioners are not maintainable on the findings arrived at by the learned Sessions Judge.

The Rule was perhaps not very happily worded. If the finding of the Sessions Judge is inconsistent with his conclusion that would only be a ground for re-hearing of the appeal. But the real point in this case is whether on the findings of the Judge the petitioners had a right of private defence and are, therefore, entitled to acquittal. This is a matter with which we can deal as a pure point of law.

Now, the facts which are admitted to have been found by the lower Court are that Baburam grew the disputed crops. Baburam, we may say, is the principal man in the party of the accused. And Nagina is the complainant and his rival. It is further admitted that Nagina's party went and cut the crops, and carried them away and stacked them in the field of Ram Birich without interruption. They then retired from the field. After they had retired Baburam's party came up and they consisted of forty or fifty persons and apparently were also armed like Nagina's party with *lathis*, *gorasas* and other weapons. There is nothing to show, nor is there any finding that they intended to commit a premeditated riot. Their intention, so far as it can be gathered from the findings and from their conduct, was merely to take away the crops they were entitled to, and not to use any force unless they were opposed or attacked. Whether they would have been justified in attacking Nagina's party after deliberately arming themselves while Nagina's party were in possession of the crops is a matter which we need not decide here. They were clearly acting within their rights in collecting their own crops with a view to take them away.

While they were doing so they were attacked by Nagina's party, first by clods of earth and then with spear. This, as might be naturally expected, resulted in a free fight and in that fight several of Baburam's people were injured and four of Nagina's party, it is said, were nearly killed. What was the precise nature of their injury does not appear in the judgment. The learned Judge finds all these facts in favour of Baburam's party, yet he finds that there was no right of private defence either of property or of persons. As we have already said we need not at this stage discuss the question of right of private defence of property inasmuch as no property was then attacked. But certainly Baburam and his party had the right to defend their persons from an attack with clods and spears, an attack which reasonably caused apprehension that death would be the result. For the object of Nagina's party must have been to drive them away altogether from the *Khalian* and in doing so if they resisted, it is clear that some of them would probably have been killed. They had, therefore, a right to defend their persons and to cause any injury short of death. That being so the convictions and sentences, in our opinion, are illegal and must be set aside.

The Rule is made absolute, the convictions and sentences set aside, and the accused persons will be acquitted and released.

Rule made absolute.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 347 OF 1913.
April 16, 1913.
Present:—Mr. Justice Imam and Mr. Justice Chapman.
ABDULLAH MANDAL AND ANOTHER—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 173 190 cl. (c), 200—Information of theft case to Police—Report that case true but no evidence—Making over of case to Honorary Magistrate who reported that alleged stolen property belonged to accused—Issue of summons by Magistrate, whether proper—Proceedings before Honorary Magistrate, whether legal.

Information was given of the theft by the accused of a bullock to the Police who submitted a report to the Magistrate that the case against the accused might be true but that the evidence to prove it was not forthcoming. Thereupon the Magistrate made over the case to an Honorary Magistrate for inquiry and report. The Honorary Magistrate examined witnesses on both sides and reported that it was proved that the bullock was purchased by the accused and that no trial of the accused could be recommended. On receipt of this report, the Magistrate ordered the issue of summons against the accused with the remark that the purchase of the animal by the accused should be proved in Court:

Held, that (1) upon the report of the Police under section 173 of the Criminal Procedure Code, it was open to the Magistrate to take cognizance of the case under section 190, clause (*b*), but instead of doing so, he made over the case for inquiry and report as though he was dealing with the matter on a complaint under section 200; the proceedings before the Honorary Magistrate were not in consonance with the provisions of the law; and (2) after the report of the Police and the Honorary Magistrate, the Magistrate ought not to have summoned the accused; and (3) the proceedings should not be allowed to go on.

Rule against the proceedings taken against the petitioners under section 379, Indian Penal Code, by the Sub-Divisional Magistrate of Hooghly, by his order of January 6th, 1913.

Babu *Manmotha Nath Mukherjee*, for the Petitioners.

JUDGMENT.—This was a Rule calling on the District Magistrate of Hooghly to show cause why the order, dated the 6th January 1913, should not be set aside.

Information was given to the Police by the complainant, Nasirul Huq, at the *Thana* of Dadpur in respect of the theft of a bullock belonging to his brother-in-law, Panchhari Sheik, by the petitioners Abdullah Mandal and Neamul Huq. The Police on such information being recorded, submitted a report to the Magistrate in which they stated that the case against the accused might be true but that the evidence to prove it was not forthcoming. Thereupon the Sub-Divisional Magistrate made over the case to Mr. N. K. Bose, an Honorary Magistrate, for the purposes of inquiry and report. The Honorary Magistrate examined a number of witnesses on both sides and then submitted a report to the Sub-Divisional Magistrate in which he expressed his opinion that it was amply proved that the bullock had been purchased by Abdulla and that, therefore, he could not recommend a trial of the accused under section 379, Indian Penal Code. On receipt of this report the Sub-Divisional Magistrate ordered the issue of summons against the petitioners and in his order remarked that the purchase of the animal by the accused should be established in Court.

The proceedings of the Sub-Divisional Magistrate are open to attack on grounds of law and fact alike. A report having been submitted by the Police under section 173, it was open to the Magistrate to take cognizance of the case under section 190, clause (*b*), of the Criminal Procedure Code. But he did not choose to do so and proceeded to make over the case for inquiry and report as though the matter he was dealing with was one on a complaint under section 200 of the Code. The proceedings before the Honorary Magistrate thereafter, so far as they bear on the case based on a Police report, were not in consonance with the provisions of the law. We might have been disposed to overlook the proceedings that were erroneously had before the Honorary Magistrate and should have treated, the order of the Sub-Divisional Magistrate for the issue of summonses against the accused persons as one passed under section 190, clause (*b*), had not the petitioners based their contention for the dropping of these proceedings on another ground as well. They say that the facts disclosed before the Honorary Magistrate do not justify the trial of the accused persons. Ordinarily we would not be disposed to interfere with the discretion of the Magistrate if it were not for exceptional circumstances, namely, the examination of a number of witnesses before the Honorary Magistrate having already had the effect of causing the two parties a great deal of trouble. If those proceedings before

the Magistrate had disclosed facts which led us to believe that a trial would be in the interest of justice, we should have had no hesitation in allowing the proceedings to go on. But the inquiry by the Police as well as by the Honorary Magistrate disclosing the fact that there is no case against the petitioners that could be rightly tried, and the Sub-Divisional Magistrate not having given sufficient ground for not agreeing with the Honorary Magistrate and the Police, we are not disposed to allow the proceedings to go on.

The order, therefore, is that this Rule be made absolute, the order of the Magistrate, dated the 6th January 191[illegible], set aside and the proceedings stayed. If the petitioners are on bail, they will be discharged from their bail.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 148 OF 1912.

November 14, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

IMPERATOR—PROSECUTOR

versus

CHELLARAM NARAINDAS—

ACCUSED—APPLICANT.

Criminal Procedure Code (Act V of 1898), *ss.* 188, 192, 537—*Native Indian Subject committing offence in foreign country—Sanction of Local Government not obtained—Proviso to section* 188 *applicable—Trial illegal or irregular—Section* 537 *cannot be applied at intermediate stage of case—Order of District Magistrate under section* 192 *does not decide questions of law or fact in the case.*

The accused, a Native Indian Subject of the King, was charged with the offence of criminal breach of trust committed at Las Palmas in Spain. He objected to his trial by the City Magistrate, Hyderabad, on the ground that it was illegal for want of sanction of the Local Government.

The Magistrate decided that he had jurisdiction as the case had been made over to him, under section 192, Criminal Procedure Code, by the District Magistrate:

Held, on revision;

(*i*) that an order by a District Magistrate under section 192, Criminal Procedure Code, does not import a decision of any question either of law or fact arising in the case;

(*ii*) that the proviso to section 188, Criminal Procedure Code, is universal in its application and is not restricted to Native States in India;

(*iii*) that whether the proceedings of the Magistrate were irregular or illegal for want of sanction of the Local Government, section 537, Criminal Procedure Code, could not be applied at an intermediate stage of the case so as to allow the error to remain uncorrected.

Mr. *Wadhumal Oodharam*, for the Applicant.

JUDGMENT.—This is an application for revision of an interlocutory order made by the City Magistrate, Hyderabad, deciding that he has jurisdiction to try the accused.

The Magistrate bases his decision solely on the ground that accused had been made over to him under section 192 of the Criminal Procedure Code for trial by the District Magistrate. But an order by a District Magistrate under section 192 does not import a decision of any question either of law or fact arising in the case. The Magistrate was, therefore, wrong in not allowing the accused to raise the question of jurisdiction. We might return the record to the Magistrate with a direction to this effect that as the case is before us it is expedient that we would consider the question raised and decide it.

The accused is a Native Indian Subject of the King and the offence charged against him is that of criminal breach of trust committed at Las Palmas in Spain.

The accused is at Hyderabad Sind; an offence committed out of British India is punishable as if it had been committed within British India under section 3 of the Indian Penal Code; and jurisdiction is conferred on the Magistrate by the first clause of section 188, Criminal Procedure Code, subject to the first proviso.

The only question is whether under that proviso the sanction of the Local Government is necessary for the trial?

The contention of the Public Prosecutor is that the words "and where there is no Political Agent the sanction of the Local Government shall be required" apply only to the territories of Indian Princes where a Political Agent might be appointed, and that places outside India altogether are beyond the scope of the proviso.

The generality of the words used negative this interpretation and the history of the

legislation which led to the amendment of section 188 points the same way.

Extra territorial jurisdiction is vested in the Governor-General in Council in his executive capacity and also in the Indian Legislature.

The legislative powers are derived from three Acts of Parliament. These are:—

(*i*) The Indian Councils Act, 1861, 24 and 25 Vict. c. 67:—"For all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty."

(*ii*) The Government of India Act, 1865, 28 and 29 Vict. c. 15:—"For all British Subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government or otherwise."

(*iii*) The Indian Councils Act, 1869, 32 and 33 Vict. c. 98:—"For all persons being Native Indian Subjects of Her Majesty without and beyond as well as within the Indian Territories under the deminion of Her Majesty."

The jurisdiction of the Governor-General in Council in his executive capacity is much wider and is now declared in the Indian (Foreign Jurisdiction) Order in Council, 1902 —See Gazette of India, Part I, page 667. This foreign jurisdiction is delegated to the Governor-General in Council by His Majesty the King; and the Foreign Jurisdiction of His Majesty is declared in similar terms in the preamble to the Foreign Jurisdiction Act, 1890, 53 and 54, Victoria, Chapter XXXVII.

Now the Indian Foreign Jurisdiction and Extradition Act, 1879, was defective in many ways. It dealt with both the extra territorial powers of the Governor-General in Council in his executive capacity and with the extra territorial powers of the Indian Legislature. The former was declared in the preamble and section 8 was an enacting section under the latter power. That section corresponded exactly with section 188 of the Code of Criminal Procedure of 1882 and was as follows:—

"The law relating to offences and to Criminal Procedure for the time being in force in British India shall, subject as to procedure to such modifications as the Governor-General in Council from time to time directs, extend

(*a*) to all European British Subjects in the dominions of the Princes and States in India in alliance with Her Majesty; and

(*b*) to all Native Indian Subjects of Her Majesty in any place beyond the limits of British India."

This section fell short of the powers conferred by Parliament for it did not embrace servants of the Government of India over whom jurisdiction had been given by the Indian Councils Act, 1861, see *Queen Empress* v. *Natwarai* (1). On the other hand, it exceeded those powers as the expression 'European British Subject' is much wider than the phrase, British Subject of Her Majesty, occurring in the Government of India Act, 1865.

These defects have now been removed by the Legislature. Section 188 of the Criminal Procedure Code has been amended so as to conform exactly with the Statutes empowering the Indian Legislature. The first paragraph corresponds to the Indian Councils Act, 1869, the 2nd paragraph with the Government of India Act, 1865, and the third paragraph with the Indian Councils Act, 1861. Exactly similar amendments were made in section 4 of the Indian Penal Code by Act IV of 1898. Again the Foreign Jurisdiction and Extradition Act of 1879 has been repealed. Its legislative enactments have been produced in the Indian Extradition Act, XV of 1903, while the extra territorial powers of the Governor-General in Council are now more appropriately declared in the Indian Foreign Jurisdiction Order in Council.

Now within the territorial jurisdiction there are the following Courts:—

(1) Courts of the Foreign Sovereign.

(2) Courts established by His Majesty the King by Order in Council, under the Foreign Jurisdiction Act, 1890, 53 and 54 Victoria, Chapter 37.

(3) Courts established by the Governor-General in Council either under sections 4 and 5 of Act XXI of 1879 or under the Indian Foreign Jurisdiction Order in Council, 1902.

(1) 16 B. 178.

SATISH CHANDRA ROY *v.* EMPEROR.

An instance of the Courts in class(2) is the Court of the Consul General in Somaliland established under the Somaliland Order in Council, 1899—See Gazette of India, 1900, part I, page 41—Instances of Courts in class (3) are the Court of the Political Agent and Magistrate, first class, Makran Coast—see Notification No. 2073-E of the 10th November 1892 under Act XXI of 1879—Gazette of India, 1892, part I, prge 684, and the Courts of the Railway Magistrate and other Courts established for the territories in Native States occupied by sections of the Simla Kalka Railway—see Notification No. 426-T-B of the 29th January 1904 under the Indian Foreign Jurisdiction Order in Council, 1902—Gazette of India, 1904, Part I, page 95.

The Courts in class (3) would be Courts of a Political Agent under the definition in section 3 of Act XXI of 1879 as also under the definition in section 3 (40) of the General Clauses Act, 1897.

Then the proviso to section 188 of the Code of 1882 was designed to prevent a conflict of jurisdiction between the Courts in British India and the Courts in class (3)—But it made no similar provision in respect of the Courts in class (1) and two—So in *Queen-Empress* v. *Daya Bhima* (2), it was held that a Native Indian Subject could be tried for an offence committed in Portuguese India. The Judges said:—"The proviso to section 188 has no application to the present case, as there is no Political Agent in the Portuguese territories of Daman, where the offences charged against the accused are said to have been committed." The amendment of the proviso to section 188 seems to have been made in view of this judgment and in order to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the Courts established by the King by an Order in Council under 53 and 54 Victoria, Chapter 37.

We are, therefore, of opinion that the proviso is universal in its application and is not restricted to Native States in India.

It has been suggested that the proceedings held by the Magistrate in contravention of the proviso to section 188 are irregular but not illegal. The case of *Emperor* v. *Sakharam* (3) is cited in support of this contention. On the other hand, it has been held that the certificate or sanction is a condition precedent to the Court taking cognizance of the case and that proceedings prior to the certificate or sanction are void, see *Queen-Empress* v. *Kathaperumal* (4), and *Emperor* v. *Kali Charan* (5). Whichever may be the correct view, we do not think that section 537 can be applied at an intermediate stage of the case so as to allow the error to remain uncorrected.

We, therefore, quash the proceedings of the Magistrate and direct the complaint to be dismissed for want of sanction by the Local Government.

Proceedings quashed.

(2) 13 B. 147.
(3) 12 Bom. L. R. 667; 7 Ind. Cas. 934; 11 Cr. L. J. 453.
(4) 13 M. 423.
(5) 24 A. 256.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1671 OF 1912.

March 6, 1913.

Present:—Mr. Justice Sharfuddin and Mr. Justice Richardson.

SATISH CHANDRA ROY—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Excise—Excise Act (I E. B. & A. of 1910*), ss.* 53, 72—"Kameswar Modak"—*Mixture containing* bhang—Bona fide *medicated article—Manufacture and sale whether punishable.*

The accused, a *Kaviraj*, was convicted under section 53 of the Eastern Bengal and Assam Excise Act for manufacturing and selling an exciseable article, namely, a mixture called *Kameswar Modak* which contains *bhang*.

The defence of the accused throughout was that the article in question was a *bona fide* medicated article prepared by him for medicinal purposes:

Held, that the accused was protected by section 72 of the Act.

Rule against the order of the Deputy Magistrate of Pabna, dated August 12th, 1912, convicting the petitioner under section 53 of the Eastern Bengal and Assam Excise Act (I E. B. & A. of 1910) and sentencing him to pay a fine of Rs. 25 in default two weeks' simple imprisonment an application for the revision of which order was dismissed by the Sessions Judge of Pabna and Bogra on September 30th, 1912.

SATISH CHANDRA ROY *v.* EMPEROR.

Babu *Krishna Kamal Moitra*, for the Petitioner.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The petitioner has been convicted under section 53 of the Eastern Bengal and Assam Excise Act (I E. B. & A. of 1910) and sentenced to pay a fine of Rs. 25 or in default to suffer simple imprisonment for two weeks The charge against him is that he manufactured and sold an exciseable article, namely, a mixture called *Kameswar Modak* which contains *bhang*. At the trial he admitted having prepared and sold the mixture. He is a *Kaviraj* or medical practitioner and his case throughout has been that *Kameswar Modak* is a *bona fide* medicated article prepared by him for medicinal purposes. The defence is founded on section 72 of the Act which declares that "the foregoing provisions of this Act shall not apply to the import, manufacture, possession, supply or sale of any *bona fide* medicated article for medicinal purposes by medical practitioners, chemists, druggists, apothecaries or keepers of dispensaries, except in so far as the Local Government may by notification so direct." The *bona fides* of the petitioner and his preparation are not disputed and in view of the terms of section 72 his defence appears to us to be unanswerable.

In the explanation of the District Magistrate reference is made to a notification of the Local Government (No. 65 dated 10th November 1911) in the course of which certain powers conferred on the Local Government by section 36 of the Act are delegated to the Board of Revenue under a power of delegation conferred by an earlier section. But no rule made by the Board as delegate under section 36 can affect the operation of section 72. The power of the Local Government to restrict the operation of the section has not been delegated to the Board and so far as we are aware has not been exercised in regard to preparation containing *bhang*. The only notification issued under section 72 which appears in the Excise Hand Book is a notification issued by the Local Government restricting the operation of the section in regard to cocaine and its analogues. As we understand, the rule of the Board prescribing a fee of one rupee per annum "for the possession by a medical practitioner of *bhang* for medicinal purposes" purports to be made under section 36 (rule 165 of Notification No. 836 Ex. dated 14th November 1911). Another rule made by the Board under section 6 purports to authorize "licensed chemists" to sell *bhang* to any person holding a "druggists permit" in quantities not exceeding two seers (rule 2 of Notification No. 835 Ex. dated 14th November 1911). It is unnecessary for us, however, to consider the precise effect of these rules and we expressly abstain from pronouncing any opinion on the question of their application to the possession of *bhang* by persons such as medical practitioners and others within the description in section 72 for the purpose of the manufacture of *bona fide* medicated articles for medicinal purposes. It is true that the petitioner must have been in possession of the *bhang* which is an ingredient in his preparation and that he has not paid the fee for such possession prescribed by the Board. He has not, however, been charged with the illegal possession of *bhang* but with the manufacture and sale of a medicated article, the *bona fides* of which, as we have said, is not disputed. If the charge had been illegal possession, a different defence might have been made and it might have been necessary to consider the mode in which possession was obtained with reference to clause (*c*) of rule 37 made by the Local Government under section 73 (Notification No. 65 R.D. dated 10th November 1911) as we believe *bhang* is easily prepared from the leaves and capsules or leaves and stalks of the hemp plant (see Wilson's Glossary of Indian terms). For the purposes of this rule it is sufficient to say that in regard to the manufacture and sale of *Kameswar Modak* the petitioner is protected by section 72. The language of the section is wide enough to take any case to which it applies without restriction out of the Act. In any such case, the provisions which precede it, including apparently not only the penal clauses but the definition clause, are inapplicable. On this ground we make the rule absolute. The fine imposed upon the petitioner, if paid, must be refunded.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 147 OF 1912.

November 22, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

MAHOMED VARIS—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 161 162, 476—Statement made to the Police—Signature obtained to it—Examination as witness as to that signature—Order to prosecute in respect of the explanation given—Illegal.

To obtain the signature of a witness to his statement before the Police; then to examine him as to that signature; and then to prosecute him in respect of the explanation which he gives in respect of it, is a procedure which contravenes the policy of sections 161 and 162 of the Criminal Procedure Code and cannot be permitted to form the basis of a prosecution under section 193 of the Indian Penal Code.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Applicant.

JUDGMENT.—This is an application for the revision of an order made by the Sub-Divisional Magistrate, Nausharo, under section 476, Criminal Procedure Code, directing the prosecution of the applicant for an offence under section 193, Indian Penal Code, in that he when examined as a witness falsely denied that the signature recorded on a statement made before the Police was his own signature. Under section 162, Crimical Procedure Code, no statement made by any person to a Police Officer shall, if taken down in writing, be signed by the person making it. And under section 161, Criminal Procedure Code, the obligation to answer questions put by a Police Officer does not imply an obligation to answer truly for the word 'truly' which appears in the Code of 1872 has been omitted in the present Code.

The procedure followed has been in first place to obtain the witness's signature to his statement before the Police: then to examine him as to that signature; and then to prosecute him in respect of the explanation which he gives in respect of it. It seems to us that this procedure contravenes the policy of sections 161 and 162 of the Code. The present prosecution seems to be ill-advised. We quash the order of the Sub-Divisional Magistrate directing the prosecution of the complainant.

Order quashed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 77 OF 1913.

April 2, 1913.

Present:—Justice Sir Richard Harington, Bart., and Mr. Justice Coxe.

PIZIRUDDIN MOLLAH AND OTHERS—2ND PARTY—PETITIONERS

versus

TOTAJANNESSA BIBI AND ANOTHER—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 148 (2)—Local inquiry—Report of person deputed to make local inquiry—Evidence.

In a case under section 145 of the Criminal Procedure Code, an application for time for filing written statements by the parties was rejected. The Magistrate then directed a local inquiry and on the report of the person deputed to make the inquiry, decided the case:

Held, that the Magistrate acted within his jurisdiction.

Criminal rule against the order of a Magistrate in a proceeding under section 145 of the Criminal Procedure Code.

Babu *Narendra Kumar Bose*, for the Petitioners.

Babu *Debendra N. Bhattacharya*, for the Opposite Party.

JUDGMENT.

HARINGTON, J.—This is a Rule to set aside an order under section 145.

We can only set it aside if the Magistrate has done something which he had no jurisdiction to do. Now, what happened was that the Magistrate drew up proceedings and then when the parties appeared, they applied for time for filing written statements. The Magistrate refused that, and he clearly under the law, if he thought it proper, had the power either to entertain the petition or refuse it. He exercised his jurisdiction in refusing it. The petitioner ought to have filed a written statement or tendered any evidence to the Magistrate on the 4th December. Proceedings had been drawn up on the 27th November. After the Magistrate had rejected the petition for time, he directed that a local inquiry be held and that a report should reach him on or before the 16th December under section 148, he had the power to order a local inquiry. Then on the 16th a report came and it does not appear that the parties even then had filed written statements or asked the Magistrate to hear their evidence. The Magistrate acted on this report. An amendment of the

law has provided that in this case the report may be read as evidence. The Magistrate was clearly within his rights when he read this as evidence. This he was entitled to do, that is to take the report which he read, as evidence and he cannot be said to have acted without jurisdiction. The parties neither asked to be heard nor tendered any evidence which the Magistrate refused. If he had refused he would have been wrong under section 145. It seems to me that under the present state of the law this report may be read as evidence but in former days it could not be read as evidence as the learned Vakil for the petitioner shows.

For these reasons, the Rule must be discharged.

COXE, J.—I agree.

Rule discharged.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1670 OF 1912.
April 2, 1913.
Perent:—Justice Sir Richard Harington, Bart., and Mr. Justice Coxe.
GURU PROSAD DHAR—PETITIONER
versus
LACHMAN RAM GHOSE—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 147 *and proviso; Sch. V, Form XXIV—Easement—Dispute concerning easement—Order without finding that right was exercised within three months before inquiry—Jurisdiction.*

An order under section 147 of the Criminal Procedure Code is without jurisdiction if it is made in the absence of any finding that the right was exercised within three months anterior to the inquiry.

Rule against the order of the Deputy Commissioner of Sylhet.

Babu *Ambica Charan Das*, for the Petitioner.

Babu *Bipin Chandra Mallik*, for the Opposite Party.

JUDGMENT.—This is a Rule calling on the Deputy Commissioner of Sylhet and on the opposite party to show cause why the order complained of should not be set aside on the second ground set forth in the petition. The ground set forth is that the order is without jurisdiction in the absence of any finding that the right was exercised within three months from before the inquiry.

The order purports to have been made under section 147 and the explanation furnished by the Sub-Divisional Magistrate and forwarded by the Deputy Commissioner leads us to the conclusion that in submitting this explanation neither of these gentlemen had taken the trouble to read the ground on which the Rule was issued because the explanation does not touch that point at all. The Magistrate ought to have looked at the Rule so as to be able to furnish any explanation he had to offer.

If the Magistrate reads the proviso to section 147, he will see the procedure to be followed before he can make an order under section 147 and if he looks at the Form No. 24 in Schedule V he will notice that the Legislature has provided a form in which the order should go.

With these observations, we make the Rule absolute, set aside the order and send down the case to him in order that he may deal with it according to law on the evidence which is now before him.

Rule made absolute;
Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.
CRIMINAL REVISION APPLICATION No. 87 OF 1912.
July 25, 1912.
Present:—Mr. Pratt, J. C., and Mr Justice Fawcett, A. J. C.
Musammat HIDAYAT KHATUN—
APPLICANT
versus
MAHOMED HAYAT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 488—*Neglect or refusal by words or by conduct—Denying paternity of child—Tantamount to neglect—Neglect or refusal being established—Maintenance order to be made.*

Under section 488 of the Criminal Procedure Code, the neglect or refusal may be by words or by conduct. It may be express or implied, and when the opponent has denied the paternity of a child, that is a fact from which Court may infer neglect to maintain.

Bhikaji Maneckji v. *Maneckji Mancherji*, 9 Bom.L.R. 359; 5 Cr. L. J. 334, referred to.

Where the paternity and the neglect are established a maintenance order should be made.

Application for revision of the order of the Sub-Divisional Magistrate, Larkana.

EMPEROR *v.* BALDEO.

Mr. *Wadhumal Oodharam*, for the Applicant.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Opponent.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—We shall not in revision interfere with the Magistrate's finding on the fact that the opponents' paternity of the female child is not proved.

As to the male child it is argued that no neglect or refusal to maintain is established. But as said in *Bhikaji Maneckji* v. *Maneckji Mancherji* (1) the neglect or refusal may be by words or by conduct. It may be express or implied—and when, as here, the opponent has denied his paternity of the child that is a fact from which Court may infer neglect to maintain.

The paternity and the neglect being established, the Magistrate should have exercised the discretion the section gives him to make a maintenance order under section 488. The applicant having proved her case it was not reasonable to leave her to depend upon the bare promise and caprice of the opponent for the maintenance. The value of that promise may be guaged by opponent's applying in revision against the Magistrate's order and repeating in this Court his disgraceful repudiation of his own child.

We accordingly direct the Magistrate to make a maintenance order in respect of the male child, Ghulam Husain, as well as any order as to costs that he may think necessary under section 488, clause (8). Application allowed with costs.

Application allowed.

(1) 9 Bom. L. R. 359; 5 Cr. L. J. 334.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 222 OF 1913.

March 19, 1913.

Present:—Mr. Justice Banerji.

EMPEROR—APPLICANT

versus

BALDEO AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 207, 215—Commitments by Magistrates to Court of Session, when to be quashed.

Under section 215 of the Code of Criminal Procedure, a commitment can be quashed by the High Court only on a point of law.

Where a Magistrate is of opinion that he cannot adequately punishan accused person, and commits him to the Court of Session under section 207, the commitment is legal and cannot be quashed by the High Court on the mere ground that the punishment which the Magistrate could have awarded would have been sufficient.

Criminal reference by the Sessions Judge of Cawnpore.

JUDGMENT.—The accused in this case have been convicted to the Court of Session on charges under sections 143 and 325 of the Indian Penal Code by a Magistrate of the 1st class on the ground that he would not be able adequately to punish the accused in the event of his finding them guilty. The learned Sessions Judge has referred the case to this Court with the recommendation that the commitment be quashed because the learned Judge is of opinion that the punishment which the Magistrate was competent to award would be sufficient. I see no reason to accede to the recommendation of the learned Sessions Judge. Under section 215 of the Code of Criminal Procedure, a commitment can be quashed by the High Court only on a point of law. The Magistrate was competent under section 207 of the Code to commit the case if he was of opinion that he could not adequately punish the accused. The commitment was, therefore, perfectly legal. The Magistrate had a discretion in the matter and to say at this stage that he could award adequate punishment would be prejudging the case. Two bones of the fore-arm of one man were broken and according to the medical evidence the arm might become useless. Another man was so seriously hurt that he had concussion of the brain and remained unconscious for two or three days. Under these circumstances, it cannot be said that the Magistrate exercised his discretion unwarrantably. In any case, the commitment was not illegal and cannot, therefore, be quashed. Let the record be returned.

WARYAM SINGH *v.* MAHTAB SINGH.

PUNJAB CHIEF COURT.
FULL BENCH.
FIRST CIVIL APPEAL No. 1217 OF 1910.
April 1, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, Justice Sir Frederick Robertson and Mr. Justice Rattigan.

WARYAM SINGH—PLAINTIFF—APPELLANT
versus
MAHTAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. VI, Sch. I, Art. 1—Pre-emption suit—Appeal—Pre-emptor appellant praying for reduction of amount payable by him—Amount to be assessed—Vendee contesting pre-emptor's right to land—Subject-matter of his appeal—Court-fee to be levied under section 7, clause VI.

In an appeal in a pre-emption case, in which the appellant asks the Court, to reduce by a certain sum the amount payable by him under the orders of the first Court that sum represents the value of the subject-matter of his appeal, and it is upon that sum, that he must pay the *ad valorem* fee specified in Article 1 of the first Schedule to the Court Fees Act.

Where, however, the appeal is by the vendee who objects that the plaintiff is not entitled to the land in suit, the Court-fee to be affixed to the memorandum of appeal must be computed in accordance with the provisions of section 7, clause VI, of the Court Fees Act.

First appeal from the decree of the District Judge, Lyallpur, dated the 2nd November 1910, decreeing the claim.

Mr. *Pestonji Dadabhai*, for the Appellant.

Messrs. *Beechey* and *Ganpat Rai*, for the Respondents.

ORDER OF REFERENCE.

The first question that arises upon this and the connected appeal (Civil Appeal No. 117 of 1911) is whether the memorandum of appeal in each case is sufficiently stamped.

In the present appeal, the plaintiff pre-emptor, who has been granted a decree for pre-emption of the land in suit upon payment of a sum of Rs. 56,000, objects that the price demanded of him is excessive and prays, that he may be allowed to pre-empt upon payment of Rs. 11,000 only. In the lower Court, the plaintiff, who had originally valued his claim for purposes of Court-fee at Rs. 368-8, was ordered by the District Judge to pay an *ad valorem* fee on the amount entered in the *patwari's roznamcha* as the alleged amount of the consideration, namely, Rs. 56,000. He accordingly affixed a stamp of the value of Rs. 1,225 to his plaint.

But he has in appeal reverted to his first assessment of the value of the suit for purposes of Court-fee and has affixed a Court-fee stamp of the value of Rs. 27-12 only to his memorandum of appeal. It is admitted that the object the appellant has in view in appealing from the decree of the District Judge is to get the price reduced from Rs. 56,000 to Rs. 11,000, but it is contended, upon the authority of *Hazari Singh* v. *Piran* (1), that the value of the suit for purposes of Court-fee is to be assessed at five times the land revenue upon the land. The authority cited certainly lends support to this contention, but as at present advised, we are not satisfied of the correctness of that decision. It is admittedly opposed to the ruling of the Allahabad High Court in *Hafiz Ahmad* v. *Sobha Ram* (2) and to a decision of the present Chief Judge reported as *Banwari Das* v. *Nathu Shah* (3). The question is one of importance and comes up frequently for consideration, and in the circumstances, we think it should be authoritatively settled by the decision of a Full Bench. We refer it accordingly, and in so doing, we refer also the question whether the memorandum of appeal presented by the vendee (Civil Appeal No. 117 of 1911) bears a sufficient Court-fee stamp. This latter stamp is also of the value of Rs. 27-8, and it is urged that as the vendee merely takes exception to the right of the plaintiff to take the land from him, the value of this latter appeal must be assessed with reference to the land revenue on the land. Here the Allahabad ruling is in favour of the vendee's contention. Mr. Pestonji, however, contends that as the plaintiff pre-emptor was compelled by the order of the District Judge to pay an *ad valorem* fee on the amount of the alleged sale consideration *viz.*, on Rs. 56,000 the vendee should be made to pay a like sum as Court-fee upon his memorandum of appeal. This is a somewhat novel argument and we are not much impressed with it. The question is what amount is under the law demandable from the appellant as Court-fee and the mere fact that the plaintiff-respondent was by error on the part of the lower Court made to pay a certain sum as Court-fee upon the plaint is no ground for demanding that the

(1) 92 P. R. [illegible]
(2) 6 A. 488; A. W. N. (1884) 179.
(3) 9 Ind. Cas. 676; 5 P. R. 1911; 48 P. L. R. 1911; 59 P. W. R. 191[illegible]

defendant-appellant shall pay that sum as Court-fee in respect of his memorandum of appeal.

ORDER OF THE FULL BENCH.

The facts of this case are as follows:—Plaintiff sued to pre-empt certain land upon the allegations that it had been sold by defendant No. 1 to defendant No. 2 for a consideration of Rs. 11,000, that the sale was effected orally, and that the vendor and vendee, in order to defeat plaintiff's rights, had colluded and had had an entry made in the *patwari's* "*roznamchi*" (or diary), to the effect that the sale price was Rs. 56,000. Plaintiff contended that the actual value of the land was Rs. 11,000 and he claimed to pre-empt upon payment of that sum. In accordance with the provisions of section 7, clause VI of the Court Fees Act, 1870, the value of the suit for purposes of Court-fee was stated to be Rs 563-8, that sum representing five times the revenue assessed upon the land and an *ad valorem* stamp on that amount was affixed to the plaint. Upon the objection of the defendant vendee, and after inquiry through a local Commissioner as to the value of the land, the District Judge directed plaintiff to pay an *ad valorem* Court-fee on Rs. 56,000, as that amount had been entered in the *patwari's* diary as the sum paid by the vendee to the vendor and represented approximately the real value of the land. Plaintiff, accordingly, in obedience to the order of the District Judge, made good the deficiency in the Court-fee and affixed a stamp of the value of Rs. 1,225 to his plaint. The District Judge, as a result of the trial of the suit, granted plaintiff a decree for pre-emption upon payment of the sum of Rs. 56,000 and from this decree both the pre-emptor and the vendee have separately appealed to this Court. The pre-emptor in his appeal urges that he should be allowed to pre-empt upon payment merely of Rs. 11,000 and the vendee in his appeal contends that the plaintiff has no right of pre-emption and that his suit should be dismissed. In each case, the memorandum of appeal bears a Court-fee stamp of Rs. 27-12, that sum representing *ad valorem* fee payable upon five times the land revenue assessed upon the land. The questions referred to the Full Bench are whether these memoranda of appeal have been properly stamped under the provisions of the Court Fees Act.

In our opinion, these questions must be decided with reference to the terms, not of clause VI of section 7 of the Act, which is not applicable to appeals in pre emption suits, but of Article 1 of the first Schedule to the Act, which provides that the Court-fee upon a memorandum of appeal is to be computed *ad valorem* with reference to the "amount or value of the subject-matter in dispute." These words are perfectly unambiguous, and the only question that can arise in cases such as the present is:—"What is the amount or value of the subject-matter in dispute in the appeal before the Court?"

Dealing first with the appeal preferred by the pre-emptor, we find it admitted that the object of his appeal is to have the decree of the District Judge varied into one granting him the right to pre empt the property upon payment of Rs. 11,000 instead of upon payment of Rs. 56,000, or in other words, that he asks the Appellate Court to reduce the amount payable by him by the sum of Rs. 45,000. In our opinion, the latter sum represents the value of the subject-matter of his appeal and it is upon that sum that he must pay the *ad valorem* fee specified in Article 1 of the first Schedule to the Act. There are numerous authorities in support of the proposition above stated, [see *Hafiz Ahmad* v. *Sobha Ram* (2); *Nepal Rai* v. *Debi Prasad* (4); *Mahadeo Prasad* v. *Gorakh Prasad* (5); *Baji Lal* v. *Gobardhan Singh* (6) *Reference under Court-Fees Act*, 1870 (7) *Sekharan Nair* v. *Kongot Echaran Nair* (8) *Sirdar Kirpal Singh* v. *Sant Singh* (9)], and the only authority *per contra*, *Hazari Singh* v. *Piran* (1), appears to us to have proceeded upon the assumption that section 7, clause VI, was applicable to appeals in pre-emption suits, and upon grounds which, however speciously plausible, apparently overlooked the express terms of Article 1 of the Schedule which alone regulates matters connected with

(4) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.
(5) 30 A. 547; 5 A. L. J. 531; A. W. N. (1903) 241; 4 M. L. T. 448.
(6) 1 Ind. Cas. 1000; 31 A. 235; 6 A. L. J. 155.
(7) 29 M. 367; 16 M. L. J. 287.
(8) 3 Ind. Cas. 459 (penultimate paragraph); 20 M. L. J. 121; 6 M. L. T. 245.
(9) 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912.

the fee to be paid upon memorandum of appeal in such suits.

The appeal by the vendee, on the other hand, stands upon a different basis. His contention is that the plaintiff is not entitled to the land, and the subject-matter of his appeal is, therefore, the land which, according to his allegations, has been wrongly decreed to the plaintiff. In such a case, the Court-fee to be affixed to the memorandum of appeal is to be computed according to the value of the subject-matter of his appeal, *i.e.*, the land and the value of such land for the purposes of Court-fee must be estimated in accordance with the provisions of section 7, clause VI, of the Court Fees Act, [*Hafiz Ahmad* v. *Sobha Ram* (2) and *Sekharan Nair* v. *Kongat Eacharan Nair* (8)]. The fact that it was upon his objection that the plaintiff was compelled by order of the District Judge to affix a Court-fee stamp of higher value than was legally demandable cannot, we think, affect the question or afford any reason for the Appellate Court to demand from him the payment of a higher Court-fee than the law requires.

The result, therefore, is that we are of opinion (1) that the memorandum of appeal filed by the plaintiff has not been properly stamped and (2) that the memorandum of appeal filed by the vendee-appellant bears the requisite Court-fee stamp.

With this expression of opinion, we direct that the records be returned to the Division Bench for determination of the appeal.

Record returned.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1989 OF 1911.

May 15, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Newbould.

AMBIKA CHARAN GUHA—PLAINTIFF—APPELLANT

versus

TARINI CHARAN CHANDA AND OTHERS DEFENDANTS—RESPONDENTS.

Party—Necessary party—Non-joinder of necessary party—Failure of suit—Partnership suit—All partners to be joined or suit should fail—Civil Procedure Code (Act V of 1908), O. I, r. 9—Limitation.

If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or, if, when he is brought on the record, the suit as against him is barred by limitation, the whole suit will be dismissed.

In a partnership suit unless all the partners are made parties the suit must fail.

Ramdoyal v. *Junmenjoy*, 14 C. 791; *Sri Nath Pal* v. *Hari Charan Pal*, 7 C. L. J. 266, relied upon.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated April 11th, 1911, affirming that of the Munsif of Pabna, dated September 2nd, 1910.

Babu *Girija Prosonno Roy Chowdhury*, for the Appellant.

Babu *Krishna Kamal Maitra*, for the Respondents.

JUDGMENT.—The plaintiff brought this suit for the accounts of a partnership of which he and the defendants Nos. 1, 2 and 4 were members, and for other incidental reliefs. The remaining partner died after the partnership business came to an end, but before the suit was brought. It appears that he left two sons, the defendant No. 3 and the defendant No. 5. Of these two sons, only the defendant No. 3 was originally impleaded. Objection was taken in the written statement, (filed on the 9th August 1909), that the deceased partner was not properly represented. The plaintiff seems to have been very dilatory and the defendant No. 5 was not brought on the record till the 29th June 1910. At that date, the period of limitation prescribed for such a suit as this had expired. The Courts below have held that inasmuch as all the partners or their representatives were necessary parties and inasmuch as under section 22 of the Limitation Act the suit must, as regards the defendant No. 5, be deemed to have been instituted when he was made a party, the whole suit is barred by limitation. The short question which arises is whether this view of the matter is correct.

We are disposed to agree that in a partnership suit all the partners must be made parties or the suit will fail. [*Ramdoyal* v. *Junmenjoy* (1), *Sri Nath Pal* v. *Hari Charan Pal* (2)]. On behalf of the plaintiff, who is the appellant before us, reference was made at the Bar to rule 9 of Order I of the Civil Procedure Code. That rule, however, properly understood, does not do away with the necessity

(1) 14 C. 791.
(2) 7 C. L. J. 266.

for bringing a necessary party on the record. [*Jogendra Nath* v. *Secretary of State* (3)]. If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or, if when he is brought on the record, the suit as against him is barred by limitation, the suit will be dismissed.

It was argued that the deceased partner or his estate was represented, if imperfectly, by the defendant No. 3, that the defendant No. 5 was brought on the record merely to complete the representation and that in such a case, section 22 of the Limitation Act would not operate to bar the suit. Reference was made to the case of *Peary Mohan Mookerjee* v. *Narendra Nath Mukerjee* (4). In that case, all the living descendants of the original testator were on the record from the commencement. The question arose which of them should be considered *shebait* of the *debutter* estate to which the suit related. That question was determined after the plaint had been amended and the suit proceeded against the defendant who was found to be *shebait*. It was held that what was done did not amount to the addition of a new defendant.

We are of opinion with the learned Subordinate Judge that the case is distinguishable from the present case on the facts. The plaintiff here ought to have impleaded all the legal representatives of the deceased defendant. He cannot plead ignorance of the existence of the defendant No. 5. In the absence of that defendant, the estate of the deceased partner was not fully represented.

The Courts below appear to us to have taken a correct view of the law and this appeal must be dismissed with costs.

Appeal dismissed.

(3) 17 Ind. Cas. 921; 16 C.L.J. 385; 17 C.W.N. 835.
(4) 32 C. 582; 9 C. W. N. 421 on appeal 5 Ind. Cas. 404; 7 A. L. J. 125; 7 M. L. T. 163; 14 C. W. N. 261; 20 M. L. J. 171; 11 C. L. J. 220; 12 Bom. L. R. 257; 37 C. 229; 37 I. A. 27.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 779 OF 1910.

May 19, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

GHULAM NABI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Onus probandi—*Appellant to prove judgment appealed from to be wrong—Evidence Act (I of 1872), s. 90—Documents thirty years old to be accepted with care and caution—Question of genuineness of documents—Genuineness admitted and acted upon by third parties, effect of.*

It is for an appellant to show that the judgment appealed against is wrong.

Dinomoni Chowdhrani v. *Brojo Mohini Chowdhrani*, 29 C. 187; 29 I. A. 24; 4 Bom. L. R. 167; 12 M. L. J. 83; 6 C. W. N. 386, followed.

There is a very considerable danger in accepting, without care and caution, documents simply because they purport to be more than thirty years old.

Where in a dispute between the proprietors of a *patti* in a certain village and a body of non-proprietors, the question is as to the genuineness of a deed relating to the title of the land in dispute, the Court cannot lose sight of the fact that proprietors of another *patti* of the same village, many years ago, accepted the document and gave up a plot of land upon that basis and in consequence of their being satisfied that it was not forged.

First appeal from the order of the District Judge, Rohtak, dated the 14th April 1910, dismissing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—The plaintiffs in this case are the *Rajput* proprietors of Her Bubian, a sub-division of *Mouza* Mehm in the Rohtak District and the defendants are *Beoparis* (or *Kasabs*, butchers) of the same village. Some few of the latter are also proprietors (by purchase) in the village, but the large majority is composed of non-proprietors who have for very many years past settled down in the *abadi* as such. It appears that in the course of the recent Settlement proceedings, a dispute arose between the *Rajputs* and the *Beoparis* with regard to the plot of land now in suit which measures 15,530 square yards. As this dispute threatened to result in a breach of the peace, proceedings under section 107 and section 145 of the Criminal Procedure Code were taken with the result that security was taken from the principal

persons concerned and an order was passed after full local inquiry, by Sheikh Najam-ud-Din, Magistrate 1st class, declaring that the *Beoparis* had been in possession of the land from olden times, were still in possession, and were entitled to retain possession until evicted by a Civil Court in the course of legal proceedings. This order, which was dated the 8th February 1908, was made under the provisions of section 145 of the said Code. On the 22nd April 1909, the *Rajput* proprietors instituted the present suit. Their plaint refers to the said order of the Magistrate and recites that in consequence of that order, the plaintiffs were compelled to give up possession of the land which thereupon passed to the defendants, who have (it is alleged) no right whatsoever to it and are in possession unlawfully and without title, the proprietors of Her Bubian being the rightful owners and as such entitled to possession. Plaintiffs accordingly prayed for a decree for possession of the said land to be granted to them.

Defendants in reply to the claim urged a number of pleas of which many were of a technical and preliminary nature and need not be referred to at this stage. The only pleas which are now relevant were (1) that the defendants and not plaintiffs were the real owners of the land; (2) that the suit was time-barred inasmuch as (*a*) plaintiffs had not been in possession of the land within 12 years of suit, and (*b*) defendants had been in adverse possession thereof for more than 12 years. The case went to trial upon the following issues:—

"(1). Whether the plaintiffs' claim is within time?

(2). Whether the land in dispute is the joint property of the proprietors of Her Bubian?

(3). Whether the defendants (butchers) have been in proprietary and adverse possession of the land in dispute for more than 12 years?

The District Judge personally visited the locality on two occasions and eventually, in a somewhat brief judgment, dismissed plaintiffs' suit on the grounds (1) that the land did not belong to the proprietors of Her Bubian, (2) that the present claim was time-barred, and (3) that defendants had established adverse possession for more than 12 years.

Plaintiffs have preferred an appeal from the decree of the District Judge to this Court and we have had the advantage of hearing the case argued at length by Mr. Shadi Lal, on their behalf, and by Mr. Muhammad Shafi on behalf of the respondents. Before proceeding to deal with the points at issue between the parties, we may conveniently refer to certain facts which are not in dispute.

At the Settlement of 1853, the land in suit bore the *Khasra* No. 112 and was recorded as the *shamilat* property of the proprietors of Her Bubian. At the subsequent Settlement of 1879, this land was entered in the Revenue Records as *Khasra* Nos. 4188 and 4246, and as being 5 *bighas* 14 *biswas* and 6 *biswansis pukka* in extent. It was recorded as the *shamilat* property of the proprietors of Her Bubian *hasab rasad khewat*, and as being in the possession of those proprietors. It was further described as *a banjar kadim*.

A reference to the plan prepared in 1880 by Naib Tahsildar will show that *Khasra* No. 4188 was bounded on the north by a road and on the south by *Khasra* No. 4187. An old road which originally existed divided No. 4188 on the east from No. 4246. The latter (No. 4246), according to the said plan, was bounded on the south by No. 4247 and on the east by No. 4253, the northern boundary being the same road which was also the northern boundary of No. 4188. On the eastern side of No. 4253 (according to the said plan) was No. 4254 and in the latter plot, the plan shows "graves of butchers".....It is not denied that houses of *Beoparis* are on the western boundary of No. 4188 and immediately facing it, and also adjoin on the same side, Nos. 4187, 4186 and 4185. In the revenue papers, these and other adjoining plots have been given separate numbers and have been recorded as the respective *shamilat* properties of the five Hers (Bubian, Jarwal, Dhar, Jago and Sureya) into which the village has been sub-divided. But the District Judge, who, as above stated, visited the locality twice, states that "there is nothing to show that these plots were ever separately distinguished" and the general tenor of the order passed by Sheikh Najam-ud-Din under section 145 of the Criminal Procedure Code is to the like effect.

GHULAM NABI *v.* ALLAH DIN.

The first question, and obviously the most important, that arises in this appeal is with reference to the ownership of the land, and in connection with this question, we have heard elaborate arguments as regards the *onus probandi*. On behalf of the appellants, Mr. Shadi Lal argues that it must be presumed that the proprietors of Her Bubian are the owners of the land, inasmuch as the entries in the revenue records show them as such and a presumption of correctness attaches under section 44 of the Punjab Land Revenue Act to those entries. On the other hand, Mr. Shafi has referred us to the ruling of their Lordships of the Privy Council, reported as *Dinomoni Chowdhrani* v. *Brojo Mohoni Chowahrani* (1), in which their Lordships held that in a case where one of two parties had been put in possession under section 145, Criminal Procedure Code, it was for the other side, in a subsequent civil suit, to prove ownership before they could dispossess the party in possession. In the same case, their Lordships further held that it was for an appellant to prove that the judgment appealed from was wrong. Mr. Shafi further argued that, upon the allegations in the plaint, plaintiffs' case must be taken to be one of possession and dispossession and that, consequently, before plaintiffs can succeed, they must show that they were in possession, within twelve years of suit. In our opinion, it is scarcely necessary to give a definite decision upon this point, though we are inclined to hold that the initial presumption which may have existed in plaintiffs' favour when the case was first before the District Judge, has now been shifted and that, in this Court at all events, it is for plaintiffs to show, in the words of their Lordships, that the judgment of the District Judge was wrong. But even if the burden of proof rested upon defendants, we are satisfied that they have been able to prove their ownership of the plot in suit.

A reference to the plan prepared under the supervision of Sheikh Najam-ud-Din, the accuracy of which is vouched for by the District Judge after personal inspection of the spot, shows that the whole of this land lies between the houses of the defendants on the western side and the graveyard of the defendants on the eastern side. Immediately below No. 4188 lies No. 4187, and the plan and the evidence of Faiz Muhammad, defendant, shows that the defendants have built a *pucca* tank on the land lying in front of their houses and also sunk a *pucca* well on another part of it. The tomb of their ancestor, Muhammad Hanif, is also on part of this land and, though none of these are actually on the particular plot which bears the *Khasra* Nos. 4168 and 4264, it is clear from the record and especially from the description of the land given by the District Judge that it is impossible to distinguish any one of these plots from the others.

Defendants have produced two deeds purporting to be of ancient date, D-6 and D-7, and rely upon these as their title-deeds to the plot of 24 *bighas* which they say represents the whole of the land including the graveyard, in front of their houses. These deeds have been impeached by Mr. Shadi Lal as forgeries concocted for the purposes of the litigation which ensued in 1880 between the butchers and the proprietors of Her Jerwal with regard to *Khasra* Nos. 4186 and 4185, and the learned Counsel contends that the deeds must be false as otherwise it is inconceivable that they should not have been presented as evidence of title to the Settlement Officers at the Settlements of 1853 and 1879. We entirely agree with the proposition, so often laid down in judgments of the High Courts, that there is a very considerable danger in accepting, without care and caution, documents simply because they purport to be more than thirty years old. But in the present case, we see no sound reason to distrust the two deeds in question. They were, undoubtedly, produced in the litigation with the Her Jerwal proprietors, and there is on the record a copy of a deed of compromise, dated the 21st December 1880, in which Shahab Khan, Dalmir Khan, Imam Khan and Lakhu, on behalf of themselves and the other *biswadars* of Her Jerwal, admitted the genuineness of one of those deeds, which, they said, related to 24 *bighas* of land including the area then in dispute, and added that though this area had been entered in the *khewat* papers in the names of the *biswadars*, they were all satisfied of the title of the defendants and withdrew their claim. On

(1) 29 C. 187 (P. C.); 29 I. A. 24; 4 Bom. L. R. 167; 12 M. L. J. 83; 6 C. W. N. 386.

the back of this compromise there is endorsed an order of the Deputy Commissioner, Rohtak District, directing that the compromise should be sent to the Tahsildar, who was at the time in *Mauza* Mehm, in order that it might be verified by all the *biswadars* concerned. We have no reason to doubt that this order was duly carried out, for, about three weeks subsequently, there is another order of the Deputy Commissioner accepting the compromise and directing the file of the case to be consigned to the record room.

Mr. Shadi Lal argues that this compromise is in no way binding on the present plaintiffs and it is open to grave suspicion inasmuch as there was no reason for the proprietors of Her Jerwal to admit defendants, claim after they had successfully resisted it for so long. It may, of course, be conceded that the action of the Her Jerwal proprietors is in no way binding on the present plaintiffs, but when we have to consider whether the deeds are genuine or not, we cannot lose sight of the fact that the proprietors of one *patti*, many years ago, accepted them and gave up a plot of land upon that basis and in consequence of their being satisfied that the deeds were not forged. Mr. Shadi Lal contends that in all probability Shahab Khan, who, as the record before us shows, was a somewhat unscrupulous character, was bribed to give up the claim; but the deed of compromise is attested not merely by Shahab Khan but by the several other *biswadars* above mentioned and we cannot believe that the proprietors as a body would have tamely submitted to withdraw their claim, simply because Shahab Khan, for reasons of his own, chose to accept a document as genuine which the other proprietors had every reason to believe to be forged.

Another point in favour of the genuineness of the documents is the reference in Exhibit D-6 to the illegal action of the Bubian tribe in forcibly dispossessing the butchers one or two years previously to the execution of the document. The present allegation is that this deed was forged for the purposes of the 1880 litigation. But if so, we would have expected a reference made therein to illegal action on the part, not of the Bubians but of the proprietors of the Her Jerwal.

It is true that in 1853 the butchers raised no opposition, so far as we can judge, to the action of the Settlement Officers in entering this and the neighbouring plots as part of the *shamilat* of the various Hers. But it must be remembered that the whole of this plot of 24 *bighas* is more or less waste, and that there is every reason to believe that the butchers have been in possession of it for very many years, using it for various purposes. So long as their possession was undisturbed, the butchers had no reason to assert claims of ownership before the Settlement Officers, and we very much doubt if they were consulted at all by those officers. No doubt, at the present moment a few butchers have, by purchase, acquired *biswadari* rights in the village but there is nothing to show that any butcher was a *biswadar* at the time of the first Settlement.

We know from the evidence on the record that Ahsan, the ancestor of the defendants, had considerable trouble with the Her Jerwal proprietors and that in 1869 he was induced to pay Rs. 22 to Shahab Khan in order to secure peace and quiet. When examined in the previous litigation, Ahsan distinctly referred to the old deed whereby his ancestors were given 24 *bighas* of land and asserted that the plot then in dispute was part of the 24 *bighas*. He was asked to explain why, if that was the case, he accepted a deed of gift and a deed of sale from Shahab Khan, and his answer was that as he had planted many trees on the land and had enclosed it and as the *zemindars* threatened to turn him out and harass him, he gave them something, and that in point of fact, although the first deed was called a deed of gift, he had to give Shahab Khan Rs. 25 in order to secure it. Shahab Khan subsequently seems to have sold part of this very land to one Abdul Ghani with the result that Ahsan felt that he must take action before the revenue authorities.

Apart from this dispute, however, there seems to have been no quarrel between the present plaintiffs, *i. e*, the proprietors of Her Bubian, and the butchers and as the latter were undisturbed in their possession of this plot of *banjar kadim*, they very naturally saw no ground for troubling the Revenue Authorities to alter the entries in their records.

There is abundant evidence to show that the defendants have throughout been in possession of these plots, using them for the purposes specified by Faiz Muhammad

defendant, in his evidence. On the other hand, it is very unlikely that plaintiffs have ever had possession, and the attempt made to show that, in 1880 when the Tahsildar prepared the plan, which is on the record, there was a crop in existence on No. 4188 has entirely failed. No doubt, there is an entry written across plot No. 4188 to the effect that a crop exists, but we know from the Revenue Records and from the evidence of the *Sadar Qinungo* that this plot is *banjar kadim* and unassessed to revenue, and we further find that in the column relating to crops of the table attached to the Tahsildar's plan, the space opposite No. 4188 is blank, thus showing that at that time no crop existed on the spot. We strongly suspect that the entry in the plan is a later addition.

The result then is, that we regard D-6 and D-7 as genuine documents and that we accept the statement of Faiz Muhammad that the plot now in dispute is included in the 24 *bighas* referred to in those documents, that we find the defendants have been in possession without let or hindrance on the part of the present plaintiffs from the earliest times, of which we have any record, up till quite recently; and that the probabilities are all in favour of the defendants' contention that this plot of 24 *bighas* was granted to them by the predecessors-in-interest of the plaintiffs. As against all this, plaintiffs are able to rely merely on the entries in the Revenue Records. In the circumstances, Mr. Shadi Lal has not satisfied us that the judgment of the District Judge is erroneous, while, on the other hand, defendants have, we think, proved, as clearly as can be possible after so long a lapse of time, that their ancestors acquired this land in ownership from the then proprietors.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3599 OF 1910.

February 7, 1913.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Breachcroft.

MAULA BAKSH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHABASUNDARI DASYA—PLAINTIFF—RESPONDENT.

Limitation—Limitation Act into force at date of suit, applicable, not that which came into force during pendency of suit—Civil Procedure Code (Act XIV of 1882), *s.* 332—*Limitation Act (XV of* 1877), *Sch. II, Arts.* 11, 12, 13, 14.

A suit is governed by the provisions of the statute of limitation, in force at the time of its institution, and not by the provisions of a subsequent statute, which comes into operation during the pendency of the suit.

A suit instituted under the last paragraph of section 332 of the Civil Procedure Code of 1882, is not governed by Articles 11, 12, 13 or 14 of Schedule II of the Limitation Act of 1877, and is not barred, if brought more than one year subsequent to the order, rejecting the application under that section.

Appeal from the decree of the District Judge, Birbhoom, dated June 8th, 1910, affirming that of the Munsif of Rampurhat, dated December 22nd, 1909.

Moulvi *Nur-ud Din Ahmed*, for Babu *Kumar Sankar Roy*, for the Appellants.

Babu *Brojendra Nath Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit instituted against them by the plaintiff-respondent under the last paragraph of section 332 of the Code of Civil Procedure, 1882. The subject-matter of the litigation is a parcel of land, taken in Settlement, from the superior landlord in the name of Nawabdi, the father of the appellants. They subsequently instituted a suit against one Gour Mondal for a declaration of their title by inheritance and for recovery of possession. In this suit they were successful. But when they attempted to execute the decree, they were met by the present plaintiff who was in possession and contended that the property had been acquired by Gour Mondal for her benefit in the name of Nawabdi. This led to a proceeding under section 332, in which the question was raised, whether she was in possession as alleged, and if so, whether her possession was *bona fide*. The Court held that she had failed to prove that she was in possession, and that, even if she was

in possession, her possession could not be treated as *bona fide*. Consequently, the decree-holders were placed in possession of the property, covered by the decree, on the 24th September 1907. The plaintiff commenced the present action on the 23rd December 1908 for a declaration of her title and for recovery of possession. The Courts below have made a decree in her favour which has now been assailed before us substantially on two grounds, namely, *first*, that the suit is barred by limitation, and, *secondly*, that the plaintiff is barred by the doctrine of estoppel. In our opinion, there is no substance in either of these contentions.

In so far as the *first* ground is concerned, it has been urged, that the case is governed by the Indian Limitation Act of 1908, which came into force on the 1st January 1909, after the suit had been instituted. No authority has been cited in support of the view, that a suit is governed, not by the provisions of the statute of limitation in force at the time of its institution, but by the provisions of a subsequent statute, which comes into operation during the pendency of the suit. In the absence of any express statutory provision in this behalf, we are of opinion, that the case is governed, by the provisions of the statute, in force at the time of its institution, that is, the Indian Limitation Act of 1877. But it is worthy of note that even if the suit had been instituted in 1909, it would have been saved from the bar of limitation under section 30 of the Indian Limitation Act, 1908.

Now it is plain, that Article 11 of the second Schedule of the Indian Limitation Act of 1877 has no application. That Article refers specifically to suits by persons, against whom an order has been passed under section 280, 281 or 282 or 335 of the Code of Civil Procedure of 1882; it does not apply to suits by persons against whom an order has been passed under section 332. Article 12 also is clearly inapplicable, inasmuch as it relates to suits, to set aside sales of various descriptions. Reliance is, consequently, placed upon Articles 13 and 14. Article 13 refers to a suit, to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. This Article is not applicable on two grounds. In the first place, this is not a suit to alter or set aside a decision or order of a Civil Court. An order under section 332 deals only with the question of possession. It is not necessary for the plaintiff, who instituted a suit under the last paragraph of that section, to have the adverse order set aside or altered; he seeks a declaration of his title to the property. In the second place, even if it be assumed that it is necessary for the plaintiff, to have the order in question altered or set aside, the order is not one made in a proceeding other than a suit. As was pointed by their Lordships of the Judicial Committee, in the case of *Mungal Pershad* v. *Grija Kant Lahiri* (1), an order in an execution proceedings is an order in the suit itself. [See also *Vishnu Bhikaji* v. *Achut Jagannath* (2)]. We are, therefore, of opinion that Article 13 is of no assistance to the appellant, and this view is in agreement with that taken in the case of *Ayyasami* v. *Samiya* (3), which was accepted as good law in *Govinda Bala* v. *Ganu Abaji* (4). It has been argued, however, that the view taken in the case just mentioned, cannot be accepted as a correct exposition of the law, in the light of the decision of the Judicial Committee in the case of *Malkarjun* v. *Narhari* (5), and reference has in this connection been made, to a dictum of one of the learned Judges who decided the case of *Raghunath Prasad* v. *Kaniz Rasul* (6). We are of opinion that the decision in *Malkarjun* v. *Narhari* (5) does not affect the decision in *Ayyasami* v. *Samiya* (3). In *Malkarjun* v. *Narhari* (5), the validity of an execution sale was called in question. The plaintiff ignored the sale and sought for a declaration of his title as if the sale had not taken place. It was ruled that the sale was merely voidable, and until avoided, it must be taken to be in full operation. Consequently, it was necessary for the plaintiff to have the sale set aside, and to a suit properly framed for this purpose Article 12 of the second Schedule of the Limitation Act is clearly applicable. But we do not express any opinion upon the question whether the decision in *Narasimma* v. *Appalacharlu* (7), which related to an entirely different set of facts, and to which the principle of the decision in *Ayyasami* v.

(1) 8 I. A. 123; 8 C. 51; 11 C. L. R. 113.
(2) 15 B. 438.
(3) 8 M. 82.
(4) 10 Bom. L. R. 749.
(5) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).
(6) 24 A. 467 at p. 470; A. W. N. (1902) 116.
(7) 12 M. 294.

Smiya (3) was applied, is affected by the decision of the Judicial Committee in *Malkarjun* v. *Narhari* (5). Finally, in so far as Article 14 is concerned, it provides, that a suit to set aside, any act or order of an officer of Government in his official capacity, not otherwise expressly provided for in the Limitation Act, must be commenced, within one year from the date of the act or order. This Article obviously is of no assistance to the appellants. This is not a suit, as already explained, to set aside an order, much less is it a suit to set aside an order of an officer of Government in his official capacity. The order in question was made by a Civil Court, in the exercise of its jurisdiction, and cannot be deemed to be an order by an officer of Government in his official capacity, within the meaning of Article 14. Consequently, Articles 11, 12, 13, and 14, which are relied upon by the appellant, have no application, and this suit is clearly in time.

In so far as the second ground is concerned, it is obvious, that the doctrine of estoppel has no application to this case. It is not suggested, that the property was allowed to be occupied by the plaintiff in the name of Gour Mondal. The property stood in the name of the father of the appellants and the only question in controversy between the parties is whether Gour Mondal or the plaintiff is the person beneficially interested therein. The plaintiff was not a party to the previous litigation and is in no way bound by the result thereof.

The result is that the decree of the District Judge is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 281 OF 1911.

May 26, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

LAHORE BANK, LD., THROUGH *Lala* HARI DAS, CHIEF MANAGER—PLAINTIFF—APPELLANT

versus

LAKHI RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XLI, rr.* 25, 28—*Delegation of powers by Court to which the case is remanded—Illegal—Absence of objections to jurisdiction does not give jurisdiction—Rule* 28, *whether applicable to remand under rule* 25.

Order XLI, rule 25, Civil Procedure Code, does not give the Court, to which the case is remanded, any power to delegate its duties or make a further remand to any other Court.

Mere absence of objections does not give a Court jurisdiction which it does not possess.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated 14th December 1910, confirming that of the Subordinate Judge, Rawalpindi, dated the 12th July 1910, dismissing the claim.

Mr. *Sunder Das*, for the Appellant.

Mr. *Pestonji Dadabhoy*, for the Respondent.

JUDGMENT.—This Court by its order, dated the 6th March 1912, remanded a certain issue to the lower Appellate Court (Divisional Judge, Rawalpindi), for inquiry and report under Order XLI, rule 25, Civil Procedure Code. When the record reached the Divisional Judge, he, instead of making inquiry himself, remanded the same issue for inquiry and report to the Subordinate Judge under the same provision of the Civil Procedure Code. The Subordinate Judge, after recording evidence, submitted a finding on the issue, and the learned Divisional Judge, after hearing arguments, agreed with his finding and has submitted it to this Court.

Mr. Sunder Das, on behalf of the appellant, raises a preliminary objection, that the Divisional Judge, to whom the case was remanded for inquiry and report, had no jurisdiction to make a further remand to the Subordinate Judge, but that he ought to have made an inquiry himself. Under Order XLI, rule 25, an Appellate Court may frame issues and refer the same for trial to the Court from whose decree the appeal is preferred, and in such, case shall direct such Court to take the additional evidence required, and *such Court* shall proceed to try such issues, and shall return the evidence to the Appellate Court, together with its finding thereon and the reasons therefor. It will be noticed, that this rule does not give the Court to which the case is remanded, any power to delegate its duties or make a further remand to any other Court. Rule 28 of Order XLI provides, that when additional evidence is allowed to be produced, the Appellate Court may

direct the Court, from whose decree the appeal is preferred, or any other Subordinate Court, to take such evidence and to send it when taken, to the Appellate Court. We do not at present decide whether rule 28 is applicable to a remand made under rule 25. But, assuming for the present, that it does apply, it is clear that this Court did not direct, that additional evidence should be taken by any other Subordinate Court, but merely remanded the case to the Divisional Judge himself for inquiry and report; and in accordance with the clear wording of rule 25, that Court itself had to try the issue and to record a finding thereon, after taking the evidence produced by the parties. In *Sabri* v. *Ganeshi* (1), it was held that when a case is remanded under section 566 of the Code of Civil Procedure, (corresponding to Order XLI, rule 25, of the present Code), to the lower Appellate Court for findings on certain issues, it is not competent, to that Court to delegate the decision of those issues to a Court subordinate thereto. In that case, the High Court held that the Subordinate Judge, to whom the case had been remanded, acted without jurisdiction, in further remanding the case to the Munsif and that his proceedings were illegal and *ultra vires*. In *Ali Sher Khan* v. *Ahmadullah Khan* (2), it was held, that when issues are remitted for trial under section 566 of the Code of Civil Procedure, such issues are triable only by the Court which was originally seized of the case. That case was not on all fours with the case reported in *Sabri* v. *Ganeshi* (1), but the principle of the latter was approved of and followed.

We note, that no objection was taken to the procedure of the learned Divisional Judge, until after the Subordinate Judge had made his inquiry and report. But the mere absence of objections, does not give a Court jurisdiction which it does not possess. The appellant's objection is, no doubt, a highly technical one, but we are of opinion that it must prevail. We, therefore, allow the objection and setting aside the proceedings on remand of the lower Appellate Court, again remand the case to it, so that it may carry out the previous order of this Court dated the 6th March 1912.

Case remanded.

(1) 14 A. 23; A. W. N. (1891) 205.

(2) 29 A. 660; 4 A. L. J. 603; A. W. N. (1907) 209.

CALCUTTA HIGH COURT.

APPLICATIONS, ORDERS NOS. 3431 AND 3432 OF 1912 IN RENT APPEAL NOS. 292 AND 293 OF 1908.

March 3, 1913.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Beachcroft.

LAKHI NARAIN JAGDEO—DEFENDANT—APPELLANT—PETITIONER

versus

KRITTIBAS DAS—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Decree—Transfer of Property Act (IV of 1882), s. 90—Order under section 90, whether decree—Appeal—Court-fee on memorandum.

An order under section 90 of the Transfer of Property Act is a decree, and an appeal from such an order is an appeal from a decree and, consequently, in such an appeal *ad valorem* Court-fee must be paid on the memorandum of appeal.

Application for refund of money deposited in Court by the appellant.

Babus *Provash Chandra Mitter* and *Sushil Madhab Mallik*, for the Petitioner.

Babu *Ram Chandra Mojumdar*, *Gunoda Charan Sen* and *Suresh Chandra Chakravarti*, for the Opposite Party.

Babu *Ram Charan Mitter*, Senior Government Pleader, for the Government.

JUDGMENT.—This is an application made under very exceptional circumstances, for refund of a sum of money, deposited in this Court by the appellant, in an appeal from original decree. The petitioner was the defendant in a suit to enforce a mortgage security. In the plaint, the mortgagee asked for the usual decree for sale, and also prayed that a personal decree might be made against the mortgagor, if the mortgage dues were not realised by sale of the mortgaged properties. The suit was heard *ex parte* and decreed on the 29th March 1900. With reference to the question of the true effect of this decree, it has been suggested, that the decree not only directed the sale of the mortgaged properties, but also entitled the plaintiff to proceed personally against the mortgagor. We are not prepared to accept this contention as well founded. The Subordinate Judge expressly directed the sale of the mortgaged properties, but did not declare that the mortgagor would be personally liable. In fact, in view of the terms of section 90 of the Transfer of Property Act, it was not competent for him, at that stage, to make an order of this description,

LAKHI NARAIN JAGDEO *v.* KRITTIBAS DAS.

A decree under section 90, can be passed only after it has been ascertained, that the net proceeds of the sale of the mortgaged properties are insufficient to pay the amount due on the decree. This is plain from Form No. 7 in Appendix D of the Civil Procedure Code of 1908, and it is clear that rule 14, of rules framed by this Court on the 6th August 1884 under section 104 of the Transfer of Property Act, did not give effect to the terms of section 90. [*Lal Behary Singh* v. *Habibur Rahman* (1); *Ram Ranjan* v. *Indra Narain Das* (2); *Damodar Sukurchand* v. *Vyanku* (3), *Badri Das* v. *Inayat Khan* (4)]. In any event, in the present case, there is nothing to show that the Subordinate Judge acted in contravention of the clear terms of section 90. This view is confirmed by the conduct of the decree-holder. After the mortgaged properties had been sold, he applied on the 1st November 1905 for a decree under section 90, and such a decree was made in his favour on the 11th May 1907. The mortgagor then applied to this Court, and, on the memorandum of appeal, paid Court-fees to the extent of Rs. 2, on the assumption that the appeal was directed against an order, made in proceedings in execution of a decree. Objection was promptly taken by the Deputy Registrar, who pointed out, that in a series of decisions of this Court, amongst which may be mentioned *Khatija Bibi* v. *Ganga Charn Das* (5), decided by Maclean, C. J., and Mitra, J., on the 26th April 1905; *Joges Chandra Roy* v. *Raj Kumar Roy* (6), decided by Ameer Ali and Brett, JJ., on the 30th July 1900, *Ram Protap Singh* v. *Chuttu Singh* (7), decided by Ghosh and Stevens, JJ., on the 12th January 1899, and *Dinanath Mitter* v. *Bejoy Krishna Das*(8), decided by Banerjee and Stevens, JJ., on the 18th June 1900, it had been uniformly held that an order under section 90 was a decree, that an appeal from such an order was an appeal from a decree, and that, consequently, in such an appeal *ad valorem* Court-fees must be paid on the memorandum of appeal. The matter then came to be heard before Caspersz and Sharfuddin, JJ., though section 5 of the Court Fees Act, 1870, makes the decision of the Taxing Officer final. Thel earned Judges, on the 2nd July 1908, directed the appellant to deposit in Court, the sum requisite for payment of Court-fees *ad valorem* on the memorandum of appeal. They further directed, that the memorandum of appeal be registered and added, that the point might be raised at the hearing of the appeal. The appeal was heard by Coxe and Imam, JJ., on the 14th March 1912. The question reserved by Caspersz and Sharfuddin, JJ., on 2nd July 1908, was not, however, raised either by the appellant or by the respondent, and the matter was not brought to the notice of the learned Judges; the consequence was that the appeal was heard and decided on the merits, though it is unquestionable that the memorandum was insufficiently stamped. It has been stated before us that the point was overlooked by learned Vakils on both sides. We unreservedly accept this statement. But we desire to add, that if the legal advisers of either party, with knowledge of the previous order, had deliberately omitted to bring the matter to the notice of the Court, the conduct of the gentlemen concerned, would have merited the gravest censure, and the only course open to the Court now would have been to discharge the judgment and decree passed under such circumstances, as section 4 of the Court Fees Act is imperative in its terms and makes it impossible for the Court, to entertain a memorandum of appeal upon which the proper amount of Court-fees has not been paid. It is, consequently, obligatory upon the Court, now that the question has been raised upon this application by the appellant, to obtain a refund of the sum in deposit, to consider whether the memorandum of appeal was or was not properly stamped. Upon this matter, there is no room for serious controversy. The principle, which underlies the decision of this Court in the case of *Bechoo Singh* v. *Bichharam Singh* (9), obviously applies to the case before us. In fact, in the present case, the position is very much stronger. Even if it be conceded, that there is scope for divergence of judicial opinion upon the question, whether or not, an order absolute is a final decree in a mortgage suit, there

(1) 26 C. 166; 3 C. W. N. 8.
(2) 33 C. 890.
(3) 31 B. 244; 9 Bom. L. R. 199.
(4) 22 A. 404; A. W. N. (1900) 132.
(5) Regular Appeal No. 60 of 1905.
(6) Miscellaneous Appeal No. 94 of 1900.
(7) Second Appeal No. 239 of 1899.
(8) A. O. D. No. 194 of 1900.

(9) 1 Ind. Cas. 677; 10 C. L. J. 91.

can be no controversy, that an order under section 90 of the Transfer of Property Act is a decree. Section 90 describes the order as a decree, the order has all the characteristics of a decree, as defined in the Code of Civil Procedure; it determines the personal liability of the mortgagor to pay to the mortgagee, the amount of the judgment-debt, not realised by the sale of the mortgaged properties; the order presupposes an adjudication by the Court, that such balance is legally recoverable from the defendants, otherwise than out of the property sold. It is consequently incontrovertible, that the order is a decree; an appeal preferred against the order must be treated as an appeal from original decree and Court-fees levied *ad valorem* upon the memorandum of appeal. But we do not decide a question which may possibly arise hereafter, namely, if an appeal is preferred against a decree *nisi* or a decree absolute in a mortgage suit, whether, upon an appeal preferred against the decree under section 90, Court-fees can be levied a second time; that point is not before us and we reserve our opinion upon it. In the present case, we are clearly of opinion, that the memorandum of appeal was not properly stamped. We direct, accordingly, thatthe amount in deposit, in this Court be now applied in the purchase of Court-fees to be annexed to the memorandum of appeal. The consequence, will be that the appellant will be entitled to have these costs included in the decree he has obtained against the respondent. The decree must be amended in this respect.

The same question arises in another appeal (R. A. No. 293 of 1908) in which a separate application has been presented. That appeal was dismissed by this Court on the merits. Consequently, the decree in that case does not stand in need of amendment. But the amount in deposit in that case, also must be applied in the purchase of Court-fees to be annexed to the memorandum of appeal.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1341 OF 1912.

May 12, 1913.

Present:—Justice Sir George Knox, KT.

TIKA RAM—PLAINTIFF—APPELLANT

versus

RATAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit by a Hindu on behalf of Hindu community to recover Thakurdwara property from a trespasser—Permission of Legal Remembrancer unnecessary.

Any member of the Hindu community can institute a suit on behalf of that community, with the permission of the Court, to eject a trespasser from a property belonging to a *Thakurdwara* in a village.

The permission of the Legal Remembrancer for such a suit is not necessary.

Muhammad Abdullah Khan v. *Kallu*, 21 A. 187; A. W. N. (1899) 18; *Jamal Uddin* v. *Mujtaba Husain*, 25 A. 631; A. W. N. (1903) 120; *Ram Das* v. *Badri Narayan*, 29 A. 27; 3 A. L. J. 773; A. W. N. (1906) 260, *Muhammad Alam* v. *Akbar Husain*, 6 Ind. Cas. 835; 32 A. 631; 7 A. L. J. 797, *Dasondhay* v. *Muhammad Abu Nasar*, 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710, *Ram Chander* v. *Ali Muhammad*, 18 Ind. Cas. 797; 11 A. L. J. 233, referred to.

Second appeal from the decision of the Additional Judge of Bareilly, dated the 17th of June 1912.

Mr. *Govind Prashad*, for the Appellant.

Dr *S. C. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by one Tikaram, who describes himself as a Hindu, caste Baqal. He sets out in his plaint, that in the village to which he belongs, there is a *Thakurdwara* and a *Shivala* in which all Hindus have, from a long time past, been performing worship. The *Thakurdwara* and the land appertaining to it had for long been used for celebration of ceremonies on festive occasions. Ten years ago, the defendants built a *kachha* shop on a *chabutra* and a court-yard belonging to the said *Thakurdwara*. They have taken possession of six *biswansis* of land, and the plaintiff and other inhabitants of the village had been deprived of the use of that land. He asked, that a decree may be given him for the demolition of the buildings erected on the *chabutra*, and that he (the plaintiff) may be put in possession of the same on behalf of the Hindu inhabitants of the village. Although, he did not make any mention of it in the plaint, but there is on the record (See paper No. 2) an application by the plaintiff in which he asked for permission to sue on behalf of all Hindu residents of the village

and there is an order dated the 19th March 1911, in which the Court granted permission and advertised the fact to the Hindu residents by a proclamation in the village. It may, therefore, be taken that the suit is one in which the plaintiff has applied for and obtained permission to sue on behalf of the Hindu inhabitants of *Mouza* Agras, *Perganah* Bareilly. In defence, it was urged that the *Thakurdwara* was not a public place of worship, that no idol had been installed and that no land had been dedicated to any idol. The defendants said, that they had purchased the land in dispute from the same Kundan Lal, who is supposed to have dedicated the temple and the land in dispute, and that it was with his permission that the defendants constructed the shop upon the land. Finally, there was a plea taken, that the plaintiff could not sue inasmuch as no written permission had been obtained from the Legal Remembrancer. The Court of first instance overruled all the pleas raised by the defendants and decreed the claim. The lower Appellate Court on all the facts in issue found against the defendants. But that Court allowed the appeal before it on the ground, that the suit was not maintainable inasmuch as no written permission had been obtained from the Legal Remembrancer. In support of its conclusion, the lower Appellate Court relied on *Raghubar Dial* v. *Kesho Ramanuj Das* (1) also *Wajid Ali Shah* v. *Dianat-ul-lah Beg* (2).

Apparently, no other ruling was quoted to the lower Appellate Court. In appeal before this Court, the plea taken is that the suit is maintainable and reference has been made to the following cases. *Muhammad Abdullah Khan* v. *Kallu* (3); *Jamal-ud-din* v. *Mujtaba Husain* (4); *Ram Das* v. *Badri Narayan* (5); *Muhammad Alam* v. *Akbar Husain* (6); *Dasondhay* v. *Muhammad Abu Nasar* (7); *Ram Chander* v. *Khawaja Ali Muhammad* (8).

In view of these rulings, I am of opinion that the present suit is not one which falls within section 92 of Act V of 1908. For the respondents, it is contended, that clause (*h*) of section 92 prevents a suit of this kind being brought without the consent in writing of the Legal Remembrancer. But it appears to me, that clause (*h*) should be interpreted, as it has been interpreted, by several of the above rulings, to mean that the further or other relief mentioned in clause (*h*) must be further or other relief *ejusdem generis* with the relief set out in clauses (*a*) to (*g*). The suit before me is a suit by the Hindus of Agras to eject a trespasser from property which belongs to a trustee in a village. I am not asked to remove a trustee or to inquire as to how the trust property is being administered. I decree the appeal, set aside the judgment and decree of the lower Appellate Court and restore that of the first Court with costs in all Courts.

Appeal decreed.

(1) 11 A. 18; A. W. N. (1888) 276.
(2) 8 A. 31; A. W. N. (1885) 318.
(3) 21 A. 187; A. W. N. (1899) 18.
(4) 25 A. 631; A. W. N. (1903) 120.
(5) 29 A. 27; 3 A. L. J. 773; A. W. N. (1906) 260.
(6) 6 Ind. Cas. 835; 32 A. 631; 7. A. L. J. 797.
(7) 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710.
(8) 18 Ind. Cas. 797; 11 A. L. J. 233.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 359 OF 1910.

May 9, 1913.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

DARSAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAWANI KOER—PLAINTIFF—RESPONDENT.

Revenue sale—Avoidance of incumbrances—Voidable at purchaser's option—Notice to avoid incumbrance, whether purchaser bound to give—Point of time when incumbrance to be considered avoided—Revenue Sale Law (Act XI of 1859), s. 29—"Any person", meaning of—Holder of incumbrance, possession of, when to be deemed wrongful—Damages for use and occupation, to be calculated on what basis—"Mesne profits," meaning of—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (12).

A revenue sale does not *ipso facto* avoid incumbrances and under-tenures, but merely renders them voidable at the option of the purchaser.

Titu Bibi v. *Mohesh Chunder Bagchi*, 9 C. 683; *Mafizuddin* v. *Korbad Ali*, 31 C. 393 at p. 396; 8 C. W. N. 115, *Mir Wazir-ud-din* v. *Lala Deokinandan*, 6 C. L. J. 472 at p. 484 and *Ram Ratan Kapali* v. *Aswini Kumar Dutt*, 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849, relied upon.

It is not necessary for the purpose of avoiding an under-tenure, that the purchaser should give notice, before bringing his suit; the option may be exercised by the institution of a suit within the time allowed by law.

Where such a suit has been instituted, the tenure must be regarded as annulled, from the date of the

commencement of the suit, and for the period antecedent to such a suit the possession of the under-tenure-holder is not wrongful and the purchaser is not entitled to claim by way of damages for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first degree.

Ram Ratan Kapali v. *Aswini Kumar Dutt*, 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849, followed.

The words "any person" in section 29 of the Revenue Sale Law, 1859, who refuse to vacate and be removed by the Collector, refer to the former proprietors or persons claiming proprietary right through them, and do not refer to under-tenure-holders, and the purchaser must bring a suit to remove a tenure-holder if he refuses to vacate.

Where the purchaser gave notice to a *mokraridar*, indicating his option to avoid the *mokrari* and called upon the *mokraridar* to give up possession, within a certain time, the possession of the *mokraridar* not being wrongful before that date, the purchaser is not entitled to mesne profits, for the period prior to that date, and is entitled only to damages for use and occupation, on the basis of the *mokrari* rent.

"Mesne profits" mean those profits, which the person in wrongful possession of such property, actually receives or might with ordinary diligence receive, and not what the plaintiff has lost.

Anukul Chandra v. *Nobin Chandra*, 15 Ind. Cas. 1, referred to.

Appeal from the decree of the Sub-Judge of Gaya, dated April 16th, 1910.

Babus *Umakali Mukherjee* and *Atul Chandra Dutt*, for the Appellant.

Babu *Kulwant Sahay*, for the Respondent.

JUDGMENT.—The plaintiff-respondent purchased an entire estate, consisting of two villages, at a sale held under section 14 of Act XI of 1859 for arrears of Government revenue, on the 27th March 1902. The sale was confirmed, on appeal by the Commissioner on the 1st September 1902, and the purchase took effect from the 13th January 1902, *i. e.*, the day after the last day of payment of revenue for the January *kist* of 1902. The plaintiff appears to have obtained formal delivery of possession of the estate from the Collectorate in September 1902. Shortly after that, the ex-proprietors and some of the *mokararidars* of the estate brought several suits for setting aside the sale in the Civil Court, and the sale was set aside by the Subordinate Judge on the 18th September 1903. On appeal to the High Court, however, the decree of the Subordinate Judge was reversed and the sale was upheld on the 13th February 1907. The plaintiff then issued notices on the 26th July 1907 for avoiding the under-tenures within one month, and then instituted the present suit on the 19th September 1907 for a declaration, that the under-tenures of the defendants were void, for possession of the same and for mesne profits. The suit was contested on various grounds by the defendants, but they were overruled and a preliminary decree was passed on the 20th July 1903, ordering possession to be given to the plaintiff and directing assessment of mesne profits.

The plaintiff obtained possession of Monohar *chak* on the 5th October 1908 and on the 3rd May 1909 applied for assessment of mesne profits. A Commissioner was appointed for the purpose, and he submitted his report on the 8th September 1909. Objections were taken by the defendants, but they were overruled by the lower Court and that Court upheld the Commissioner's report, and passed a decree on the 16th April 1910, directing the defendants Nos. 12 to 14 to pay Rs. 1,051-1-3 and the defendants Nos. 15 and 16 to pay Rs. 2,102-2 6 as mesne profits to the plaintiff.

The defendants Nos. 12 to 16 were the *mokararidars* of Monohar *chak*, one of the villages comprised in the estate, and they are the only defendants who have appealed to this Court, and three contentions have been raised on their behalf. The *first* is that the plaintiff was not entitled to mesne profits from the 13th January 1902, *i. e.*, from the date from which his purchase took effect, but only from the 26th August 1907, the date on which the term of the notice for avoiding the *mokarari* expired; *secondly*, that according to the provisions of Article 109 of the Limitation Act, the plaintiff was not entitled to mesne profits for any period beyond three years prior to the institution of the suit; and, *thirdly*, that the amount of mesne profits had been wrongly assessed.

As regards the first contention, there is no doubt, that the plaintiff's purchase took effect from the 13th January 1902 and as purchaser of an entire estate, she purchased it free from all incumbrances, and was entitled to avoid and annul all under-tenures with certain exceptions as laid down by section 37 of Act XI of 1859. But the sale does not *ipso facto* avoid the incumbrances and under-tenures, but only renders them voidable at the option of the purchaser. See *Titu Bibi* v. *Mohesh*

Chunder Bagchi (1), *Mufizuddin* v. *Korbad Ali* (2) and *Mir Waziruddin* v. *Lala Deokinandan* (3), *Ramratan Kapali* v. *Aswini Kumar Dutt* (4). It is not necessary for the purpose of avoiding an under-tenure, that the purchaser should give notice before bringing his suit and the option may be exercised by the institution of a suit within the time allowed by law. It was held in the case of *Ram Ratan Kapali* v. *Aswini Kumar Dutt*(4), cited above, that where such a suit has been instituted, the tenure must be regarded as annulled from the date of the commencement of the suit, and that for the period antecedent to such a suit, the possession of the under-tenure-holder is not wrongful and a purchaser at a revenue sale is not entitled to claim by way of damages, for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first degree. We agree with the view taken in the above case and as a notice was served in the present case for avoiding the *mokarari*, the period whereof expired on the 26th August 1907, we are of opinion that the plaintiff is entitled to mesne profits only from that date. The possession of the defendants not being wrongful before that date, the plaintiff cannot recover mesne profits for the said period. It has been contended on behalf of the respondent, that under section 29 of Act XI of 1859, the Collector has the power to order delivery of possession of the estate to be made by removing any person, who may refuse to vacate the same, and by proclamation to the occupants of the property by beat of drum, or in such other mode as may be customary, and that the delivery of possession to her under section 29 of the Act, amounted to avoidance of the defendents' *mokarari*, and that, at any rate, the possession of the defendants became wrongful from the date, on which the plaintiff obtained delivery of formal possession through the Collector. But the Collector, under section 29, has the power to remove any person, who may refuse to vacate, whether the purchase is of an estate or a share of an estate. Now, in the case of a share of an estate, the purchaser, under section 54 of the Act, acquires the share subject to all incumbrances and does not acquire any rights which were not possessed by the previous, owners, and in such a case, no question of removal of under-tenure-holders or incumbrancers can arise. The words 'any person,' therefore, who may refuse to vacate, and who may be removed by the Collector, seem to us to refer to the former proprietors or persons claiming proprietary right through them, and do not refer to under-tenure-holders. Difficult questions may, and often do, arise, whether a particular tenure or land comes within the exceptions to sections 37 of the Act. There is no procedure prescribed in Act XI of 1859, for the Collector's trying such questions, and there is no provision even for a summary trial of questions, which may arise involving civil rights. There may be numerous tenures and *rayoti* holdings in an estate, and if the purchaser asserts that they do not come within the exceptions to section 37 of the Act, the Collector must either turn out all the tenants in the estate or summarily try their rights, if the contention of the respondent is well founded. There is no authority for such a contention and there is nothing in the Act in support of it. The purchaser must bring a suit to remove a tenure-holder if he refuses to vacate, and Article 121 of the Limitation Act prescribes a period of twelve years for a suit to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue.

In the case of *Mir Waziruddin* v. *Lala Deokinandan* (3), the question was, whether formal possession, obtained from the Collector by a purchaser at a revenue sale is operative against the under-tenure-holder, so as to save limitation, in a suit for annulment of an under-tenure and recovery of possession, and the question was answered in the negative. Reliance has been placed, however, on certain observations, made by the learned Judges in that case, *viz.*, that it might be conceded that the principle upon which symbolical possession is considered as effective against a party to the proceedings is applicable, when possession has been delivered strictly in accordance with section 29 of Act XI of 1859 to a purchaser at a sale for arrears of revenue, and that the election to annul under-tenures may be indicated by

(1) 9 C. 683.
(2) 31 C .393 at p. 396; 8 C. W. N. 115.
(3) 6 C. L. J. 472 at 484.
(4) 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849.

actual ejectment by the Collector under section 29. But it appears to have been conceded only for the sake of argument, and was at most an *obiter*, as possession had not been delivered by removing the under-tenants, and formal possession only was delivered to the purchaser.

The purchaser may elect to annul an under-tenure not only by institution of a suit or by giving a notice to vacate but may indicate it by other means. And even assuming that the Collector has any power to remove under-tenure-holders, there is nothing to show that the purchaser in the present case indicated her election to avoid the *mokarari* by applying to the Collector to do so. In the present case, possession was not delivered by removing any person.

The plaintiff admits in her plaint that only symbolical possession of the *mahal* was delivered to her in October 1902.

The notice issued by her on the 26th July 1907 recites that she had purchased the estate free from incumbrances and had obtained possession through the Collectorate and then states "And whereas:—I hereby avoid and annul all under-tenures and all other incumbrances in the said *mahal* and in particular the said alleged *mokarari* tenure of the 3rd November 1838" now, therefore, I call upon you to deliver up to me possession of all the lands in the said *mahal* in which you have been in possession within one month from this date, and I hereby declare that in default of your doing so, I shall proceed to eject you therefrom by due process of law".

It was by this notice, therefore, that plaintiff indicated her option to avoid the *mokarari* and called upon the defendants to give up possession within one month, and there is nothing to show that she expressed her intention to annul the *mokarari* before the notice was issued. Besides it appears that notwithstanding the sale of the *mahal*, the defendants Nos. 12 to 16 went on paying Government revenue and cesses into the Collectorate in respect of Monohar *chak* until 1908 when plaintiff obtained possession through the Civil Court and it is not suggested that the plaintiff paid the said amount of revenue.

Under the circumstances, the possession of the defendants, prior to the expiry of the term of the notice, was not wrongful, and the plaintiff is not entitled to mesne profits for any period prior to that date, but is entitled only to damages for use and occupation on the basis of the *mokarari* rent which was payable in respect of Monohar *chak*.

In this view, the second point raised on behalf of the appellants *viz.*, whether the plaintiff is entitled to any mesne profits for any period beyond three years of the institution of the suit, having regard to the provisions of Article 109 of the Limitation Act, does not arise.

We accordingly hold that the plaintiff is entitled to recover mesne profits from the 26th August 1907 to the 5th October 1908, when she obtained actual possession from the Civil Court.

The last point relates to the assessment of mesne profits. It is contended on behalf of the appellants that there has been no proper trial of the objections to the Commissioner's report by the Court below. The Court below simply said that it saw no ground to differ from the conclusions arrived at by the Commissioner. The first objection raised is that the Commissioner ought to have measured the lands and ought not to have taken 90 *bighas* to be the area of the lands in respect of which the mesne profits were to be assessed. It appears, however, that the defendants themselves stated the area to be 58 acres which the Commissioner finds to be equivalent to 90 or 91 *bighas*, and although subsequent to the examination of plaintiff's witnesses before the Commissioner, they put in a petition before the Court stating that the area was 58 *bighas* and not acres, the petition was not sent to the Commissioner. Having regard to the facts that the area was originally admitted to be 90 *bighas* and the objection as to the area was not taken until at a late stage, which, if taken earlier, might have been at once settled by measuring the lands, we are not disposed to allow the question of area to be re-opened at this stage, which would necessitate a fresh commission for measuring the lands. The next objection is that no mesne profits ought to have been allowed on the 15 *bighas* of *parti* lands but the Commissioner has found that they were culturable lands which yielded paddy and other crops and had been left uncultivated for two or three years. It was

contended that in assessing mesne profits, the Court should take into consideration what the defendant made, not what the plaintiff lost, and reliance was placed upon the decision of this Court in the case of *Anukul Chandra Chakravarti* v. *Nabin Chandra Bose* (5). That case, however, does not help the appellant. In that case, the plaintiff before dispossession had settled the lands at a rental of Rs. 40 per year and the lower Appellate Court assessed mesne profits on that basis although the Munsif found that the land yielded profits to the amount of Rs. 766 during the period of dispossession. This Court was of opinion that the lower Appellate Court had proceeded upon a wrong basis and observed as follows:—

"The Appellate Court considered not what the defendant may be taken to have made, but what the plaintiff lost This is not the correct basis, as is shown by the definition of mesne profits in section 2, sub-section 12 of the Code of Civil Procedure. The duty of the Court in estimating mesne profits is there so clearly indicated that we need not amplify the matter..... .....It was, therefore, the duty of the Appellate Court.....to assess mesne profits as described in the Code and we remit the case to the lower Appellate Court in order that mesne profits may be ascertained accordingly." Now, section 2, sub-section 12, of the Civil Procedure Code, says that mesne profits mean those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received. That decision, therefore, goes against the appellant's contention. The third objection is as to the Bhooly rent, but the average produce has been found on the evidence and the rent has been assessed at half the produce. The fourth objection relates to the charges on account of well and earth work but the Commissioner has found that they do not exceed very much the allowance of Rs. 10 per cent. allowed on the head of collection charges. We are not disposed to interfere with the assessment made by the Commissioner. There is no reason, however, why the defendants should not be allowed a deduction of the amounts paid by them on account of Government revenue and cesses, the *chalans* of which were filed in the case.

The parties have agreed that the plaintiff will get damages to the extent of Rs. 75 for the period prior to the 26th August 1907, and Rs. 325 as mesne profits from the 26th August 1907 to 5th October 1908, total Rs. 400.

There will accordingly be a decree for Rs. 400 in favour of the plaintiff. The defendants Nos. 12 to 14 will be liable to the extent of $\frac{1}{3}$rd and the defendants Nos. 15 and 16 to the extent of $\frac{2}{3}$rd.

The defendants Nos. 12 to 16 will get half their costs in both Courts after the preliminary decree, the plaintiff bearing his own costs after the preliminary decree, and if the plaintiff has withdrawn any money deposited by the defendants Nos. 14 to 16, the latter will be entitled to restitution of the said amount within a month of the arrival of the record in the lower Appellate Court. No interest will be charged on the Rs. 400 to be paid by the defendants Nos. 12 to 16 to the plaintiff, nor upon the amount deposited by the defendants Nos. 12 to 16, if the plaintiff pays back the money within a month of the arrival of the records in the lower Appellate Court after which period interest will run.

(5) 15 Ind. Cas. 1.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 779 OF 1912.
May 19, 1913.
Present:—Mr. Justice Tudball and Mr. Justice Rafique.
BHAGWAT PARSHAD AND OTHERS—PLAINTIFFS—APPELLANTS
versus
LACHMI NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 211, 233 (k)—Partition proceeding—Objection as to title dismissed as time-barred—Subsequent Civil suit barred.

An objection as to proprietary title was taken beyond time in a partition proceeding. The partition officer dismissed the objection as time-barred:

Held, that a civil suit in respect of the same subject-matter was barred under the provisions of section 233 (*k*) of the Land Revenue Act.

BHAGWAT PARSHAD *v.* LACHMI NARAIN.

Second appeal from the decision of the District Judge of Banda, dated the 22nd March 1912.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit for recovery of possession and mesne profits of immoveable property. It was instituted on the 9th of February 1911 in the Court of the Subordinate Judge of Banda. It was decreed by the Court of first instance and dismissed by the lower Appellate Court. The plaintiffs have come up here in second appeal.

The facts may be briefly stated as follows:—

The plaintiffs were owners of a certain share in a certain *khata* in the village in question. Attached to this and other *khatas* was some *shamilat* land. The plaintiffs owned other shares in addition to this in the village. The share in the *khata* was mortgaged. A suit was brought on the basis of the mortgage and the share in the *khata* was sold together with all appurtenances. It was purchased by the defendants to the present suit. The plaintiffs' contention was that the share in the *shamilat* land was neither mortgaged nor sold in execution of the decree. The defendants' contention was that the share in the *shamilat* land was appurtenant to the share in the *khata* and must be deemed to have been mortgaged and sold when the latter was mortgaged and sold.

The plaintiffs filed suits for rent against some tenants of the *shamilat* land who pleaded that they had paid their rent to the defendants. The suit was finally decided against the plaintiffs, the Revenue Courts holding that the defendants had received possession, in execution of the Civil Court decree, of the *shamilat* land. It was after this decision that the present suit was brought. Among other defences, the defendants raised the plea that the question between the parties as to the ownership of the *shamilat* land had been decided by the Revenue Court in connection with a partition case and, therefore, the present suit was barred. The Courts below disallowed the defence on the ground that the objections filed in the partition suit were disallowed as being made out of time, therefore, the Revenue Courts could not be held to have decided the question and there was no bar to the present suit.

The facts of the partition case are briefly as follows:—

The application for partition was made in the year 1909 some two years prior to the institution of the present suit. The defendants asked for partition of their share and they claimed the property which is now in dispute as their own. Notices and proclamations were issued by order dated the 11th of November 1909 and the 10th December 1909 was fixed for the filing of objections. On that date, Ahmad Ali Khan, described in the record of the partition case as the *Mukhtar-am* of Bhagwat Prasad, one of the present plaintiffs, was present. The order of the Court shows that no objections of any sort were filed; it, therefore, directed partition proceedings to be drawn up. On the 20th of January 1910, objections raising the question of proprietary title of the property now in suit were filed on behalf of the present plaintiffs. The Revenue Court rejected them as having been made out of time. No appeal whatsoever was preferred from that order and in the partition proceedings, it was ordered that the *shamilat* land should be divided among the co-sharers of the different *khatas* in proportion to the shares which they held in those *khatas*. Partition has taken a somewhat weary and lengthened course and is at the present moment on the verge of being completed. The lands have been divided and the share claimed by the plaintiffs in this suit has been allotted to the defendants. It is urged on behalf of the respondents that under section 233 (*k*) of the Land Revenue Act, the present suit is barred, that it was open to the present plaintiffs to have filed their objections and preferred their claim in the course of partition proceedings. Having failed to take advantage of the opportunity given under sections 110, 111, and 112 of the Revenue Act, they are now barred from coming into the Civil Court to establish their title.

In our opinion, there is considerable force in this contention. It is urged on behalf of the plaintiffs that if further time be allowed to them, they might be able to show to the Court that they had not or some of them had not the opportunity, which the law contemplates, of preferring objections under section 110 of the Revenue Act. In our

opinion, it is too late to raise this contention now. The partition case has been going on for some four years and this suit has passed through two different Courts. It was open to the plaintiffs, in answer to the defence raised by the respondents, to have met them with this contention that they had not received the opportunity of filing their objections in the partition case. It is too late now to ask this Court to allow further time merely in order to enable them to see whether or not this plea can be raised and can be established.

So far as we can judge from the record, they have had ample opportunity of filing objections; as a matter of fact they did file objections though not within the time fixed by the Court. They did not state therein that they had not had any opportunity of filing their objections within time and that the notice was not duly served upon them. The order of the Revenue Court amounted to a decree and was open to appeal.

In our opinion, section 233 (*k*) of the Land Revenue Act bars the present suit. For this reason, the appeal must fail and it is dismissed with costs including Pleader's fees in this Court on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 30 OF 1911.
May 21, 1913.
Present:—Mr. Justice Stephen and
Mr. Justice Mullick.
MEHER ABZAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAHAMAN ALI MEAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3 –Limitation Act (IX of 1908), Sch. I, Art. 95—Suit for possession of raiyati *holding after setting aside* ex parte *decree as being fraudulent.*

The period of limitation applicable to a suit for declaration of the plaintiff's *raiyati* right in the disputed land and for *khas* possession of it, after setting aside an *ex parte* decree as being fraudulent and illegal, is that prescribed by Article 95 of the Limitation Act and not that prescribed by Article 3 of Schedule III of the Bengal Tenancy Act, as the setting aside of the *ex parte* decree is the essential feature of the case from which the other remedy will follow; because if the decree is void the plaintiff's right to possession will follow as a necessary consequence.

Appeal from the decree of the District Judge of Chittagong, dated September 29th 1910, reversing that of the fourth Munsif of Patiya, dated May 18th, 1910.

Babu *Dhirendra Lal Kastagir*, for the Appellants.

Babu *Khitish Chandra Sen*, for the Respondents.

JUDGMENT.—In this case, the plaintiffs sued for declaration of their *raiyati* right in the disputed land and for *khas* possession of it after setting aside an *ex-parte* decree as being fraudulent and illegal. The lower Appellate Court has dismissed the suit on the ground that it is barred by Article 3 of Schedule III of the Bengal Tenancy Act.

The appellants before us contend that this Article is not applicable to the case before us. Their argument is that the suit before us is, in the first place, a suit for declaring the *ex parte* decree and proceedings consequent on it void, for reasons set forth. If that decree is void, their right to possession follows, according to their contention, as a necessary consequence. Consequently, the suit is not one to recover possession as mentioned in Article 3 of Schedule III to the Bengal Tenancy Act but to set aside a decree as mentioned in Article 95 of the Limitation Act. Looking at the nature of the suit, the setting aside of the decree is the essential feature of this case from which the other remedy will follow. We consider that this contention is correct.

In opposition to this view, the respondents cite the case of *Saraswati Dasi* v. *Horitarun Chuckerbutti* (1), where it is said that the limitation under the Bengal Tenancy Act is intended to apply to all suits to recover possession of the land which may be brought by an occupancy *raiyat*. We cannot, however, hold that this observation applies to the present case, the distinction between the two cases being that the one referred to is a suit for possession whereas the present one is for setting aside the decree in the first place and for possession as a consequential relief.

(1) 16 C. 741.

NABIN CHANDRA HAZARI *v.* MRITUNJOY BARNIK.

In the second place, the appellants contend that in this case dispossession by the auction-purchaser is not necessarily dispossession by the landlord. This, in our opinion, depends on whether the action of the auction-purchaser, in dispossessing the tenant, took place in collusion with the landlord which we take to be the same thing for present purposes as acting at his instigation. We cannot suppose that the judgment in *Aminuddin Munshi* v. *Ulfatunnessa Bibi* (2) can be taken as meaning that the shorter period of limitation will apply to every suit brought against the auction-purchaser. No doubt, it will, according to law, apply to suits where the auction-purchaser has acted in collusion with the landlord, but there is in this case no finding whether there was such collusion or not.

We accordingly remand the case to the lower Appellate Court in order that he may consider whether there was in this case such collusion or instigation. If there was, the limitation of Article 3, Schedule III, of the Bengal Tenancy Act will apply. If there was not, the period of limitation will be the longer period provided by Article 95 of the Limitation Act. The result is that the lower Appellate Court will re-hear both the appeals that were before it in accordance with what we have said.

Costs will abide the result.

Case remanded.

(2) 3 Ind. Cas. 315; 13 C. W. N. 108; 9 C. L. J. 131.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 341 OF 1912.

May 22, 1913.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

NABIN CHANDRA HAZARI—DECREE-HOLDER—APPELLANT

versus

MRITUNJOY BARNIK—SURETY OF JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Surety of judgment-debtor—Undertaking that judgment-debtor would apply in insolvency—Death of judgment-debtor before specified time—Right of decree-holder to enforce conditions of undertaking—Civil Procedure Code (Act V of 1908), *s.* 55, *sub-ss.* (3), (4).

The conditions of an undertaking given by a surety that a judgment-debtor would apply in insolvency within a specified time and that he would appear in Court whenever he was required to do so, cannot be enforced if the judgment-debtor die before the time of his appearance in Court had arrived. In that case, it is impossible for the surety to produce the judgment-debtor, and the decree-holder loses his remedy against the surety.

Krishnan Nayar v. *Ittinan Nayar*, 24 M. 637, followed.

Appeal from the order of the District Judge of Chittagong, dated April 30th, 1913, reversing that of the Munsif of Fatikcheri, dated January 27th, 1912.

Babu *Atul Krishna Roy* cited *K. Wadara Devan* v. *Ma Kin*, 8 Ind. Cas. 985; 3 Bur. L. T. 141, for the Appellant.

Babu *Dhirendra Lal Kastagir*, for the Respondent.

JUDGMENT.—In this case, the appellant, decree-holder, applied to enforce the conditions of an undertaking given by a surety that the judgment-debtor would apply in the insolvency within a specified time and that he would appear in Court whenever he was required to do so. Before the time of his appearance in Court had arrived, the judgment debtor died, and it was, therefore, impossible for the surety to produce him. The lower Appellate Court has held that thereupon the decree-holder loses his remedy against the surety. This is the correct view of the law, for, the event which occurred was not in contemplation of either party and, therefore, put an end to the obligation that there was under the contract. This view is in accordance with the ruling laid down in the case of *Krishnan Nayar* v. *Ittinan Nayar* (1).

The result is that this appeal on behalf of the decree-holder is dismissed with costs, the hearing-fee being one gold *mohur*.

Appeal dismissed.

(1) 24 M. 637.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 889 OF 1911.

May 26, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Agnew.

CHHABIL DAS—PLAINTIFF—APPELLANT

versus

MASSU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. II, rr.* 2,

CHHABIL DAS *v.* MASSU.

4 (c)—Mortgage without possession—Share of produce to be paid as interest—On default to pay interest possession to be taken—Default—Suit for produce without asking for possession—Subsequent suit for possession barred—Rule 4 (c), object of insertion—Novation of contract—Burden of proof—Mere promise by creditor not to sue, effect of—Jurisdiction of Civil or Revenue Court.

Plaintiff-mortgagee sued for possession of certain land mortgaged to him and for recovery of a certain sum on account of produce. The mortgage was without possession and a share of the produce was agreed to be paid as interest to the mortgagee. The only remedy for non-payment specifically provided was the assumption of possession by the mortgagee on default. Default had been made and plaintiff had brought suits for recovery of produce before without claiming possession:

Held, (1) that the suit was cognizable by a Civil Court;

(2) that the terms of a mortgage-deed drawn up by an unskilled draftsman must not be construed too strictly;

(3) that the right to sue for recovery of produce was inherent in the mortgagee and followed upon the obligation of the mortgagor to pay produce;

(4) that the present claim was barred under Order II, rule 2, Civil Procedure Code.

The new clause (*c*) to rule 4 in Order II, Civil Procedure Code, has been inserted in order to avoid the possibility of mistake and to make it perfectly clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both.

The party who relies on a new contract in substitution for an old one must prove that it was supported by consideration.

A mere promise by a creditor made at the request of his debtor to forbear from suing him is regarded as a voluntary promise and is, therefore, of no effect.

Trimbak Gangadhar v. *Bhagwan Das*, 23 B. 348, referred to.

Second appeal from the decree of the Additional Divisional Judge, Multan at Ferozepore, dated the 31st March 1911, affirming that of the District Judge, Muzaffargarh, dated the 7th February 1910, dismissing plaintiff's suit.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Pandit *Rajindar Parshad*, for the Respondents.

JUDGMENT.—The suit was by the plaintiff-mortgagee for possession of certain land mortgaged to him on 20th January 1896 and for Rs. 375-5-0, on account of produce. The mortgage was without possession, the land revenue to be paid by the mortgagor who remained in cultivating possession and was to pay $\frac{1}{4}$th produce as interest to the mortgagee. The deed further recites that if the mortgagor does not deliver produce to the mortgagee or if he fails to cultivate the land, the mortgagee shall have the right to take possession. The mortgage-deed does not in terms recite that if the produce by way of interest is not paid, the mortgagee may recover such unpaid interest by way of rent or otherwise. The only remedy for non-payment specifically provided is that the mortgagee may assume possession when default is made.

The pleas of the defendants were that they had not agreed to any condition to give possession to the mortgagee if they failed to pay produce, *that they had failed to pay produce in Kharif* 1907 *and Rabi* 1908 *but had paid before these harvests*, and finally that as plaintiff had brought suits for recovery of produce in lieu of interest before and had not in those suits claimed possession, his present claim was barred under Order II, rule 2, Civil Procedure Code.

Both the lower Courts have held that the suit was cognizable by a Civil Court and that the plaintiff's claim is barred by Order II, rule 2.

In this appeal, Counsel for appellant urges that—

(1) the claim was one cognizable by a Revenue Court;

(2) that although the mortgagee sued the mortgagors for value of produce in lieu of interest in 1897 and obtained a decree in February 1898, and in that suit did not claim possession, yet the admission of the mortgagor defendants that they paid produce between 1897 and *Rabi* 1907, removes the case from the operation of Order II, rule 2.

The first of these contentions is not seriously pressed by Counsel and we are satisfied that the suit was one for the decision of a Civil Court. Under the terms of the mortgage-deed produce was to be paid by way of interest and the mortgagor remained in possession. The right of proprietary possession was not transferred by the mortgagee to the mortgagor and in no sense can the latter be said to have "held the land under" the mortgagee. Following the principle laid down in *Buta Shah* v. *Kalu* (1), we hold that the suit was cognizable by a Civil Court.

(1) 46 P. R. 1894 (F. B.).

On the second point, the argument of appellant's Counsel may be briefly summarized as follows:

On the terms of the mortgage-deed of 20th January 1896, the plaintiff-appellant had no right to sue for recovery of produce. His only remedy was that provided by the mortgage-deed itself, *viz.*, that he should assume possession, if default in payment were made. The decree of 5th February 1898, under which plaintiff recovered the value of produce then due, should never have been passed, since the only remedy for failure to pay produce open to plaintiff under his mortgage-deed was to sue for possession. The plaintiff's right under the mortgage-deed to have possession in default made in payment of interest was not lost when he obtained his decree for produce and omitted to sue for possession, even though Order II, rule 2, may stand in the way of his enforcing his claim by way of suit; and as defendants have admitted payment of produce between 1897 and 1907 that admission operates to revive the plaintiff's right to sue for possession in the face of Order II, rule 2.

In reply, Counsel for the defendants-respondents points out that although the mortgage-deed of 20th January 1896 does not provide that if produce by way of interest be not paid by the respondents the plaintiff-mortgagee may sue for its recovery, such a right to sue is inherent in the mortgagee and follows upon the obligation of the mortgagor to pay produce. We hold that this view must prevail. The terms of a mortgage-deed such as this, drawn up as it was by unskilled draftsman, must not be construed too strictly. The object of the mortgage-deed was to secure to the mortgagee the payment of the produce agreed upon and though the penalty for non-payment specifically mentioned is that the defaulting mortgagor is to lose possession, we ses no reason why the mortgagee should not, if so advised, waive his right to possession, and sue to recover the value of the produce to which he was entitled under the bond. We cannot, therefore, accede to the appellant's contention that the decree of 5th February 1898 was a wrong decree as not being warranted by the terms of the mortgage-deed.

As regards the argument that the payment of produce by defendants, endorsed by their own admission, between the date of the decree of 1898 and the year 1907, operates to give plaintiff a right to sue for possession on the original mortgage-deed of 1896, the defendants certainly made the statement now relied upon by the appellant in his plea and Massu defendant repeated it when examined in Court. There is no other proof of such payments The plaintiff did not admit receipt of produce for these years and merely said that he looked upon items of produce for certain years, of which the recovery was barred by limitation, as having been paid so far as he was concerned. This is somewhat slender foundation upon which to build the ingenious argument put forward before us by Counsel for the appellant However, assuming for the moment that defendants did pay produce to plaintiff between 1898 and 1907, can it be said that the defendants thereby waived their right to plead Order II, rule 2, in bar of the plaintiff's present claim? Or was there any tacit renewal of the contract of mortgage, a breach of which might give the plaintiff a fresh cause of action? As regards the first question, the dictum of the learned Judges, who decided *Chaudhri Kundan Mal* v. *Sardar Allah Dad Khan* (2), appears to us to expound the law correctly:— "We cannot assent to the proposition that it is open to the parties by agreement *inter se* to override the rule laid down by the Legislature as regards splitting of causes of action" (page 60 of the report). It is further clear that at the time of the suit in 1897-98, the plaintiff's cause of action for assumption of possession and for recovery of accrued interest was one and the same, *viz.*, the defendants' failure to pay produce due at that time under the covenant. In a case decided by the Chief Court of Lower Burma, *Dubash Kader* v. *Fakeer Meera* (3), Bell, J., held that the addition of the new clause (*c*) to Order II, rule 4, of the Code of Civil Procedure has materially altered the law as it stood in section 44, rule (*a*) of the last Code. The argument is that the clause (*c*) to the present rule 4 in Order II shows by implication that claims coming under (*a*) and (*b*) of the rule are not claims based on the same cause of action as that on which the suit for recovery of moveable property

(2) 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910.

(3) 8 Ind. Cas. 445; 3 Bur. L. T. 56.

is based, because otherwise clause (*c*) would be superfluous. We are unable, however, to accept this view. It appears to us that the new clause (*c*) has been inserted in order to avoid the possibility of mistake and to make it perfectly clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both. As pointed out in *Ganga Ram* v. *Abdul Rahman* (4), the Code nowhere defines the term "cause of action", and it is, therefore, not probable that the Legislature in enacting clause (*c*) of rule 4, Order II, intended to distinguish the claims mentioned in clauses (*a*) and (*b*) of rule 4 as being causes of action distinct in nature from the class of claim dealt with in clause (*c*).

As to the appellant's contention that the payment of produce by way of interest after the suit of 1897-98 tacitly created a new contract of mortgage and thereby gave the plaintiff, on breach of its terms, a fresh cause of action, Counsel has referred us to a remark of Johnstone, J., in *Malik Karim* v. *Jattu Ram* (5). The facts were similar to those in the present case but the defendant had made no payment of interest subsequent to decree as is alleged to have been the case here. The remark in question is as follows:— "Had defendant after the first decree begun to pay Kasur, it might have been argued that there was a new tacit contract of mortgage". This is a mere *obiter dictum* of the learned Judge and does not even decide that in the case propounded, a fresh contract of mortgage should be presumed. Section 62 of the Contract Act lays down that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. But the party who relies on the new contract must prove that it was supported by consideration, a mere promise by a creditor made at the request of his debtor to forbear from suing him is regarded as a voluntary promise and is, therefore, of no effect. *Trimbak Gangadhar* v. *Bhagwan Das*(6). In the present case, we have, at most, an admission by the defendant that he paid produce after the original contract had for all practical purposes determined in his favour by the mortgagee's failure to enforce his right to possession thereunder in the suit of 1397-98. And that admission was made not in reply to a suit brought specifically on the new contract now put forward, but as a plea in bar of a claim made upon the original contract. Certainly, the defendants never contemplated that any such results would flow from their admission as are embodied in the ingenious argument put forward on behalf of the plaintiff-appellant. It is by no means certain that the fact now put forward by the plaintiff-appellant is true. If true, he fails in any event upon part of his original claim, *viz.*, for the value of the produce of the harvests of *Kharif* 1907 and *Rabi* 1908. It hardly lies in his mouth now to say in this Court that part of his claim is false and to put that forward as an argument in furtherance of his other claim for possession. Cases may arise in which the claim of a mortgagee to possession becomes barred under Order II, rule 2, and a fresh legal contract may be inferred from the action of the parties even if not formally embodied in a fresh deed of mortgage, but the present case is not one of them. There is no sufficient proof of any such novation as is claimed by the plaintiff-appellant to have taken place.

The appeal, therefore, fails and is hereby dismissed with costs.

Appeal dismissed.

(4) 28 P.R. 1907; 93 P.L.R. 1908; 140 P.W.R. 1907.
(5) Case No. 1178 of 1909.
(6) 23 B. 348.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1113 OF 1912.

May 16, 1913.

Present:—Mr. Justice Rafique

JAMNA PRASHAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GOPINATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Easement—Door used by females cannot be used by males—Aggravation of easement.

If an easement is confined to a particular purpose, it ought not to be extended to any other. Hence the back door of a house which was occasionally used by the sweepress or the ladies of the house or their maids for passage cannot be converted into a main door to be used by males.

JAMNA PRASHAD *v.* GOPINATH.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 2nd of July 1912.

Mr. *M. L. Agarwala* (with him Mr. *Haribans Sahai*), for the Appellants.

Mr. *Baldeo Ram* (with him Mr. *Iswar Saran*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for restraining the defendants-appellants from making certain additions to their house. It appears that the plaintiffs-respondents are the *zemindars* of Mohalla Dewan Raja Ram, situate in the city of Gorakhpur. There are certain houses close to the houses of the plaintiffs-respondents which belong to other persons, but the lands of those houses belong to the plaintiffs-respondents. A house immediately to the south of the plaintiffs-respondents' house belonged to one *Musammat* Sundar, who sold it to the defendants-appellants on the 5th of August 1909. There is a lane between that house and the house of the plaintiffs-respondents. The lane is a blind alley on the west side and connects with the public road on the east side. The defendants-appellants after their purchase re-built the house. They opened three new windows in the northern wall of the house, made a *verandah* on the north side and enlarged the back door on the north side turning it to main entrance to the house. They also re-built the privy in the north east corner and opened a door on the north side of it for the sweepress to come in and cleanse the place. The defendants-appellants further intended to make a drain and a cess-pool next to the privy on the north side. The plaintiffs-respondents objected to these new additions and instituted a suit in the Court of the Munsif of Gorakhpur praying for the following reliefs, namely, (1) that the defendants be ordered to close the new windows, the privy and the door of the privy and the new back door, and (2) that they should be restrained from making the drain and the cess-pool. It was alleged by the plaintiffs-respondents that the construction of the privy was a nuisance and that the opening of the privy door and the enlargement of the back door were encroachments on their rights. It was said that all that the defendants were entitled to was the use of the lane to the north of their house by their ladies and female servants occasionally and by the sweepress when she wanted to go into the house to cleanse the privy. The Court of first instance dismissed the claim of the plaintiffs-respondents except as regards the injunction in respect of the drain and the cess-pool. On appeal, the learned District Judge modified the decree of the first Court by granting all the reliefs prayed for in the plaint except those which related to the closing of the three windows and the building of the privy. The defendants have come up in second appeal to this Court. They challenge the decree of the lower Appellate Court with regard to the enlargement of the back door and the opening of the privy door. They contend that they were within their rights in opening a new door next to the privy and in turning the back door into the main entrance to the house. They have, it is said, admittedly, a right of easement over the lane to the north of their house. The right of easement which they have is the right of passage and it is no aggravation of the servitude if in addition to the ladies of the house and the servant maids, the males of the house and their visitors also pass over the lane. A similar argument is advanced with regard to the privy door. It is said that prior to the new additions to the house the sweepress used to go by the lane in question into the house by the old back door to the privy to cleanse it. The defendants have by opening a new door next to the privy shortened her passage over the lane and have lessened and not aggravated the burden on the servient heritage. The plaintiffs-respondents have, therefore, no ground of complaint. In support of this contention the learned Counsel for the defendants-appellants relies on section 23 of Act V of 1882 and the case of *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1). On the other hand, the contention for the plaintiffs-respondents is that the acts of the defendants-appellants in enlarging the back door and in the opening of a new door of the privy have imposed an additional burden on the servient heritage. The only question, therefore, for decision is whether the acts

(1) 13 C. 136.

complained of do constitute an aggravation of the servitude. I think they do. To take up the case of the enlargement of the back door first. It is a well-established rule of law that if an easement is confined to a particular purpose, it ought not to be extended to any other. The original back door was used, as has been found as a fact, by the sweepress or by the ladies of the house or their maids occasionally. The defendants-appellants who are related to each other as uncle and nephew are professional men—one is a lawyer and the other is a doctor. The conversion of the back door to the main entrance would necessarily lead to the use of the lane in question by their clients. Such use would be at variance with the original object of the easement and would certainly extend the right to a purpose other than that for which it was granted. The defendants-appellants by converting the back door to the main entrance to the house have, undoubtedly, imposed an additional burden on the servient heritage. The opening of a new door next to the privy is also, in my opinion, an aggravation of the servitude. The said door is an innovation and instead of only one door opening into the lane from the house of the defendants-appellants, there would be two doors now. It is in evidence that the ladies of the adjoining houses occasionally pass by the lane and it would be obnoxious to them to have to pass by the door of a privy used by the males. It is urged for the plaintiffs-respondents, and I think not without some reason, that the new door would be the means of giving out bad smell and would thus be a nuisance to the neighbours. I, therefore, agree with the learned Judge that the plaintiffs-respondents are entitled to have the new privy door closed and to restrain the defendants-appellants from using the back door as the main entrance of their house. It has been pointed out to me for the appellants that the relief granted by the learned Judge with regard to the back door cannot be supported in law. The said relief is as follows, namely, an injunction restraining the defendants against opening a door for the use of the males into the lane. It is said that all that the learned Judge could grant was an injunction restraining the defendants-appellants from using the back door or the door to the north of their house as the main entrance door to their house. The appellants, it is said, can make a door on the north side large or small as it suits their pleasure. In support of this contention, reliance is placed on the case of *Durga Prasad* v. *Sheo Parsad* (2). I think there is force in this contention and I allow it. The appeal fails in the main and is dismissed with the modifications mentioned below. I modify the decree of the learned Judge with regard to the back door by granting the plaintiffs an injunction against the defendants-appellants restraining the latter from using the door on the north side of their house as the main entrance to their house, which should be used by the females, maid servants and the sweepress. As the appeal substantially fails, I allow costs to the respondents including fees on the higher scale.

The plaintiffs-respondents have taken objections to the decree of the lower Court with regard to the privy and the windows. It is contended for the respondents that the defendants-appellants have no right to build the privy or to open the three windows in dispute. It has been found as a fact by the lower Court that the privy is only re-built on its old foundation. The plaintiffs-appellants cannot object to the re-building of the privy. As to the opening of the three windows, it is not alleged that by their opening there has been any invasion of the privacy of the respondents' house. The latter, therefore, can have no right to object [*vide Durga Prasad* v. *Sheo Prasad* (2)]. The objections fail and are dismissed with costs.

Appeal dismissed.

(2) A. W. N. (1888) 270.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 41 OF 1912.
May 13, 1913.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Lyle.
Raja SIDHESWARI PRASAD NARAIN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Goshain MAYANAND GIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act XIV of* 1882), *s.* 315—*Suit by auction-purchaser to recover purchase-money on he*

ground that judgment-debtor had no saleable interest in property—Limitation Act (IX of 1908), Sch. I, Art. 120.

A suit brought by an auction-purchaser to recover the purchase-money, in pursuance of section 315 of the Code of Civil Procedure, 1882, on the ground that the judgment-debtor had no saleable interest in the property, is governed by Article 120 of the Limitation Act.

First appeal from the decision of the Subordinate Judge of Benares, dated the 16th of November 1910.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

The Hon'ble Mr. *Moti Lal Nehru* (with him the Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Muhammad Ishaq*, *Gulzari Lal*, the Hon'ble Mr. *Gokal Prashad*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed to recover a sum of Rs. 15,200 in certain proportionate shares from the several defendants. The suit has been dismissed by the Court below as being barred by limitation. The facts for the purposes of the present appeal may be taken as admitted. A decree-holder of the name of Mayanand Gir caused certain property to be put to sale in order to realise the amount of a decree. The property was sold and purchased by the plaintiffs. An objection was taken on the part of a claimant to the property in the execution proceedings but the objection was disallowed with the result that the purchase in favour of the present plaintiffs was confirmed on the 20th of May 1907. The proceeds of the sale were paid into Court and were distributed among the persons who held decrees against the judgment-debtor of Mayanand Gir. Its distribution took place on the 1st of July 1907. Subsequently, the claimant to the property brought a regular suit to which he made the present plaintiffs parties and also Mayanand Gir. That suit was decreed by the Court of first instance on the 11th of September 1907 and after various hearings was confirmed by the High Court on the 22nd of November 1909. The plaintiffs instituted the present suit on the 12th of September 1910 claiming to get back the purchase-money as already mentioned. The Court below holding that the suit was one for "money had and received" by the defendants for the use of the plaintiffs dismissed the plaintiffs' suit as being barred by limitation on the ground that Article 62 applied and the time began to run from the 1st of July 1907 when the decree-holders received the money. The plaintiffs come here in appeal contending that the decision of the Court below was wrong. It seems to us that apart from the Code of Civil Procedure, the plaintiffs in the present case would have no right to recover back the purchase-money they paid merely on the ground that the judgment-debtor's title had proved defective. This seems to have been the view taken in by Straight, J., when referring a question to the Full Bench in the case of *Munna Singh* v. *Gajadhar Singh* (1). The learned Judge, after referring to a number of rulings, says:—"By all these decisions, it seems to have been recognised as an established principle of law, that a purchaser at a sale in execution of decree cannot recover his purchase-money, if it turns out that the judgment-debtor whose immoveable property he has purchased had no saleable interest."

When the case came before the Full Bench, this view of the law seems to have been accepted. The learned Chief Justice refers to section 315 of the Code of Civil Procedure then in force as being the foundation of the plaintiffs' right in that case to get a return of his purchase-money. This also seems to have been the view taken by Napier J., in the case of *Mohideen Ibrahim* v. *Muhamed Meera Levvai* (2). At page 489, the learned Judge says:—"It has been laid down by the Privy Council in *Dorab Ali Khan* v. *The Executors of Khaja Moheeoodeen* (3) that as in India moveable and immoveable property are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff, in respect of sales here, is governed by the law relating to chattels rather than by that relating to the sale of real property. It is clear that where the property seized was personal estate and it was sold by the Sheriff, no suit lay either against the Sheriff or the judgment-creditor who had received the purchase-money to recover it when the property had been recovered from the purchaser by a person claiming title, the principle being that a sale by the Sheriff

(1) 5 A. 577.

(2) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.

(3) 3 C. 806; 5 I. A. 116.

was not a sale in market overt, the purchaser acquiring thereby only what the judgment-creditor had a right to sell, namely, the precise interest and no more, which the judgment-debtor possessed in the goods, and that there was no warranty of title implied in a sale by the Sheriff." We agree that, outside the provisions of the Code of Civil Procedure, to which we shall presently refer, an auction-purchaser has no right to recover back the purchase-money merely by showing that the judgment-debtor had no saleable interest. The real reason is that in a sale by the Court, or its officer there is no warranty of title, and the money which the purchaser pays cannot either in law or equity be said to have been received by the Court, its officer or the creditor for the use of the auction-purchaser We, therefore, think that if the plaintiffs had any cause of action, their cause of action was to enforce the right which was given to them by sections 313 to 316 of the Code of Civil Procedure of 1882 (which admittedly was in force at the time of the sale and distribution of the purchase-money in the present case). Section 315 provides, amongst other things, that when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid. There is an alteration in the present Code which we need not consider for the reason mentioned above. The plaintiffs' right is regulated in the present suit by the provisions of the Code of 1882. In the Full Bench case to which we have already referred, *viz.*, *Munna Singh* v. *Gajadhar Singh* (1), it was unanimously decided that an auction-purchaser was entitled to bring a suit to recover back his purchase-money when it was found that the judgment-debtor had no saleable interest. It seems to us quite clear that this is a form of suit for which there is no special provision in the Limitation Act. We have already pointed out how, in our opinion, it cannot be said to be a suit for money had and received. We, therefore, think that Article 120 applies and it is admitted that if this is the proper Article, the suit is within time. The learned Advocate on behalf of the respondents urges that even if it be held that the plaintiffs' right in the present case is a right under the statutory provisions of the Code of Civil Procedure of 1882, the suit is nevertheless a suit for money had and received by the defendants for the use of the plaintiffs and he quotes in support of this contention the case of *Ram Kumar Shaha* v. *Ram Gour Shaha* (4). The learned Judges in deciding that case referred to the case of *Hanuman Kamat* v. *Hanuman Mandur* (5) and say as follows at page 1083:—"We are unable to distinguish this case in principle from the case before us." With great respect to the learned Judges, we think that the cases were distinguishable. In *Hanuman Kamat* v. *Hanuman Mandur* (5), the money was sought to be recovered on the ground that there had been a failure of consideration in the case of a private sale, whilst the case before the learned Judges in *Ram Kumar Shaha* v. *Ram Gour Shaha* (4) was a case like the present one in which an auction-purchaser sought to recover his purchase-money on the ground that the judgment-debtor had no saleable interest. As against the authority of this case, we have the case, already referred to, of *Mohideen Ibrahim* v. *Muhamed Meera Levvai* (2), in which the learned Judges expressly decided that Article 120 was the Article applicable to a suit in which an auction-purchaser sought to recover the purchase-money on the ground that the judgment-debtor had no saleable interest.

Under these circumstances, we think that the appeal should be allowed and the case remanded.

We accordingly allow the appeal, set aside the decree of the Court below and remand the case with directions to re-admit the suit under its original number in the file and proceed to determine the same according to law. Costs heretofore will be in the discretion of the Court disposing of the suit, and costs in this Court will include fees on the higher scale.

Appeal allowed.

(4) 2 Ind. Cas. 559; 13 C. W. N. 1080; 10 C. L. J. 558; 37 C. 61.

(5) 19 C. 123; 18 I. A. 158.

CHAMATKARINI DASI *v.* TRIGUNA NATH SARDAR.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1579 OF 1910.
APRIL 30, 1913.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Mullick.
CHAMATKARINI DASI—DEFENDANT NO. 1 —APPELLANT
versus
TRIGUNA NATH SARDAR AND OTHERS— PLAINTIFFS—RESPONDENTS.

Parties—Suit for rent—All tenants, whether necessary parties—Sale of holding freefrom incumbrances—Bengal Tenancy Act (VIII of 1885), *Ch. XIV—Contract Act* (*IX of* 1872), *s.* 43.

Whatever may be required for the purposes of a mere money decree, ordinarily all the tenants of a holding are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in Chapter XIV of the Bengal Tenancy Act.

Roop Narain Singh v. *Juggoo Singh*, 10 W. R. 304, *Ananda Kumar Naskar* v. *Hari Das Haldar*, 27 C. 545; 4 C. W. N. 608, and *Ashok* v. *Karim*, 9 C. W. N. 843, relied upon.

But where one of a number of tenants is put forward by the rest as their representative, he can be regarded as the sole tenant for the purposes of a suit for arrears of rent within Chapter XIV. Whether one of several tenants can be regarded as a representative of the rest, must depend on the circumstances of each case and is, if not essentially, at any rate largely, a question of fact.

Appeal from the decree of the District Judge of 24-Parganahs, dated March 29th, 1910, confirming that of the Second Munsif of Diamond Harbour, dated September 8th, 1909.

Mr. *S. P. Sinha*, Counsel, Babus *Mohendra Nath Roy* and *Shoshi Shekhar Bose*, for the Appellants.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti*, *Ganoda Charan Sen* and *Debendra Nath Ghose*, for the Respondents.

JUDGMENT.—The facts out of which this second appeal arises are these: Biswanath Sardar was the recorded tenant of a holding. He died in 1884 and was succeeded by his son Narendra, by a grandson Haripada, the son of a pre-deceased son, Aswini, and by the son Gouri, and the grandson, Triguna, of another pre-deceased son, Nabu. In 1897, a partition decree was passed and by it each branch became entitled to one-third. In 1901, the sole landlord brought a suit for rent of the whole holding against Narendra alone and in execution of that decree there was a sale and the appellant, Srimati Chamatkarini, the wife of Narendra, became the purchaser.

This suit is brought by Triguna, Haripada and Gouri to establish their right to two-thirds of the property notwithstanding the sale in execution. Both the lower Courts have decided in the plaintiffs' favour, and so Srimati Chamatkarini, the purchaser, has appealed. The sale professes to have been made under Chapter XIV of the Bengal Tenancy Act, and, if it was rightly so made, the title of the purchaser must prevail.

Was it then rightly so made?

As the Act stood in 1901, the date of the sale, Chapter XIV, commenced with section 159, which provides that where a holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests but with power to annul the interests defined as incumbrances.

We have no concern in this case with "protected interests" or "incumbrances". This and the other sections of the Chapter, make it clear that on a sale under the Chapter it is not merely the right, title and interest of the judgment-debtor that passes, but the holding. For the purpose of a sale under the Chapter, however, the decree must be for arrears due in respect of the holding, and so it must be a decree obtained by the sole landlord, or by all the landlords, if there are more than one. The decree in this case was for arrears due in respect of the holding, and the plaintiff was the sole landlord: so far, therefore, no difficulty arises. But then only one of the tenants was a defendant, and this is where the difficulty comes in, for it has been contended, and with success in both the lower Courts, that as all the tenants were not parties to the suit for rent, the holding could not be sold in execution of the decree. It is common ground that at the institution of the suit, there were several tenants interested in the holding, and that they were jointly liable for the rent.

Their liability was contractual and section 43 of the Contract Act provides that when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the pro-

mise. At the same time, Chapter XIV of the Bengal Tenancy Act, while requiring the presence as plaintiffs of the whole body of landlords, makes no similar provision as to the tenants. Why then, it may be asked, does not a decree against some of the tenants come within Chapter XIV?

The answer is furnished by decided cases binding on us, and I refer in particular to *Roop Narain Singh* v. *Juggoo Singh* (1), and *Ananda Kumar Naskar* v. *Hari Das Haldar* (2). The decision in *Ashok Bhuiyan* v. *Karim Bepari* (3), is also to the same effect. These cases go to show that whatever may be required for the purposes of a mere money decree, ordinarily all the tenants of a holding are necessary parties to the suit in order that the decree and the sale in execution of it may have the important consequences described in Chapter XIV of the Bengal Tenancy Act. I say ordinarily, because there may be conditions in which the presence of even one or some of the tenants as a defendant may be as effective as that of all. And I now propose to consider whether those conditions are established in this case. The authorities sanction the view that where one of a number of tenants is put forward by the rest as their representative, he can be regarded as the sole tenant for the purposes of a suit for arrears of rent within Chapter XIV. Whether one of several can be regarded as a representative of the rest must depend on the circumstances of each case, and is, if not essentially, at any rate largely a question of fact.

Both Courts have negatived representation in this case. This finding has been forcibly criticised, but no error of law has been established, though I realize, and, in some measure sympathize with, the view that a different view of the facts might have been taken.

Much reliance has been placed on the decision in *Doolar Chand Sahoo* v. *Chabeel Chand* (4), but it cannot, however, be treated as governing this case as it turned on considerations which are applicable to a tenure, and not to a holding. The result is that we must confirm the decree with costs.

Appeal dismissed.

(1) 10 W. R. 304.
(2) 27 C. 545; 4 C. W. N. 608.
(3) 9 C. W. N. 843.
(4) 6 I. A. 47; 3 C. L. R. 561.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1173 OF 1912.

May 9, 1913.

Present:—Sir Henry Richards, KT., Chief Justice, Mr. Justice Banerji and Mr. Justice Lyle.

SONA DEI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FAKIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Gift—Agreement among members of a Maha Brahman *family to receive funeral offerings on particular days—Valid agreement—Gift made to individual member of that family—Suit to recover the gift—Civil Procedure Code (Act V of* 1908), *s.* 9.

The members of a certain *Maha Brahman* family, with a view to avoid dispute as to the division of the funeral offerings made to the family, entered into an agreement under which certain members of the family were to get offerings made on certain days of the month and certain other members, those on other days. A man died on a day which belonged to the plaintiff who was a female. The donor being of opinion that the gift would be more efficacious if it were made to a male, made the gift to the defendant:

Held, (*Richards, C. J.*, dissenting) that the plaintiff could not recover the gift made to the defendant inasmuch as it had distinctly been made to the latter in his individual capacity and not as a member of the *Maha Brahman* family.

Richards, C. J.—If the offering was of the nature which was included in the agreement between the parties, the wishes of the donor could not regulate their rights. The defendant was bound to make over the gift made to him on plaintiff's day.

Second appeal from the decision of the District Judge of Meerut, dated the 30th July 1912.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Rama Kant Malviya*), for the Appellants.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claimed to recover from the defendants certain offerings which had been made on the occasion of the death of one Rai Bahadur Debi Singh. It appears that the plaintiff and the defendant both are members of the same family of *Maha Brahmans*, the common ancestor of which was one Dhan Singh. Both the Courts below have found that an arrangement had been come to between the members of the family with a view to the division of the offerings. Certain members of the family were to have certain days of the month and certain other members other days. Both the Courts below have found that the

offerings in question were made on a day which belonged to the plaintiff. But the plaintiff's suit was dismissed upon the ground that the offerings in question were "personal" offerings, made to Fakir Chand, the defendant. It is admitted that so far as the donor of these offerings is concerned, no Court could interfere to compel him to make the offerings to any particular individual. On the other hand, it has been admitted that an arrangement between the *Maha Brahmans* as to the division of the offerings between themselves is perfectly legal. This has been decided in two cases [see *Doorga Parshad* v. *Budree* (1) and *Oochi* v. *Ulfat* (2)]. It seems to me that the whole case turns upon the nature of the agreement and the nature of the gift. There cannot be the least doubt that unless the gift in question was within the scope of the arrangement which, the Courts below have found, existed between the parties, the plaintiff cannot succeed. The agreement was not in writing. It is stated in somewhat general terms in the plaint, and evidently the Courts below accepted the statement in the plaint as being the terms of the agreement. The object of the agreement was beyond doubt to prevent disputes as to the division of the offerings. As the family increased, some such agreement was obviously very necessary. In my opinion, the only fair interpretation to give to the agreement is that the descendants of Dhan Singh agreed amongst themselves that all the offerings that were made upon the occasions of death to any member or members of the family should be divided in accordance with the agreement. As the learned Advocate for the plaintiff said in the course of the arguments, the agreement amounted to this, namely, that each member or branch of the family agreed to refrain from taking the offerings on the days assigned to the other member or branch. It is said that this agreement could only apply to offerings that were made to the family as such. This seems to me to be rather a restricted view to take. If it was open to the members of the family to exclude from the scope of the arrangement all gifts which any individual might prevail on the donor to say was to be his, it would mean that the agreement would be practically futile. While, on the other hand, if the agreement is interpreted to include all gifts that were made to any of the members of the family of Dhan Singh, it might reasonably carry out the object of the arrangement, namely, to avoid disputes.

I next come to the nature of the gift. It must at once be admitted that if this gift was made for a purpose disconnected with cremation ceremonies, the plaintiff would have no right. But reading the evidence of Raghubir Narain Singh, it seems to me perfectly clear that this gift was a gift directly in connection with cremation ceremonies, that it was made to one of the members of the family of Dhan Singh, and that the only reason why it was made to Fakir Chand instead of the plaintiff was because the donor had been informed that it would be more efficacious if the gift was not divided and it was not given to a female. It seems to me that if the offering was of a nature which was included in the agreement between the parties, the wishes of the donor could not regulate the rights of the parties to the present suit. Fakir Chand might have refused to take the gift if the donor coupled the donation with the condition that he must keep it entirely for himself. I think that so long as the agreement continued to exist, Fakir Chand having taken the gift was bound to make it over to the plaintiff in accordance with the agreement.

For these reasons, I think the decision of the Court below was erroneous and I would allow the appeal.

BANERJI, J.—I regret that I cannot agree with the learned Chief Justice in the conclusion at which he has arrived. I fully agree with him that the whole case turns upon the nature of the contract, a breach of which is the foundation of the plaintiff's suit, and also on the nature of the gift made by Raghubir Narain Singh on the occasion of his father's death. It is alleged in the plaint that Dhan Singh, the ancestor of the family, was the *Maha Brahman* of the particular village in question and that offerings made to this family of *Maha Brahmans* were offerings to the members of the family

(1) 6 N. W. P. H. C. R. 189.
(2) 20 A. 234; A. W. N. (1898) 23.

as such. In order to prevent disputes between the members of the family as to the division of the offerings, they entered into an arrangement by which individual members of the family were to take offerings given on certain dates; but it seems to me from the nature of the offerings, which according to the plaintiff's own case, were agreed to be divided, that the offerings which were to be divided were the offerings made to individual members of the family as such members and not offerings made personally to individual *Maha Brahmans* who were members of the family. If the contract between the parties was that they were to divide the offerings given on a particular date to any member of the family whether as representing the family, or in his individual capacity as a *Maha Brahman*, the plaintiff would, of course, be entitled to the offerings received on the particular day, which was the day on which her turn for receiving offerings occurred. In the persent case, neither of the Courts below has found that the contract between the parties was of the wide nature just now mentioned, and, as I have already said, it was not the plaintiff's own case as laid in the plaint. If then the contract related to offerings made to the family as such, any present made to an individual member of the family would not fall within the scope of the contract. In the present case, according to the evidence of Raghubir Narain Singh, and according to the findings of both the Courts below, the present made by him was a present individually to Fakiri, defendant, and the donor distinctly stated at the time of the gift that the offerings were not to be divided among the *Maha Brahmans* and they were not to go to a female member of the family. It is clear from his evidence, which, I think, has been rightly interpreted by the Courts below, that the offerings in question were made to Fakiri in the individual capacity, and not as representing the *Maha Brahman* family of which the parties were members. That being so, I think the plaintiff is not entitled to the offerings claimed and her suit has been rightly dismissed. I would dismiss the appeal.

LYLE, J.—I concur with the judgment of Mr. Justice Banerji. There can be no doubt that where there is an agreement among *Maha Brahmans* that offerings shall be taken by a particular man on a particular day, the agreement is one which will be enforced in law. But in the absence of any special stipulation, such an agreement can only refer to offerings made to the general body or to the whole family, as the case may be, of *Maha Brahmans*. Where a client wishes to benefit a particular *Maha Brahman* by making him a special gift, there is nothing to prevent his doing so; and in such a case, no other *Maha Brahman* can claim any share in the gift. It seems to me as clear as possible in this case, that it was the deliberate wish of the donor not only to benefit the defendant but to exclude the plaintiff. I do not think it is necessary to consider what the motives were that animated it. It is sufficient to say that he knew that if the gift were made to the whole family, the plaintiff might get a share of it. Not wishing that she should, he deliberately elected to make the gift not to the whole family but to the defendant individually. No doubt, the gift was what might be called a funeral gift, but it was open to any one to make a funeral gift either to a family of *Maha Brahmans*, or to an individual *Maha Brahman* as he might wish. In this case, I think he made his offering to an individual *Maha Brahman* and the plaintiff is, therefore, not entitled to any share. I would, therefore, affirm the decrees of the lower Courts and dismiss the appeal.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

In re AN ATTORNEY.

CALCUTTA HIGH COURT.
SPECIAL BENCH.
May 23, June 2 and June 12, 1913.
Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Mr. Justice Stephen and Mr. Justice Chaudhuri.

In re AN ATTORNEY.

Letters Patent, cl. 10—Attorney—Striking attorney's name off the rolls—Rule, service of—Practice—Grounds, copy of, to be served on attorney personally—Sufficient time to be given—Disciplinary action against attorney—Misconduct of attorney, by whom to be brought to Court's notice—Verification, importance of—Suspicion not enough to justify disciplinary action.

The rules of the High Court make no special provision for the disciplinary procedure of the Court. The English procedure in its entirety cannot be adopted.

When the alleged misconduct of an attorney is the subject of consideration, it is expedient to initiate proceedings by a rule, or motion or notice calling on the attorney to answer the matter in the affidavits of the applicant. Service should be personal, a copy of the affidavits should be served with the rule or notice of motion, and the returnable date should allow sufficient time for an answer to be put in. Ordinarily ten days should suffice.

Disciplinary action against an attorney rests on the principle that the Court deems him an unfit person to act as an attorney, and not by way of punishment.

Any body is entitled to inform the Court of the misconduct of an attorney.

In re Sanky and In re Solicitors' Act, 1888, *Ex parte Incorporated Law Society*, (1890) 25 Q. B. D. 17; 59 L. J. Q. B. 238; 38 W. R. 533, followed.

A verification is a matter of great importance as possessing the security of being made under the sanction of a solemn declaration for which the person making it would be liable to the penalties attaching to the crime of giving false evidence if the declaration were false to his knowledge.

Girdhari v, *Khaniya Lal*, 15 *A*. 59; A. W. N. (1892) 235, and *Ram Mohan Mookerjee* v. *Nursing Deb*, W. R. Sp. No. 54; 1 Ind. Jur. (O. S.) 63; 1 Hay 379, referred to.

Even a strong case of suspicion is not enough to justify the disciplinary action on a summary proceeding, especially when there is a positive sworn denial and repudiation of the misconduct imputed.

This was a Rule calling on an attorney of this Court to show cause why he should not be struck off the Roll of Attorneys for alleged professional misconduct.

On the matter being called on May 24th, 1913, the Advocate-General informed the Court that a copy of the Rule in this case had been served upon him in accordance with the usual practice, and it being the practice for the Advocate-General to attend in applications of this sort, he was present in conformity with that custom.

Mr. Buckland said that the Rule had also been served on the Law Society in accordance with the orders of Mr. Justice Chaudhuri and he appeared on behalf of the Law Society.

The Chief Justice: Who obtained the Rule?

Mr. *Langford James*: I.

The Chief Justice: For whom?

Mr. *James*:—For Kusum Kumari Dassi.

Mr. *Jackson*: I appear with Mr. Norton and Mr. St. John Stephen for the attorney. (Here he mentioned the name of the attorney.) It is for the purpose of showing that this matter is not ripe for hearing at the present stage.

The Chief Justice:—I do not wish the name of the attorney to be mentioned.

Mr. *Jackson*: Very well, but, as a matter of fact, it is rather farcical, specially in the present case.

The Chief Justice: Perhaps we had better be told what the Rule is about by Mr. James.

Mr. *James*:—Shortly the Rule is this. My client is the executrix of a man named Nilmony Pal, now deceased. On the 21st April, 1909. . . . .

Mr. *Jackson*:—I don't wish to interfere with what your Lordship had just said. But at the present moment what I wish to say is that nothing can be mentioned in this Court at the present stage. The case is not ripe for hearing.

The Chief Justice:—We must know what the case is before we can say whether it is ripe for hearing or not. We must have some general idea. Mr. James will not go beyond a mere statement of what the Rule is about and what we are asked to do.

Mr. James said that on the 21st April 1909, a suit was filed on behalf of Nilmony Pal against Noyan Manjuri Dassi to recover Rs. 9,000 said to be due on a promissory-note. The plaint in that suit was drawn personally by the attorney against whom this Rule had been obtained. The promissory-note on the face of it appeared to be for Rs. 9,000 and it was witnessed by a man named Kuchil Lal Sen. It was mentioned in the Rule that it was on information received from Nilmony Pal, now deceased, that he told the Sirkar that the promissory-note was in the hand-writing of this attorney,

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That was as high as Mr. James could put it on that point. In July 1910, Kuchil brought a suit against the attorney. On the 29th November 1910, the attorney verified and filed his written statement in that suit. Mr. James read the plaint as well as certain paragraphs of the written statement and said that in the written statement there was a statement on oath by the attorney that on the date of the promissory-note, Rs. 3,000 was advanced, a year afterwards Rs. 4,000 was advanced and a fortnight afterwards Rs. 1,000 was advanced making in all Rs. 8,000. They had it on the oath of the attorney that when the promissory-note was executed, Noyan Manjuri Dassi was a client of his firm. Therefore if the attorney's statement in his written statement was true, he was shown to have persuaded his client, with his knowledge, to sign a promissory-note for Rs. 9,000, knowing full well that only Rs. 3,000 had been advanced. At the time the suit was filed by Nilmony Pal, the attorney's firm were acting for Noyan Manjuri Dassi. Therefore the attorney drew a plaint which he knew to be untrue, containing allegations which he knew to be untrue and he drew the plaint against a client of his own. Those were the circumstances under which Counsel brought this matter before their Lordships.

THE CHIEF JUSTICE: On that you applied for a Rule?

Mr. *James*: Yes, a Rule on the attorney to show cause why he should not be struck off the Rolls.

Continuing Mr. James said that the Rule was obtained upon a petition. In most of the paragraphs of the petition, he had stated the source of his information. In other paragraphs, he had stated the grounds of his belief but inasmuch as the Rule was verified in this form that "it is true to the best of my information, knowledge and belief" in order to comply more strictly with the Rule he had put in a supplementary affidavit stating what paragraphs were true to his knowledge, what paragraphs were on information and belief and stating with regard to those paragraphs wherein he omitted to state the source of his information, what the source of his information was.

THE CHIEF JUSTICE: Very well. Then we can hear Mr. Jackson.

Mr. *Jackson*: I say that the case is not ripe for hearing. I don't intend dealing with the merits at all. One thing, I apprehend, is perfectly clear, namely, that I must have sufficient time. Another thing I apprehend is also perfectly clear, namely, that there must be personal service on me. What has been done? I submit your Lordships will look into these things and see the way in which business is done.

THE CHIEF JUSTICE: We had better deal with your objections. There has been no personal service?

Mr. *Jackson*: No.

Mr. *James*: If it would shorten matters, I have no objection to time being given.

Mr. *Jackson*: The only document which was served on the 16th was a copy that had been received from the clerk to the attorney in question. At 2-30 on Thursday afternoon, copies of certain affidavits were served.

THE CHIEF JUSTICE: Does it mean that you want further time?

Mr. *Jackson*: I am not asking for an adjournment. I ask that the business of this Court be regulated

THE CHIEF JUSTICE: I am asking whether you ask for further time?

Mr. *Jackson*: Your Lordship will pardon me but I wish to explain my position. I say you cannot hear this Rule until ten clear days after the service of the Rule in regular order. That has not been done. I mean no disrespect to your Lordships in not answering your Lordship's question. What I am insisting on is my strict rights. I may say that I do not wish to mislead your Lordships in any way. When the Rule is served in regular order, I shall contend that the Rule under no circumstances whatever——

THE CHIEF JUSTICE: It is no use anticipating that.

Mr. *Jackson*: I want at any rate that the Rules should be followed strictly. May I call your Lordships' attention to the practice at Home?

THE CHIEF JUSTICE: We know the practice at Home. What is the practice here?

Mr. *Jackson*: Your Lordships can easily ascertain that by referring to cases of Sir Augustus Stewart and McNair. On the authority of the second case, I shall, when the Rule comes on, object to Mr. Pugh or Mr.

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Buckland appearing for the Law Society. There is a distinct authority in my favour. Would your Lordships like to be referred to those cases?

THE CHIEF JUSTICE: What we would like to be referred to is the Rules of this Court.

Mr. *Jackson*: So far as I know, there are no Rules on the subject. There are Rules for motions. I understand that where there are no rules, absolutely referring to a matter, the practice is to follow the English rules in such matters. However, whatever may be the practice, I am mentioning it to your Lordships that under no possible circumstances can this matter come on to-day. What I have been served with on the 16th is before the Court; there are no affidavits of any description or copies of affidavits and no grounds. One of the things most clearly laid down in this Court and in England is that you cannot throw a lot of affidavits at a man's head and say "find out the grounds here." When you apply for a Rule, you have to state specifically what are your grounds for asking to strike so and so off the Rolls and support that by an affidavit. In the case of another attorney of this Court (Mr. Jackson here mentioned the name), the grounds were specifically stated.

THE CHIEF JUSTICE: I would ask you not to mention the name of any gentleman whose name does not appear. It is most objectionable.

Mr. *Jackson*: How am I to get that case then?

THE CHIEF JUSTICE: There is no great difficulty. The Registrar can be approached. It is absolutely wrong to mention the name of an attorney against whom no order has been made.

Mr. *Jackson*: Very well. I will not mention any names. I will tell the attorney to approach the Registrar for that case.

Continuing Mr. Jackson asked whether there was anything in the Rule about exhibits. As regards the exhibit filed on Thursday, how could that be admitted after the Rule had been issued? All these things were said to be penal and were to be treated on that footing.

THE CHIEF JUSTICE: I don't think it is necessary to labour this at all. We think you ought to have grounds. If you want ten days to answer the affidavits, by all means you may have time. That only required three sentences. It was so obvious.

Mr. *Jackson*: The fact of my having mentioned this and having obtained ten days' time does not interfere with my saying that the Rule is hopelessly bad and cannot be cured.

THE CHIEF JUSTICE: We are not dealing with the Rule now.

Mr. *James*: My friend has stated that no exhibit was served on him. His attorney wrote himself that the grounds might be sent to him without exhibits and I have the correspondence here.

Mr. *Jackson*: Will you kindly show me the letter?

Mr. James handed the letter over.

Mr. Jackson read the letter and said that his client was asked to pay Rs. 10-14 and on that Counsel asked the attorney whether he was a born idiot.

THE CHIEF JUSTICE: I think we had better not have confidential communication. (Laughter).

Mr. *Jackson*: I am to assist at my own execution by sending him Rs. 10-14. That is rather a startling idea.

THE CHIEF JUSTICE: When will you be ready?

Mr. *Jackson*: Put it at Monday week.

THE CHIEF JUSTICE: Very well. You must be prepared to deal with supplementary affidavit.

Mr. *Jackson*: I propose to deal with everything on that day. Your Lordships will give me full liberty to argue the whole Rule. I am entitled to object even to the admission of the supplementary affidavit.

THE CHIEF JUSTICE: The Rule is to be reserved with the grounds and whatever other materials may be necessary, all the affidavits.

Mr. *Jackson*: It will be open to me to argue that the Rule cannot be reserved. There may be a fresh Rule, if your Lordships like.

THE CHIEF JUSTICE: Certainly, anything you wish to argue, any technical objections as well as the merits.

His Lordship the Chief Justice then passed the following

ORDER.—What we intend to do is this. We consider that the service, though it may not be in opposition to any Rule of this Court, is not sufficient for us at

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present to act on. We, therefore, require that there should be a further service of the Rule with the grounds, that is, with all the affidavits at present in existence, and the matter will come on Monday the 2nd June.

Mr. *Langford James* appeared for Kusum Kumari Dassi.

The *Advocate-General* represented the Crown.

Messrs. *Pugh* and *Buckland* appeared for the Incorporated Law Society of Calcutta, to watch the proceedings.

Messrs. *Jackson*, *Norton* and *St. John Stephen*, represented the Attorney.

On the case being called on, Mr. Jackson objected to Mr. James appearing for the petitioner and challenged Mr. James to cite a single instance of any one appearing for a party when the Advocate-General appeared for the Crown. As regards Messrs. Pugh and Buckland representing the Incorporated Law Society, there was a decision by Sir Richard Garth, Mr. Justice Pontifex and Mr. Justice Wilson that the Attorneys' Association could not appear.

THE CHIEF JUSTICE: The only question is who is to put before the Court the fact that there is misconduct, if there is a misconduct? The Advocate-General is, of course, always the proper person to appear in these cases. But it is laid down by the Court of Appeal in England that before the passing of the Solicitors' Act of 1883, any one, who chose to say a Solicitor was guilty of misconduct, could make an application to the Court.

Mr. *Jackson*: This is the hearing of the application. A Rule has been issued.

The Advocate-General pointed out that while proceedings in England in this connection were purely statutory and governed by the Solicitors' Act of 1888, here their Lordships were acting under the Charter of the High Court which enabled them to deal with any application in the matter of a Solicitor. It would be more convenient that the complainant who was alleging certain facts should put those facts before their Lordships. If, however, their Lordships deemed it more convenient that he should read the affidavits, he would do so and acquaint them with the facts.

Mr. James, in response to Mr. Jackson's challenge, cited a case in *In re E. F. Hardwick* (1) and said as a matter of fact in that case the applicant appeared and argued the matter. Certain affidavits had been filed on behalf of the attorney but neither the Advocate-General nor Mr. Pugh nor he had any copies of those affidavits. They had no opportunity whatever of knowing what those affidavits contained.

THE CHIEF JUSTICE: Do you want any opportunity of seeing those affidavits?

Mr. James said that copies had just been handed to them. If there were facts in those affidavits which he wished to meet afterwards, allegations which he considered to be untrue, he would like to have an opportunity of perusing the affidavits to contradict them.

The Advocate-General in reply to the Court said he had only just received copies of the affidavits.

THE CHIEF JUSTICE: Do you wish to have an opportunity of considering these affidavits?

The Advocate-General said it would be convenient to have an opportunity to peruse these affidavits.

Mr. *Jackson*: As a matter of courtesy, we are now handing over these copies.

THE CHIEF JUSTICE: You have referred to the courtesy of the Bar. What about the courtesy to the other side? The only question is whether we should grant an adjournment.

Mr. *Jackson*: Where does the courtesy of the other side come in? To ask me to pay Rs. 10-8 for my affidavits?

THE CHIEF JUSTICE: You do not seem to realise what we are considering.

Mr. *Jackson*: My contention is that your Lordships have no power to adjourn the matter which is ripe for hearing. They could have taken the necessary steps to obtain copies of these affidavits.

THE CHIEF JUSTICE: Though we cannot for a moment agree that the Court has not the power to grant an adjournment if desired, we think in this case we will go on.

Mr. *Jackson*: As a matter of fact, I can give your Lordships' authority that no affidavits can be used in reply.

(1) (1883) 12 Q. B. D. 148; 53 L. J. Q. B. 64; 49 L. T. 584; 32 W. R. 191.

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THE CHIEF JUSTICE: I do not think you understand the point raised by the other side.

Mr. *Jackson*: I do understand it and I am trying to meet it.

THE CHIEF JUSTICE: We have given our decision. That is enough.

Mr. *Jackson*: That is hardly any reason for your Lordships saying that I do not understand the point raised by the other side. What is going to be done?

THE CHIEF JUSTICE: We will determine what is to be done when you sit down.

Mr. *Jackson*: I ask your Lordship to allow a note to be taken.

THE CHIEF JUSTICE: Everything will be done that is in order. Now, Mr. James.

Mr. James then read the plaint, the petition on which this Rule was issued and the affidavits filed. The allegations against the attorney were, he acted against a client of his firm, drew up a plaint against her, got her to sign a promissory-note for Rs. 9,000 when, as a matter of fact, she was given only Rs. 3,000.

Mr. James submitted that an application to strike the attorney off the Rolls was not a criminal matter. In support of his contention, he cited a case in *Godfrey* v. *George* (2).

The Advocate-General cited another case in *In re Eede, Ex parte Davey* (3).

Mr. Jackson in reply drew their Lordships' attention to the plaint and asked their Lordships to notice what its verification was. The verification was on information and belief and nothing else; nobody was mentioned. On the 6th May, a Rule for an injunction was issued but on the 16th May, without the defendant replying the Rule was discharged. On the 13th May, the present Rule was issued. Nothing whatever had been done by way of correction of the plaint. On the 20th May, the petitioner came in and filed an affidavit which Mr. Justice Chaudhuri did not admit as the matter had been referred to a Special Bench. It was not a new affidavit at all but it purported to be in continuation of an affidavit of a certain date. The new verification was worse than the other one.

This was an application by a Hindu *pardanashin* lady. Mr. Jackson ventured to say that it was a unparalleled application. The basis of this application was that the husband of the petitioner was a scoundrel because the husband must, as a matter of fact, have been a party to filing this false plaint because he knew he had not got the money. Even few European ladies would go the length of sacrificing their husbands' reputation in order to recover some money. Here, however, a Hindu widow, who worshipped the memory of her husband, filed a plaint to recover this money on the allegation that her husband was a consummate scoundrel. Counsel sought to show their Lordships that the widow was simply a puppet and everything in this matter tended to show that such was the case.

Mr. Jackson then read the attorney's affidavit in reply which Counsel said was an absolute answer to the other side and which was abundantly clear. In his affidavit, the attorney admitted that he drew up a plaint on behalf of the husband of the present petitioner against a lady client of the firm but stated that he did so with the consent and knowledge of the manager of the lady client in question and that although there was litigation going on from 1909 to 1913, the manager never objected to his having so acted. As regards the other charges, the attorney totally denied them.

After reading the other affidavits filed in the defence of the attorney's statement. Mr. Jackson referred to the question of costs and asked how, if his client was successful, he was going to recover his costs from this *pardanashin* lady on whose application this Rule was issued? This very *pardanashin* lady, in the plaint she had filed in another suit, stated that one of her suits was stopped by Mr. Justice Fletcher who ordered her to furnish security for costs.

Continuing Mr. Jackson said: They use a *pardanashin* lady for a purpose of this kind and I am put to all this expense.

Mr. *James*: I want to know who "they" is?

Mr. *Jackson*: I will put it in another way and say "a *pardanashin* lady has been used."

Mr. *James*: Who is she being used by?

Mr. *Jackson*: I am not bound to state that. I have said she was a puppet. I do not impute anything to Mr. James personally.

The Chief Justice: You do not suggest that a *pardanashin* lady cannot come to Court?

Mr. *Jackson*: I have never heard of such instance. In the first place, a *pardanashin*

(2) (1896) 1 Q. B. 48; 65 L. J. Q. B. 249; 73 L. T. 599; 44 W. R. 245.

(3) (1893) 25 Q. B. 228; 59 L. J. Q. B. 376; 38 W. R. 683.

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lady could not know anything about the facts of the case. Somebody must have acted on her behalf. Her case must be that her husband was a scoundrel. I venture to say that no Hindu widow would do that. She would see the money in a bottomless pit before she would throw any slur on her husband's character. If, as a matter of fact, Rs. 9,000 was not advanced, her husband was as big a scoundrel as might be imagined. He was suing for the money and he lived for two years after the suit was filed. It is obvious that she cannot be the moving spirit in this matter but I am not bound to show who it is.

After dealing categorically with every single charge, Mr. Jackson said that the charges had to be brought home to the attorney beyond all question and doubt. That he submitted had not been done here. As to whether an attorney could act for both sides, was a debatable question. Counsel submitted that where there were no secrets to be disclosed or facts prejudicial to a client, an attorney could so act as was held in the case in *Rakusen* v. *Ellis, Munday* and *Clarke* (4).

In conclusion, Mr. Jackson submitted that the matter would have to be disposed of on these affidavits and not upon Counsel's statements or admissions. If the affidavits were a complete answer, then it was not their Lordships' province to decide the affidavits were untrue. Their Lordships had to deal with the affidavits as they appeared. Counsel referred to Impey's Practice which said that when a matter was denied by an attorney, there was an end of the matter and there was no question of further affidavits in reply or in examination. This was a matter of serious importance because a stigma of this kind on an attorney was a moral death.

Mr. Norton next briefly addressed the Court and emphasised some of the points to which their Lordships' attention had been called by Mr. Jackson. He then went on to say that this Rule could not be confirmed unless it had been shown to their Lordships' absolute satisfaction that on the occasion on which misconduct had been charged to the attorney, he had acted *malus animus*. That could only be shown by a comparison between the plaint drawn up by the attorney and the statement made by the attorney in his written statement in another case. If there was the slightest evidence to show that the attorney had acted in a dishonest manner, then, no doubt, he would be properly punished, by having this Rule confirmed.

THE CHIEF JUSTICE: Will it not be enough if it is shown that he knowingly made, or permitted, two conflicting statements with the knowledge that one of them was false?

Mr. *Norton*: I concede that.

Continuing Counsel drew attention to the comparison between the plaint drawn up by the attorney and the statement made by the attorney in his written statement, pointed out that there was a difference of three years between the two and submitted that there was a mere verbal alteration between the two. On that their Lordships were invited to adjudge an attorney of this Court—who hitherto had no stain cast upon his character—a criminal from his own acts and pass an order which, besides ruining him professionally, would make him a social outcast.

In conclusion. Mr. Norton asked their Lordships to deal with the facts perfectly frankly and face to face. He did not want anything held back. He submitted not only were these affidavits true and, if true, there must necessarily be an end of the case, but it was hard that in the first instance this Rule should be issued without a preliminary explanation being required from his client.

THE CHIEF JUSTICE. I understand that an explanation was asked for by the Court.

Mr. Norton said an explanation was called for by the Registrar but was eventually postponed pending the hearing of the Rule. Counsel was sure that if in the first instance this explanation had come by way of explanation and not by way of a Rule, Mr. Justice Chaudhuri would have hesitated, after hearing the explanation and the affidavits now put in, to issue a Rule. Whatever might be the ultimate effect of this case, the very fact that a Rule had been issued, which in a way tended to question the honesty of his client's conduct, left that last blackwash of suspicion which was so often availed of by the persons, not of a generous disposition, to make life intolerable to those who had to endure it.

(4) (1912) 1 Ch. D. 831; 81 L. J. Ch. 499; 106 L. T. 556; 28 T. L. R. 826.

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The Chief Justice thanked Mr. Norton for his assistance to the Court.

Mr. James, in reply, referred to Mr. Jackson's argument that some one else was at the back of this *pardanashin* lady and proceeded to refute it.

THE CHIEF JUSTICE: You may take our assurance that that argument will have no effect whatever on us. We have paid no attention to it.

Mr. James then dealt briefly with the merits of the case and said it seemed to him quite justifiable to state that this attorney was one of those birds of prey who hovered over the estate of Gopal Lal Seal. If their Lordships came to the conclusion that the statements in the written statements were true, the statements in the affidavits, so far as they introduced this new question of trust funds, were not in the written statements and could not stand with the written statements. Unless the other side could substantiate this new case of theirs, unless their Lordships believed that, that was a credible story, then the matter stood as it stood before the attorney filed his affidavits.

June 12th, 1913.—The Chief Justice in delivering the judgment of the Court said :— On the 13th of May 1913, a Rule was issued by Mr. Justice Chaudhuri at the instance of Sreemati Kusum Kumari Dassi, plaintiff in Suit No. 405 of 1909, calling on an attorney of this Court to show cause why he should not be struck off the Roll of Attorneys. The Rule was returnable on the 23rd May and on that day came before this Bench. A number of objections were taken as to the procedure that had been adopted and special stress was laid on the fact that the service of the Rule on the attorney had not been personal, that none of the materials on which the Rule was based and no grounds had been served, and that the length of the service was insufficient. It was proposed to support these objections by reference to the English rules, but we had to be guided by the rules of this Court. These rules make no special provision for the disciplinary procedure of this Court, and the course adopted in this case except as to the mode of service was according to the Court's ordinary procedure as expressed in the rules. It appeared to us, however, that in a proceeding, such as the present, the individual involved should be under no disadvantage; and so we directed a further personal service of the Rule together with the materials on which it was based, and enlarged the time for the hearing. On the matter being mentioned to us on a later date, we directed that the grounds on which misconduct was charged should be distinctly formulated. This was done; the attorney put in his affidavits in answer and the case has been heard.

At the outset an objection was taken by Mr. Jackson on behalf of the attorney that Mr. James, Counsel for the applicant, could not be heard. This objection proceeded on a curious misconception of the nature of these proceedings. More than a century ago, it was determined by Lord Mansfield, after consulting all the Judges, that disciplinary action against an attorney rests on the principle that the Court deems him an unfit person to act as an attorney, and not by way of punishment. The purpose then of an application is to bring to the notice of the Court the misconduct of one of its officers, and it would indeed be a fantastic rule that would debar an aggrieved person or his representative-in-interest from the right of application. But authority as well as good sense affords a complete answer to this argument for in the case of *In re Sanky and In re Solicitors' Act*, 1888, *Ex parte Incorporated Law Society* (5), it was decided by the Court of Appeal, affirming the judgment of a Division Bench, that anybody was entitled to inform the Court of the misconduct of one of its officers. Therefore, we consider that Mr. James, as Counsel for the person who brought the matter before the Court, was certainly entitled to be heard. He accordingly placed before the Court the materials on which he relied. Though many objections of a somewhat technical character have been placed in the forefront of the attorney's answer, it would be neither safe nor just to make against the attorney himself any adverse presumption on this account or to treat the conduct of the case as indicating a lack of confidence in his own defence on the merits for he has put in an affidavit by way of answer in which he has set forth the merits from his point of view. This aspect of the case has been placed before us with great clearness by Mr. Norton, and his argument lost no force from its candour and conciseness. It is with this that I now propose to deal.

(5) (1890) L. R. 25 Q. B. D. 17; 59 L. J. Q. 238; 38 W. R. 533.

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The case made against the attorney is substantially this. In 1906, while still an articled clerk, he wrote out a promissory-note for Rs. 9,000 purporting to be made by Sreemati Noyan Manjuri Dassi in favour of the late Nilmony Pal, the present applicant's husband. On or about the 21st of April 1909, having then become an attorney of this Court, he as such attorney drew a plaint in Suit No. 405 of 1909, in which Nilmony Pal was plaintiff and Sreemati Noyan Manjuri Dassi one of the defendants. In that plaint, so drawn by him it is alleged:

"(1) That on the 22nd day of April 1906, the plaintiff lent and advanced to the defendant, Srimati Noyan Manjuri Dassi, the sum of Rs. 9,000 only with interest thereon at the rate of 12 per cent. per annum and the defendant, Srimati Noyan Manjuri Dassi, executed a promissory-note in favour of the plaintiff on the same date as security for the said loan and whereby she promised to pay the plaintiff or his order at Calcutta the said principal sum of Rs. 9,000 with all interest to accrue due thereon at the aforesaid date on demand.

(4) That there is due to the plaintiff under the said promissory-note Rs. 9,000 for principal and Rs. 3,240 for interest, calculated up to the 21st day of April 1909 making a total of Rs. 12,240."

The prayer was for Rs. 12,240 with interest. The verification was as follows:

"I, Nilmoni Pal, the plaintiff above-named, declare that the matters and facts stated in paragraphs 1, 3 and 4 of the foregoing plaint are true to my knowledge and that the matters and facts stated in paragraphs 2 and 5 of the said plaint are received on information, which information I believe to be true and that I have signed this verification at No. 8/2, Hastings Street, on the 21st day of April 1906."

On the 23rd July 1910, a Suit No. 723 of 1910, was instituted by Kuchil Lal Sen against the attorney, who put in his written statement on the 30th November following. In that written statement, it was alleged as follows:

"(1) That one Srimati Noyan Manjuri Dassi, the youngest widow of Gopal Lal Seal, and a client of the defendant's firm, sometime in the beginning of 1906 requested the defendant through the plaintiff to raise a loan for her of Rs. 9,000.

"(2) That the defendant, in or about the month of April 1906, secured one Nilmony Pal, Banker, who was willing to advance the said sum, and accordingly on the 23rd April 1906 the said Srimati Noyan Manjuri Dassi executed a promissory-note for Rs. 9,000 in favour of the said Nilmony Pal in presence of the plaintiff. The said Nilmony Pal, on the date of the execution of the said promissory-note, paid a sum of Rs. 3,000 to the said Srimati Noyan Manjuri Dassi, but declined to pay the balance on that date inasmuch as her father and natural guardian, Manick Lal Seal, being then seriously ill, did not like to pay so large a sum of money to a *pardanashin* lady.

"(5) That on the 11th May 1907, the plaintiff obtained a further sum of Rs. 4,000 from the said Nilmony Pal out of the balance of Rs. 6,000 as aforesaid and out of such Rs. 4,000 the plaintiff, as duly constituted attorney of the said Srimati Noyan Manjuri Dassi, on the said date, on behalf of the said lady, deposited with the defendant a sum of Rs. 3,125 and promised to pay another sum of Rs. 2,000 within a fortnight thereof as and for costs already incurred and to be incurred in connection with the litigation of the said Srimati Noyan Manjuri Dassi and the defendant thereupon granted the plaintiff a receipt annexed in the plaint.

"(6) That on the 28th May 1907, the defendant received only a further sum of Rs. 1,000 on account of the said Srimoti Noyan Manjuri Dassi from the said Nilmony Pal and the defendant states that the allegations in paragraph 3 of the plaint that the defendant obtained a further sum of Rs. 2,000 is untrue."

The verification was in these terms:

"I, ... the defendant above-named, do declare that the statements contained in paragraphs 1 to 13 of the foregoing written statement are true to my knowledge. I sign this verification at No. 8/2, Hastings Street, Calcutta, on the 29th day of November 1910."

Here then, it is said, we have two conflicting verified statements for which the attorney is responsible, and one of them

must have been false to his knowledge. This, it is urged, amounts to professional misconduct demonstrating unfitness to continue on the Rolls of this Court. Several grounds have accordingly been formulated and the gist of them is that the attorney knowingly made or procured a false verification.

Mr. Norton did not seek to minimise the gravity of the misconduct ascribed to the attorney, and rightly so. A verification is a matter of great importance [*Girdhari* v. *Kanhaiya Lal* (6)], and has been described by a Full Bench of this Court as possessing the security of being made under the sanction of a solemn declaration for which the person making it would be liable to the penalties attaching to the crime of giving false evidence if the declaration were false to his knowledge [*Ram Mohun Mookerjee* v. *Rajah Nursing Deb* (7)]. But while Mr. Norton conceded the seriousness of the charge, he maintained that there was no foundation for it; that the statements made by the attorney were not false, and that in any case no knowledge of the falsehood could be ascribed to him. To appreciate the force of this argument, it will be convenient to start with the written statement in Suit No. 723 of 1910, and in order to grasp the real meaning of what is there alleged, it is necessary to go back to the plaint in that suit. Kuchil Lal Sen, the plaintiff, prayed that the defendant attorney might be ordered and decreed to render him an account of the money deposited with him. In the plaint, it was alleged that on the 11th May 1907, Kuchil paid to the attorney a sum of Rs. 3,000 as deposit to meet sundry expenses in connection with the estate of Noyan Manjuri Dassi, and this was one of the items in the account according to the plaintiff's case. The attorney's defence was that he was under no obligation to Kuchil but that his indebtedness was to Noyan Manjuri Dassi. The whole drift, therefore, of his written statement is to show that what he received was part of the Rs. 9,000. For this purpose, it is alleged that of this sum only Rs. 3,000 was actually paid on the 22nd April 1906, that Rs. 4,000 was paid on the 11th May 1907 and that out of this Rs. 3,125 was deposited with the attorney on the same day. Further, it is alleged that on the 28th of May 1907, the attorney received Rs. 1,000 on account of Noyan Manjuri Dassi from Nilmony Pal. From the attorney's affidavit we learn that it is his case that this sum of Rs. 1,000 was a part of the Rs. 9,000 and that he learnt that the balance of Rs. 1,000 was in fact paid by Nilmony Pal to Noyan Manjuri Dassi. It is true that this sum is not mentioned in the written statement but there was no occasion for it. In this way, it is said, the whole of Rs. 9,000 was paid. The payment of this sum is a factor of no small importance in this case, and the evidence on this point, such as it is, is that it has all been paid. There is nothing on the record that controverts this, and so for the purpose of this proceeding, and for that purpose only, we must act on the basis that it has not been shown that the whole amount has not been paid.

I now turn to the plaint in Suit No. 405 of 1909, of which the written statement in Suit No. 723 of 1910 is said to be contradicting. It is there said that on the 22nd of April 1906, Nilmony Pal lent and advanced to Noyan Manjuri Dassi the sum of Rs. 9,000 with interest thereon at the rate of 12 per cent. per annum and that the promissory-note was executed as security for the same. It is further alleged that there is due under the promissory-note Rs. 9,000 for principal and Rs. 3,240 for interest. This sum of Rs. 3,240 represents interest on Rs. 9,000 from the 22nd April 1906. Mr. Norton has urged on us that we should not construe the words of the pleadings too strictly against his client; that we should keep in view the substance of the pleadings and not the mere literal wording. To begin with, he points out that actual and unqualified payment of the Rs. 9,000 is not alleged in the plaint drawn by the attorney and that the words used are at least susceptible of a meaning consistent with the case as made in the written statement in Suit No. 723 of 1910, read in the light of the explanation contained in the attorney's affidavit. This affidavit, it is further alleged, affords a possible explanation as to how interest came to be chargeable on the whole Rs. 9,000 from the 22nd April 1906. The attorney declares that he was not present at the time the pro-

(6) 15 A. 59; A. W. N. (1892) 235.
(7) W. R. (F. B.) 54; 1 Ind. Jur. (o. s.) 63; 1 Hay. 379.

missory-note was executed and the money paid and that his information as to what happened is derived from Nilmony Pal, Manik Lal Seal and Kuchil Lal Sen. Of these the first two are dead and we have no statement from Kuchil Lal Sen. Noyan Manjuri, the person most interested, does not seem to have mentioned the matter. Mr. James has urged that as the attorney has in his verification declared that the statements contained in paragraph 2 are true to his knowledge, it must mean that he was present. But we think not; the attorney has given an explanation, which, if true, would show that Mr. James' argument ascribes too narrow a meaning to the words. In this connection, too, he relies on the word "decline" as inconsistent with the attorney's present version. It is a strange story that the attorney tells; still even a strong case of suspicion is not enough to justify disciplinary action on a summary proceeding, especially when there is a positive sworn denial and repudiation of the misconduct imputed. Moreover there is more than a bare denial, there is an explanation of the transaction by the attorney, and it is an old rule that where this is so, an adverse order should not be made on a summary proceeding unless the attorney's story is highly incredible. If his affidavit in answer and explanation be false, he can be prosecuted for a criminal offence. We cannot, on the materials before us, hold that the attorney's explanation is demonstrably false; more than that we are not prepared to say. On this ground, therefore, we discharge the Rule, but as, in our opinion, the matter has been properly brought to our notice, there will be no order as to costs, except that each party do bear his or her own costs.

We would wish to add one word as to the procedure in cases of this class. We have had an opportunity of examining a note of all proceedings against attorneys in the exercise of the Court's disciplinary jurisdiction, of which there is a record. The procedure has not been uniform but except as to service the proceedings in this case have been in substantial conformity with the more recent cases that have come before the Court. There is an insuperable obstacle in the way of our adopting the English procedure in its entirety but we think we should do well to approximate it as far as can be. Here a preliminary inquiry before a professional body is impossible, but the English procedure suggests the expediency of initiating proceedings by a Rule, or a motion or notice calling on the attorney to answer the matter in the affidavit or affidavits of the applicant. Service should be personal, a copy of the affidavits should be served with the Rule or notice of motion, and the returnable date should allow sufficient time for an answer to be put in. Ordinarily, we think, ten days should suffice. After the explanation has been considered, it will then be for the Court to determine whether further proceedings should be taken, and if this be determined in the affirmative, then it would be right to request the Advocate-General or some other person or body as the case may be to take the necessary steps for that purpose. In case, these further proceedings are taken, the same Rule as to service should be observed, and there should be as a part of the Rule or notice of motion a general statement of the grounds on which the proceedings are based.

So far as concerns the supplementary inquiry* before Mr. Justice Stephen and myself, we are prepared to determine that the papers should be placed before the Government Prosecutor for such action as he may think fit.

*An affidavit was filed by the attorney purporting to have been made by a certain person. But subsequently that person informed the Court that he had not made the affidavit. An inquiry was held in this connection, and that is the inquiry which is referred to here—*Ed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 706 OF 1912.

November 5, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Richardson.

KALU KHALASHI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence—Prosecution evidence disbelieved in most parts—Conviction, if can be based on rest of evidence to be considered by Judge—Judge disbelieving almost entirely accounts of occurrence given by prosecution and substituting his own, theory founded on surmise and conjecture—Conviction whether ought to be set aside.

KALU KHALASHI *v.* EMPEROR.

If a Sessions Judge disbelieves and rejects much of the evidence of the prosecution, he should consider carefully whether a secure basis is left for the verdict against the accused.

If the Judge has discarded almost in their entirety the accounts of the occurrence given by the witnesses for the prosecution and has substituted a narrative of his own founded for the most part on surmise and conjecture and wholly inconsistent with the story told by the witnesses, it cannot be said that his account of the matter is proved by testimony regarded as credible. He ought not to convict the accused under the circumstances.

Appeal against the order of the Sessions Judge of Faridpur, dated July 11th, 1912.

Messrs. *K. N. Chaudhuri*, *Surita* and Moulvi *A. K. Fazlul Huq*, for the Appellants.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The learned Sessions Judge, in agreement with one assessor and in disagreement with the other, has convicted the three appellants of the offences made punishable by section 147 and by section 304 read with section 149 of the Penal Code. For the latter offence, he has sentenced them each to undergo rigorous imprisonment for three years, no separate sentence being passed under section 147.

There can be no doubt that on the morning of the 25th February last, a riot occurred in the course of which one Abbas Khalashi received injuries to which he very soon afterwards succumbed without recovering consciousness. The first intimation of the occurrence received by the Police was a written report by a *dafadar*. In that report, it is stated that the accused persons, of whom eight are named, had been seized and detained by the *dafadar* and a *choukidar*. As in any view of the case the appellants are not the persons mainly responsible for the riot, the point was taken on their behalf that the record contains no very clear indication why the principal accused were not sent up for trial. Probably, the language of the report is loose and inaccurate and the principals contrived to evade arrest. However that may be, the main ground on which the appeal was argued and the ground on which we shall deal with it, is that the Judge has disbelieved and rejected so much of the evidence for the prosecution that no secure basis is left for the verdict against the appellants. It is difficult to resist the force of this argument. This is not a case in which the story told by the witnesses on the one side or the other has in substance been accepted and acted upon or in which there is evidence on the one side or the other in support of the facts found. Here no witnesses were called for the defence and the Judge has discarded almost in their entirety the accounts of the occurrence given by the witnesses for the prosecution and has substituted a narrative of his own founded for the most part on surmise and conjecture. The cause of the dispute, it appears, was a straying bullock. According to the case for the prosecution, the bullock belonged to Hishabdi, the principal person on the side of the appellants, and the witnesses speak to an incident which took place two days before the riot, and to proposals for arbitration on the following day, which came to nothing. All this the Judge regards as pure invention. The bullock, he finds, belonged not to Hishabdi, but to Taijuddi, the principal man on the prosecution side. The quarrel took place on the same day as, and just before, the riot. There was no attempt at arbitration. Taijuddi and some of his men rescued the bullock which had been captured by Hishabdi and were taking it away when they were attacked. They were not attacked while ploughing as they say themselves. The Judge accepts the evidence as to the spot where the chief assault was delivered and Abbas was wounded, because it is not far from Basiruddi's house to which Abbas was undoubtedly carried. But it is obvious that in regard to the origin of the disturbance and the course of events the story as re-constructed by the Judge is wholly inconsistent with the story told by the witnesses. There may be indications in the evidence in favour of the Judge's view. But it cannot be said that his account of the matter is proved by testimony regarded as credible. In more than one instance, the Judge prefers a statement said to have been made by a witness at the time to the differing statement afterwards made by the same witness on oath in Court, though the latter statements are in accord with the testimony of the other witnesses. The difficulty is increased by the fact that according to the Judge, Taijuddi and his followers were the first to take the aggressive. The Judge may or may not be correct in his deductions. But that is not the question. The question is how far his conclusions are justified by the evidence. In our opinion, as we

have already indicated, the Judge has proceeded not upon evidence but upon conjecture. That being so, we cannot affirm the conviction of the appellants.

The result is that the appeal is allowed and the appellants are acquitted of the offences with which they were charged. If on bail, they will be discharged from their bail bonds and if in prison, they will be set at liberty.

Appeal allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 255 OF 1913.

June 16, 1913.

Present:—Mr. Justice Scott-Smith and Mr. Justice Agnew.

BISHEN DAS—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 122—Communication between husband and wife—Disclosure not to be permitted except with consent—Consent cannot be implied—Duty of Court to ask whether consent given or not—Proof of guilt by circumstantial evidence—Nature of evidence required.

Under section 122 of the Evidence Act, no communication between husband and wife can be disclosed by the one against the other without consent of the party concerned. The consent cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given whether he or she would consent to the evidence being given, and not to admit it unless such consent is given.

Reg. v. *Amrita Govinda*, 10 B. H. C. R. 497, referred to.

Where it is sought to prove an offence on circumstantial evidence only, there must be a chain of evidence, or series of established facts so far complete as to leave no reasonable ground for a conclusion therefrom consistent with the innocence of the accused.

Crown v. *Goola*, 15 P. R. 1867 Cr. *Hurji Mul* v. *Imam Ali*, 8 C. W. N. 278; 1 Cr. L. J. 124, referred to.

Appeal from the order of the Sessions Judge, Lahore Division, dated the 25th February 1913, convicting the appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Bawa *Sewa Ram Singh*, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellant, Bishen Das, has been convicted of the abetment of murder of *Mahant* Jai Ram Das, which took place in Lahore City on the evening of the 5th December 1912 and has been sentenced to death. He has appealed to this Court and the case is also before us for confirmation of the sentence of death under section 374, Criminal Procedure Code.

The facts of the case are given in our judgment of this date in the appeals of Sheru and Mamba, Nos. 254 and 256, who have been convicted of the actual murder.

The chief witness in the case is *Musammat* Kishen Devi (P. W. No. 10), wife of the present appellant. She has given detailed evidence as to the actual murder and we have accepted that evidence as true as against Sheru and Mamba, the actual murderers. Part of her evidence consists of statements said to have been made to her by Bishen Das to the effect that he would get the *Mahant* murdered or that he had arranged to have him murdered. This evidence was admitted in the Sessions Court without any objection being taken by or on behalf of the appellant. Section 122 of the Indian Evidence Act runs as follows:—

"No person, who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other." Having regard to the provisions of this section, the evidence of *Musammat* Kishen Devi as to communications made to her by her husband, the appellant, are *prima facie* inadmissible unless the appellant consented to her disclosing them. It is not alleged that the appellant expressly consented to this evidence being given, but it is urged by Mr. Sewa Ram Singh, on behalf of the Crown, that as neither the appellant nor his Counsel raised any objection, the Court should hold that he did consent within the meaning of section 122. We are unable to accede to the proposition that there can be any implied consent to the giving of such evidence. Having regard to the clear wording of the section, we think it was incumbent upon the learned Sessions Judge to ask the appellant whether he consented to the evidence being given and he

should not have admitted it unless such consent was given. In a recent case, *Milkhi* v. *Emperor*(1), it was held by a Division Bench of this Court that such evidence was inadmissible where the appellant or his representative-in-interest had not consented to the statements being disclosed. In *Reg.* v. *Amrita Govinda* (2), where a confession made by an accused person had been wrongly admitted in evidence by the Sessions Judge, and where it was contended that no objection had been raised to its acceptance, it was held by the High Court that the contention on the ground of waiver could not be allowed to prevail in a criminal case and that it was the duty of the Judge to prevent the production of inadmissible evidence whether it was or was not objected to by the parties. In *Abbas Peada* v. *Queen-Empress* (3) also, it was held to be the duty of the Judge to see that evidence which was not admissible in itself could not be allowed to be given to the prejudice of the accused. That was a case where the evidence was inadmissible under section 126 of the Evidence Act and was, therefore, not on all fours with the present case. We have, however, no hesitation in agreeing with the principle enunciated in these rulings and having regard thereto and to the actual wordings of the section itself, we hold that that part of the evidence of *Musammat* Kishen Devi which deals with the statements made to her by her husband was inadmissible and must be excluded in considering the appellant's case.

Now this evidence having been excluded, very little remains to connect the appellant with the murder. There is, no doubt, some evidence to show that he had a motive for the murder. This is discussed by the learned Sessions Judge and we may at once say that we consider that a motive has been made out. It is also proved by the evidence of *Musammat* Nand Kaur, widow of the deceased, that the appellant took her away from Lahore on the 30th November in order to attend certain religious ceremonies in outlying villages and that he obstructed her when she wanted to return to Lahore and prevented her from getting back home until the day after the murder. It is also proved that Sheru, one of the actual murderers, visited Bishen Das the day before the murder. He may have come to get his final instructions as to the murder from the appellant but there is no proof that he did so. The appellant's conduct in keeping *Musammat* Nand Kaur away from Lahore until after the murder is, no doubt, very suspicious but it does not go very far to prove that he abetted the murder. Where it is sought to prove an offence on circumstantial evidence only, there must be a chain of evidence or series of established facts so far complete as to leave no reasonable ground for a conclusion therefrom consistent with the innocence of the accused. See *Crown* v. *Goola* (4). In *Huriee Mull* v. *Imam Ali* (5), the Judges said—"It is a fundamental principle, and one of universal application in cases dependent on circumstantial evidence, that in order to justify any inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If the circumstances are found to be as consistent with the innocence as with the guilt of the accused, no inference of guilt should be drawn."

We are quite unable to hold in the present case that the facts proved are inconsistent with the innocence of the appellant. *Musammat* Kishen Devi's evidence as to the appellant's statements having been excluded, there is really no evidence at all to show that he abetted the murder.

The proved facts are, no doubt, consistent with the theory that he did abet the murder but they are also quite consistent with his innocence.

We, therefore, accept his appeal and, setting aside the conviction and sentence, acquit Bishen Das and order him to be released from custody.

Appeal accepted.

(1) 19 Ind. Cas. 705; 14 Cr. L. J. 273.
(2) 10 B. H. C. R. 497.
(3) 2 C. W. N. 484; 25 C. 736.
(4) 15 P. R. 1867 Cr.
(5) 8 C. W. N. 278; 1 Cr. L. J. 124.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 442 OF 1913.
April 30, 1913.
Present:—Mr. Justice Imam and
Mr. Justice Chapman.
SEWDHAR SUKUL—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Railway receipt of goods, production of, whether establishes possession of accused.

Certain stolen goods were sent from one station to another. At the station of delivery, the accused returned the Railway receipt to the Railway office and paid the freight. The goods had not been removed by the accused when he was arrested, as he was not able to account for the fact of his receiving the goods. He was subsequently convicted under section 411 of the Indian Penal Code for having received stolen property:

Held, that the production of the Railway receipt established the possession of the accused and it was not necessary for the accused to have removed the goods from the Railway premises; that after the delivery of the goods by the Station Master, they came to be not merely in the potential possession of the accused but actually within his power and unrestricted control, the possession of the Railway Company having from the moment of delivery ceased and that of the accused having commenced; and that the conviction was right.

Reg. v. *Hill*, 3 Cox. C. C. 533; 3 New Sess. Cas. 348; 1 Den. C. C. 453; T. & M. 150; 2 Car. & K. 978; 18 L. J. M. C. 199; 13 Jur. 545, distignuished.

Rule against the order of the Fifth Presidency Magistrate of Calcutta, dated February 26th, 1912, convicting the petitioner under section 411, Indian Penal Code, and sentencing him to undergo rigorous imprisonment for six months.

Babu *Khirodi Lal Sen*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—This was a Rule calling on the Chief Presidency Magistrate to show cause why the conviction should not be set aside on the ground that the production of the Railway receipt does not establish the possession of the petitioner.

The petitioner was prosecuted for receiving stolen property under section 411, Indian Penal Code, in the form of a package containing some piece-goods at the Railway station, Takia, on the Oudh and Rohilkhand Railway. The goods belonged to a firm of dealers of the name of Ram Kisson Das-Jaiparmal and were missed from their godown on the 25th December 1912. Information of the disappearance of the package was given to the Police on the 27th December and it seems that on the 28th December Sew, Sagar a *Jamadar* of that firm having come to know that the goods had been despatched to Takia started for that Railway station. On arrival at Takia on the following morning, 29th December, he informed the Station Master of the incident after he had found the package in question at the Railway station amongst the goods that had to be delivered to various consignees. That morning at 7 A. M. or thereabouts, a man other than the petitioner came to take delivery of the goods but on being questioned by the Station Master he was not able to satisfy that officer that he was entitled to receive the goods. That man was sent away and it seems that Sew Sagar said that he could bring the petitioner, Shewdhar Sukul, to whom the goods had been consigned for taking delivery: and, as a matter of fact, at abount 10 A. M., Shewdhar Sukul accompanied by Sew Sager came to the station, presented the Railway receipt before the Station Master, paid the freight for the goods and received delivery of the goods from the Station Master.

It is contended on behalf of the petitioner that no actual delivery took place because although the receipt had been returned to the Railway office and the freight paid, the goods had not, as a matter of fact, been removed by the petitioner and that, therefore, the transaction could not be construed either into receiving the goods or having possession over them.

Information of this receiving of stolen goods was given at once to the Police and the petitioner was arrested. The petitioner's defence in the lower Court was that at the time when the goods came to Takia, a large and popular fair was held at that place and the petitioner had a shop of piece-goods and things of sorts at that fair. It was further contended that the goods, as a matter of fact, had been brought to Takia by Sew Sagar and the Railway receipt was handed to the petitioner and the petitioner was brought by him to the Railway station to receive the goods, that, in these circumstances, the petitioner was quite innocent and knew nothing as to the stolen character of the articles in question and that he could not be convicted under section 411, Indian Penal Code.

SEWDHAR SUKUL *v.* EMPEROR.

The facts found by the learned Presidency Magistrate are that, as a matter of fact, the goods had disappeared from the godown of Ram Kissen Das-Jaiparmal sometime before the 24th December, that they had been despatched to Takia, that at that station the petitioner had received the goods, that he has not been able to account for the possession or the fact of his receiving the goods.

The Rule in this case is limited to the construction that is to be placed on the possession of the Railway receipt or the production of it by the petitioner.

There might have been something said in favour of the petitioner if the matter had ended with the mere production of the Railway receipt; but we see in this case that, after the production of the Railway receipt, the delivery of the goods had been effected. The Station Master swears that delivery was made. He further says that freight had been paid by the petitioner. We are not in a position to accept the petitioner's contention that unless and until he had removed the goods from the Railway premises, he could not be declared to have received the goods. The case of *Reg.* v. *Hill* (1) has been cited to us as an authority on which this conviction sought to be set aside. The judgment in that case proceeded on the prisoner never having in fact received the stolen property or never having had power over it. That cannot be said to be the case in the present instance. After the delivery of the goods by the Station Master, they came to be not merely in the potential possession of the petitioner but actually within his power and unrestricted control. It was open to him to do as he liked with the goods; he could have removed them without let or hindrance to any place wheresoever he might have wished them to be carried, the possession of the Railway Company having, from the moment of the delivery, ceased and that of the petitioner having commenced. In these circumstances, we do not see how the Rule in the terms in which it was issued can be made absolute. We are, therefore, not prepared to set aside this conviction.

We have been asked by the learned Vakil, on behalf of the petitioner, to consider the question of sentence. The petitioner has been sentenced to a term of six months' rigorous imprisonment and it is said that he does not deserve such a severe punishment inasmuch as he offered to the Station Master that as the goods were represented to be stolen, they might be kept by the Station Master and that information of the goods being stolen might be given to the Police. Had this offer been made by the petitioner to the Station Master before the delivery of the goods, the question of *locus pœnitentiæ* might easily have been raised. That, however, does not arise in the circumstances of this case. We are inclined to think that as soon as the petitioner discovered that people knew that the goods were stolen, he possibly was penitent but because of the penitence of the petitioner if we were to reduce his punishment, we would be encouraging the receipt of stolen property by others. Most of these cases of receipt of stolen property disclose that the thefts would not probably have taken place if the receivers had not encouraged the thefts. In this case, whatever might be said in respect of the penitence of the petitioner, one fact stands out very prominently against him, and that is, that even at the trial he did not disclose the name of the person who had consigned the goods to him. He attempted to show that Sew Sagar was the consignor, that he (Sew Sagar) had brought the goods to Takia and had attempted to get the petitioner into trouble and here at the Bar it has been argued that Sew Sagar is the real thief.

Upon the facts that have been disclosed in this case, we see not a tittle of evidence to charge Sew Sagar with the misdeed. We, therefore, considering the conduct of the petitioner in laying a false charge against Sew Sagar and his failure to disclose the name of the real consignor, see no reason to interfere with the sentence. The sentence that has been passed must be undergone by the petitioner.

The Rule, therefore, is discharged.

Rule discharged.

(1) 3 Cox. C. C. 533; 3 New Sess. Cas. 348; 1 Den. C. C. 453; T. M. 150; 2 Car. & K. 978; 18 L. J. M. C. 199; 13 Jur. 545.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 140 OF 1912.

October 10, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

IMPERATOR—PROSECUTOR

versus

Musammat KHAIRI—COMPLAINANT

Bombay District Police Act (*IV of* 1890), *s.* 41—*Complaint that a certain person was using a certain house as brothel—Criminal Procedure Code* (*Act V of* 1898), *ss.* 4 (*o*), 250—*Complaint—Compensation cannot be awarded.*

A complaint, filed under section 41 of the Bombay District Police Act, is not the complaint of an offence as defined in section 4 (*o*) of the Criminal Procedure Code, and so the Magistrate hearing the complaint has no jurisdiction to order the complainant to pay compensation under section 250, Criminal Procedure Code.

Reference by the Additional Sessions Judge, Sukkur-Larkana.

ORDER.—The complainant has been fined by the Magistrate for making a frivolous or vexatious complaint that a certain person was using a house as a brothel. The complaint was filed under section 41 of the Bombay District Police Act. But the section does not make the use of a house as a brothel an offence for it is not punishable. The only order the Magistrate can make under section 41 is that such user of the house should be discontinued. The offence is only created under section 67 when that order is disobeyed—but the proceedings had not advanced to that stage nor was the complaint under that section.

The complaint in this case was, therefore, not the complaint of an offence as defined in section 4 (*o*) of the Criminal Procedure Code and the Magistrate had no jurisdiction to award compensation under section 250, Criminal Procedure Code.

We, therefore, reverse the order and direct the fine to be refunded.

Order reversed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1675 OF 1912.

November 23, 1912.

Present:—Mr. Justice Beadon.

KESAR SINGH—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 439—*Revision—First Report—Concurrent finding—Doubt.*

Where, with reference to the first report at the *Thana* and other circumstances, the case against an accused person is very doubtful, the benefit of the doubt should be given to the accused and in such cases even the concurrent findings of facts by the lower Courts are liable to be set aside on revision.

Petition under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Lahore, dated the 2nd October 1912, modifying that of Magistrate, 2nd class, Chunian, dated the 4th September, 1912, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—This is a very doubtful case and, though it is possible that Jaswant Singh's version of the affair is correct, it appears to me to be equally probable that Kesar Singh's version at the *Thana* may be correct. It is a significant fact that Jaswant Singh was brought to the *Thana* where the report was made. The *lambardar* and *choukidar* accompanied Kesar Singh to the *Thana* and, if they knew that Kesar Singh's story was false, it is not apparent why they consented to take Jaswant Singh in custody to the *Thana*.

The proceedings at the *Thana* between 8 A.M., when the report was recorded, and 5 P. M., when the Police started for the village, are not above, suspicion. In my opinion, it is not established that the report at the *Thana* was false. I, therefore, set aside the conviction and sentence and acquit Kesar Singh.

Petition allowed.

END OF VOLUME XIX.

GENERAL INDEX.

VOLUME XIX—1913.

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Abandonment—*Land left in possession of persons not related to owner—Living at distance of a few miles.*

Where an owner left his land in possession of a person not related to him, had no concern with it for over 20 years, and lived at another village seven or eight miles off and cultivated other land:

Held, that this was sufficient evidence of abandonment. AMIR *v.* JIWAN, 33 P. W. R. 1913; 72 P. L. R. 1913 **3**

Abduction. *See* PENAL CODE, s. 71 **167**

Absolute right **660**

Abwab—*Illegal cess—Permanent tenure—Tenant to pay fixed sum of Rs.* 4,310 *of which Rs.* 4,300 *is* jama, *Rs.* 5 *as* salami towji *and Rs.* 5 *as* tehwari dasahra *—Part of consideration for which tenancy was created—Sums legally recoverable.*

A permanent tenure was created in 1874 by a lease which specifically provided that the lessee shall pay to the lessor year by year the fixed sum of Rs. 4,310 of which the sum of Rs. 4,300 was described as *jama*, Rs. 5 as "*salami towji*" and Rs. 5 as "*tehwari dasahra*:"

Held, that the two sums of Rs. 5 though not described in the lease as rent, are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid, and not illegal cesses, and are legally recoverable. KALANAND SINGH *v.* EASTERN MORTGAGE AGENCY AND CO., LD., 18 C. L. J. 83 **701**

Accession. *See* MORTGAGE **90**

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——— ———**'s** evidence—Corroboration **207**

——— ———*Confession — Retracted confession, value of- -Evidence Act* (*I of* 1872), *ss.* 30, 114, 133.

There is nothing in law to prevent the conviction of an accused on the uncorroborated and retracted confession of an accomplice, if it be believed against him. Such a confession should, however, be approached with the greatest caution and care and should be subjected to the most anxious scrutiny in deciding on its truth or falsity so far as it incriminates any person other than he who made it. Yet, if after applying every test to it that is available and remembering that it cannot be sifted by cross-examination, that by it one criminal is incriminating another and all other similar considerations, the Judge still believes it to be true as against that other or others, it is the duty of the Judge to act upon it. NGA TUN E *v.* EMPEROR, 6 BUR. L. T. 47; 14 CR. L. J. 179 **179**

Accomplice—concld.

——— ———*Evidence—Direction as to the value of statement of an unreliable witness—All accomplices not unreliable.*

The rule of evidence contained in section 133, Evidence Act and in section 114 (*b*) amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot be held proved, within the meaning of section 3, if there be no other evidence of it than the statement of an unreliable witness.

All accomplices are not condemned by law as wholly unworthy of credit. RAMCHAND *v.* EMPEROR, 6 S. L. R. 195; 14 CR. L. J. 262 **534**

Account, adjustment of, between landlord and tenant **752**

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——— ———*Suit for account—Preliminary decree—Appeal from decree—Subsequently final decree passed—Preliminary decree subsequently set aside—Execution—Whether final decree may be executed—Executing Court—Power to determine whether decree operative or not.*

In a suit for account a preliminary decree was made directing the defendant to render accounts. The defendant appealed. A final decree was eventually passed against the defendant for a certain sum of money, but the defendant did not take any part in the proceedings in the matter of taking of accounts. After that the preliminary decree was set aside on appeal:

Held, that as no final decree had been passed when the defendant preferred his appeal, and as the plaintiff did not bring it to the notice of the Appellate Court that a final decree had been passed in the case the Appellate Court had jurisdiction to hear the appeal, and that the power to hear it was not taken away by the final decree; that the final decree which was dependent upon and subordinate to the preliminary decree must be taken to have been superseded by the decision of the Appellate Court setting aside the preliminary decree, and that, therefore, the final decree could not be executed.

It is open to an executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not, and if such a decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground. UGRA NARAIN SINGH *v.* BASAN NARAIN SINGH, 17 C. W N. 868; 18 C. L. J. 209 **630**

Account-Books locked up in boxes form one item of property **315**

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—— 1882—II. *See* TRUSTS ACT.
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11 & 12 VIC., C. 21. *See* INSOLVENCY ACT.
21 & 22 VIC., C. 108. *See* GOVERNMENT OF INDIA ACT.
24 & 25 VIC., C. 104. *See* HIGH COURTS ACT.

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Act VI of 1895, s. 5 **881**

Act VIII of 1903, s. 2 692

Act of Parliament (22 Geo. III, c. 45), s. 1—*'Any other person'—Doctrine of* ejusdem generis—*Public service—Source of payment and place immaterial—Construction of Act—Later Act surplusage—*41 *Geo. III, c.* 52, *s.* 4 *not surplusage—Secretary of State—His status in the British Government and also with regard to his Council.*

When the first section of the Act of Parliament, 1782 (22 Geo. III, c. 45) after enumerating several office-holders proceeds to add the words 'any other person or persons whatever,' the doctrine of *ejusdem generis* applies. Any 'other person' means any one who holds an office in the British Government of a similar kind to those enumerated.

The 'public service' required by the Act need not be one either executed or requited within Great Britain or paid for out of any particular fund.

The 4th section of 41 Geo. III, c. 52 passed in 1801 is not surplusage. It enlarged the area of disqualification, and its presence on the Statute book is in no way inconsistent with the construction put by their Lordships upon the Act of 1782.

It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way, a later enactment would be surplusage.

The Secretary of State for India is in fact one of His Majesty's five principal Secretaries of State, and as such can discharge most, if not all, of the duties of the other four, as they can discharge most, if not all, of his duties. He is an officer of the British Government in the fullest sense.

A contract is none-the-less made with the Secretary of State that he has to obtain the concurrence of others (members of his Council) before making it, and that he and they are designated by statute as liable to be sued or to sue on it as a corporate body.

The personality of the Secretary of State is not merged in any corporation by the statute (Act of Parliament, 1858, for the better Government of India) nor in that of the Council.

A member of Parliament is disabled from sitting and voting in the House, if he or his firm (of which he is a partner) makes contracts with the Secretary of State for India in Council for or on account of the public service of the Crowu in India. SIR STUART SAMUEL, *In the matter of*, 17 C. W. N. 735 **765 P. C.**

——— ——— ——— **(41 George III, C. 52), s. 4** **765**

Actionable claim—*Arrears of rent—Purchase of Pleader—Whether claim may be enforced—Transfer of Property Act* (*IV of* 1882), *s.* 136.

The right to arrears of rent in respect of property purchased by a Pleader along with the property is an actionable claim and he cannot, under section 136 of the Transfer of Property Act, enforce it in any Court. HARI LAL SINGH *v.* TRIPURA CHARANI ROY, 17 C. L. J. 438; 17 C. W. N. 679 **129 F. B.**

Additional evidence, *taking of, by lower Appellate Court—Documents filed in first Court* 12 *days before judgment—Not dealt with by judgment of either Court—After remand, taking of documents which make new case for defendants—Reason for taking additional evidence not given by Court—Peculiar circumstances of case, whether any reason for taking additional evidence—Supplying* lacuna *in evidence—Civil Procedure Code* (*Act V of* 1908)—*Evidence Act* (*I of* 1872), *s.* 83.

A suit for possession was dismissed by the first and the lower Appellate Courts as barred by limitation. In second appeal the case was remanded by the High Court for decision on the merits. The lower Appellate Court did not send the case back to the first Court as all the evidence had been recorded. The lower Appellate Court, however, allowed a *mehalwari* register and a map of the disputed estates to be filed as documentary evidence "under the peculiar circumstances of the case." These documents were filed 12 days before the original decision in the Court of first instance but they were not dealt with in either of the judgments before remand for they were not accepted as evidence in the first Court; they made out an entirely new case for the defendants and the lower Appellate Court took them in appeal:

Held, that the lower Appellate Court ought not to have received the documents as evidence; because *first*, no reason was given for admitting them, the reference to the peculiar circumstances of the case cannot be taken as any reason, and *secondly*, because such a case depending on new and important evidence could only be taken by way of review and not as supplying any lacuna in the evidence necessary for the decision of the case.

A map prepared by private arrangement by a Deputy Collector for the settlement of the silted bed of a river, does not fall within the purview of section 83 of the Evidence Act. RAHIMUDDIN MUNSHI *v.* BHABANGANA DEBYA **572**

Adjustment. *See* COMPROMISE.

——— ——— ——Submission and award **786**

Admissibility — Incriminating statement of accused in Police custody while pointing out or producing instrument with which or spot where offence committed—Blood stains on *zemindar's* clothes **190**

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Admission Register—Admissibility for corroboration **452**

——— ———*Evidence—Estoppel.*

The express admissions of a party to a suit, or admissions implied from his conduct, are evidence and strong evidence against him. But he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition. BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS, 15 BOM. L. R. 209 **401**

Adoption. *See* CUSTOM; HINDU LAW.

———Adopted son—Occupancy rights—Succession **40**

——— ———*Evidence of adoption—Recitals in deeds—Evidence Act* (*I of* 1872), *ss.* 32 (5) *and* (6), 50—

Adoption—concld.

Civil Procedure Code (Act V of 1903), s. 92—Suit to remove a trustee—Suit to enforce private rights.

Where the fact to be proved was an adoption alleged to have taken place about 40 years ago, the adopted son being dead:

Held, that under section 50 of the Evidence Act, evidence of enjoyment of the properties of the adoptive father by the alleged adopted son and evidence of acquiescence of such enjoyment by persons who but for the adoption would have been entitled to possession of such properties is admissible to prove the adoption.

Held, also, that recitals in sale-deeds and mortgage-deeds by the adopted son and in his Will, in which he described himself as such adopted son were admissible under section 32 (5) and (6) of the Evidence Act.

Illustration (*k*) to section 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement.

A Hindu widow who was the holder of a hereditary office of trustee of a public charity having alienated the office, the next reversioner contended that by reason of the said alienation the office had become vacant and that he was entitled to immediate possession:

Held, that the effect of the alienation was not to determine the estate of the trustee and let in the next reversioner, but that such an illegality was a good ground for removal of the trustee in a proper suit:

Held, also, that the next reversioner was entitled to have the widow removed from the office of trustee and that section 92 (2), Civil Procedure Code, was no bar to the suit.

The scope of section 92 (2) is to protect the right of the public and it is not aimed at the infringement of private rights and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. MULLANGI VENKATARANGAM CHETTY *v.* VENKATASUBBAMMAH, 13 M. L. T. 515 **740**

Adultery—Accused convicted of rape—Conviction set aside—Conviction for adultery cannot be had without husband's complaint **716**

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Adverse possession — Extinguishment of right to immoveable property **222**

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———————*Defendant's adverse possession when may be supplemented by previous adverse possession of another person—Limitation Act (XV of 1877), s. 3, Sch. II, Art. 144—Adverse possession of defendant must be of the same nature as that sought by the plaintiff.*

The question whether a defendant can supplement his own adverse possession by the previous adverse possession of another person, must depend on whether he can be said to have derived his liability to be sued from or through that other person.

A defendant who is a lessee for less than 12 years cannot add to the period of his adverse possession under his lease, the period during which his lessors were in adverse possession prior to the grant of his lease.

Adverse possession—concld.

The words "possession of the defendant" in Article 144 of the Limitation Act cannot by reference to the defamation of "defendant" in section 3 be reasonably held to include the possession of another person, a co-defendant still in possession under a different title.

The adverse possession of a defendant must be of the same nature as that s ought by the plaintiff.

Therefore, the defendant cannot set up his possession as a permanent lessee as adverse in a suit by the plaintiff for possession as proprietor. LAHURI BIBI *v.* BIJOY CHAND MAHATAP, 17 C. W. N. 748 **367**

Age, proof of **452**

Agency. *See* PRINCIPAL AND AGENT.

Agra Tenancy Act (II of 1901), s. 4, Ch. X—*Land, meaning of—Grove, not land held for agricultural purposes—Resumption of rent-free grants.*

Land held as a grove whether on payment of rent or not is not 'land' held for agricultural purposes. The word 'land' in Chapter X of Agra Tenancy Act which deals with resumption of rent-free grants, is used in the same sense as in section 4 (2).

Where there was no evidence that at the time when a particular piece of land was granted rent-free it was a grove but it was proved that the grove existed since 1836, the presumption is that the trees were planted with the consent of the *zemindars*. HADI HASAN KHAN *v.* PATI RAM, 11 A. L. J. 236; 35 A. 200 **416**

——————————**s. 20**—*Mortgage of occupancy holding—Sub-mortgage by mortgagee—Right of sub-mortgagee to recover money.*

An usufructuary mortgage of property, consisting partly of a fixed-rate holding and partly of an occupancy holding, was made in favour of *N.* in 1906. In 1909 *N.* sub-mortgaged his right under the mortgage to *B*:

Held, that *B.* could recover his money from *N.* inasmuch as no interest in occupancy holding had been transferred to him under the deed of 1909. BALGOBIND BHAGAT *v.* NAGINA MISIR **745**

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Agreement among members of a *Maha Brahman* family to receive funeral offerings on particular days—Valid agreement—Gift made to individual member of that family—Suit to recover the gift **990**

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——— ——*Temporary injunction—Whether appeal lies against order refusing temporary injunction—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1, O. XLIII, r. (1) (r).*

An appeal lies against an order refusing to grant a temporary injunction. HARI LAL *v.* PRYAG RAM, 18 C. L. J. 39; 17 C. W. N. 996 553

——— ——*Bengal Tenancy Act (VIII of 1885), ss. 52, 109, sub-s. (3)—Second Appeal—Question whether excess land liable to rent—Contract by landlord not to measure land or enhance rent—Right to additional rent for excess land added to tenure by alluvion—Landlord and tenant—Alluvion—Regulation XI of 1825, s. 4.*

Where the question is not merely what amount of rent should be settled for the excess land in the tenant's possession, but also whether the excess land is liable to rent or not, a second appeal is not barred under section 109 sub-section (3) of the Bengal Tenancy Act.

Where there is a contract between a landlord and a tenant to the effect that the rent of the permanent sub-tenure shall never be liable to be reduced or increased, and the landlord shall have no right to measure the lands or enhance the rental of the *taluk* on any account, the landlord is not entitled to any additional rent for the excess land added to the original area of the tenancy by alluvial action. GUNENDRA NATH CHOWDHURY *v.* RAJENDRA KUMAR SINGH 924

——— ——Onus probandi—*Appellant to prove judgment appealed from to be wrong.*

It is for an appellant to show that the judgment appealed against is wrong. GHULAM NABI *v.* ALLAH DIN, 241 P. L. R. 1913; 143 P. W. R. 1913 964

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Appeal—concld.

——— —**Criminal**—*Admission — Subsequent dealing with question, whether appeal lay—Sentence of one month's imprisonment under each of three sections to run concurrently—Whether appealable—Criminal Procedure Code (Act V of* 1898), *s.* 35, *sub-s* (2).

The mere fact of the admission of a criminal appeal, does not preclude the Court from dealing subsequently with the question whether an appeal lay.

An accused who has been sentenced to concurrent terms of imprisonment no one of which is individually appealable has no right of appeal against them collectively. AZIZ SHEIKH *v.* EMPEROR, 14 CR. L. J. 254; 17 C. W. N. 825; 40 C. 631 **510**

——— ——— ———*Appellate Court bound to peruse record—Perusing judgment only, if sufficient—Criminal Procedure Code (Act V of* 1898), *s.* 423.

When, in a criminal appeal, no one appears on behalf of the appellant, the Court must peruse the record. A decision upon a perusal only of the judgment appealed against is not legal. ABBASH ALI *v.* EMPEROR, 14 CR. L. J. 182 **182**

——— ——— ———*Finding inconsistent with conclusion—Re-hearing, ground for.*

If the finding of a Sessions Judge on appeal is inconsistent with his conclusion, that is only a ground for re-hearing of the appeal. BABURAM RAUT *v.* EMPEROR, 17 C. L. J. 394; 14 CR. L. J. 295 **951**

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——— ——— ———*Order dismissing appeal as barred by limitation, whether decree—Decree—Civil Procedure Code (Act V of* 1908), *ss.* 2, 100.

An order dismissing an appeal as having been filed beyond time is a decree within the meaning of section 2 of the Civil Procedure Code, passed in appeal from which a second appeal is allowed under section 100. RAKHALCHANDRA *v.* ASHUTOSH GHOSH, 17 C. W. N. 807 **931**

Appeal to Privy Council. *See* PRIVY COUNCIL APPEAL.

Approver—*Accomplice — Evidence, value of—Corroboration—Quantity of corroboration—Practice—Law—Evidence Act* (*I of* 1872), *ss.* 114, *ill.* (b), 133.

The law as such does not require any corroboration to validate the testimony of an accomplice. The rule of practice which does lay down this requirement must be applied with due regard to the varying circumstances of each particular case. The corroboration is necessary not only *quoad* the incidents and circumstances of the crime but also *quoad* the identity or personality of the offenders.

There is no rule, whether of law or practice, which seeks to furnish an inflexible canon as to the precise degree of corroboration which in all cases should be demanded for an accomplice's evidence.

The law does not require that every detail of the approver's story should be fortified by a similar story told by an independent witness, since the effect of any such principle would be to rule out the accomplice's evidence as altogether inadmissible. It is only necessary that accomplice's evidence should, in the circumstances of each particular case, receive that corroboration which it seems to require. EMPEROR *v.* KUBERAPPA, 15 BOM. L. R. 288; 14 CR. L. J. 225 **321**

Arbitration. *See* ARBITRATION ACT.

——— ———Agreement of reference on behalf of minor—Award—Leave of Court not obtained—Minor not bound **424**

——— ———, costs of **611**

——— ———Invalid award—Decree in accordance with award—Finality—Appeal—Right of appeal—Not a mere matter of procedure—Alteration does not affect right **348**

——— ——— ———Joint Hindu family—Family disputes between mortgagee father and his sons—Award not touching the mortgaged property—Mortgagor paying off mortgage-debt to the sons—Re-payment ignored by mortgagee—No effect of award upon the title of mortgagee to recover the whole rent due in respect of the mortgaged property **638**

——— ——— ———Pending suit—Reference to arbitration without the intervention of the Court—Power of Court to inquire whether the award is proper **786**

——— ——— ———*Award—Decree based on award—Appeal, whether lies—Arbitrator leaving certain work unfinished—Misconduct of arbitrator.*

When a decree has followed an award, it is not appealable on the ground that the award is altogether invalid because the arbitrator failed to do certain things which he was bound to do under his appointment, nor on the ground that he has been guilty of misconduct in not carrying out the duties which were imposed on him. RAM BHAJAN PANDAY *v.* UDIT PANDAY **405**

——— ———*Private arbitration—Award—Decree—Award deciding questions not referred and leaving undecided, questions referred, whether good—Civil Procedure Code* (*Act V of* 1908), *Sch. II, paras.* 14, 15, 20, 21—*Remitting private award, if within power of Court.*

A private award, that is, one made on a reference out of Court, is bad, if it decides questions not referred to the arbitrators and leaves undecided questions which they were authorised to decide.

If an award is open to objection in material particulars, the entire award must be deemed null and void.

But the invalid portion may be separated from the objectionable part, if this is possible, and enforced.

Under paragraph 21 of Schedule II of the Civil Procedure Code of 1908, a Court is competent to direct a private award to be filed if the grounds mentioned in paragraphs 14 and 15 are not established. If such grounds are established, the Court is bound to refuse to file the award. A private invalid award cannot be remitted to the arbitrators to enable them to make a proper award. SABITREE DABI *v.* PROMODA PROSAD CHATTERJEE **941**

——— ——— *through Court—Stipulation in submission—Adjusted accounts not to be taken into consideration—Interpretation—Taking in evidence as a*

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statement of account acknowledged to have been signed by defendant—No misconduct—Award not vitiated—Honest, though mistaken, admission of document—When no ground for setting aside award.

A suit was referred to arbitration with a stipulation that the arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiffs be not taken into consideration by them. During the arbitration proceedings the question arose whether the debt of a particular item was proved. An adjusted account was tendered in evidence by the plaintiff in which account the item appeared, and the signature on which had been admitted by the other side in his written statement. The defendant objected, but the adjusted account was accepted in evidence in proof of the debt. The defendant, however, did not seek the interposition of the Court for a proper construction of the terms of the reference; he withdrew from the case, and allowed the inquiry to go on, and it was only when the award had been made, that he asked the Court to interfere and set the award aside as a nullity ;

Held, that the arbitrator's action did not amount to misconduct and the award was valid.

The honest, though mistaken, admission by arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* would not be a ground for setting aside an award. AISHABAI *v.* ESSAJI TAJBHAI, 15 BOM. L. R. 292 **934**

Arbitration Act (IX of 1899), s. 4—*Submission—Written agreement to refer—Document embodying terms of agreement not signed by both parties—Not written by agreement—Assent of each party need not be on same paper—Entry of agreement by broker without signature of parties—Office* dhara (*office term*).

A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties, does not come within the purview of a submission as defined in section 4 of the Indian Arbitration Act.

There is an essential difference between a written agreement and a document which merely embodies the terms of an agreement. Such document may be evidence of the agreement, but is not the agreement itself. If one party only attaches his signature, then it is a document embodying the terms of an agreement to which one party has expressed his assent in writing, but it is not a written agreement in writing unless the assent of both parties has been so expressed.

It is not, however, necessary that the assent of each party shall be written on the same piece of paper. It is sufficient if each party sign a separate document, provided that each contains the complete terms of the agreement.

An entry by a broker in the '*noond*' of each contracting party embodying the terms of the contract signed by the broker is nothing more than a written intimation by the broker to each party that a contract has been effected.

The words 'office *dhara*' ('office terms') do not constitute a written agreement to submit differences to arbitration. They are merely symbols to denote that such an agreement had been made, and the use of such symbols does not justify the Court in accepting oral evidence of the agreement. LENZ, J. *v.* LALCHAND, 6 S. L. R. 278 **925**

Arbitration Act—contd.

——— ——— ——— ss. 12, 15—*Enlarging tim after expiry of time for award—Suit for partition and possession referred to arbitration—Declaratory award—Incapable of execution—Appointment of Commissioner to partition incompetent—Acquiescence in voidable proceedings of arbitration.*

The Court can enlarge the time for making an award under section 12 of the Indian Arbitration Act after the expiry of the time for making it.

In a suit for partition and possession referred to arbitration, if the award merely declares the shares of the parties, it falls short of the reference. Such an award should be remitted to the arbitrator for completion.

If the Court passes an order on the award appointing a Commissioner to make partition, it would be usurping a function which the parties had appointed the arbitrator to perform. Such an order is not enforcement of the award under section 15 of the Arbitration Act.

A declaratory award is not susceptible of execution.

Where a person has voluntarily acted upon the reference and voluntarily appeared before the arbitrator, he would be held to have acquiesced in the reference although it had been voidable at his option. GHULAM HUSSEIN *v.* SAKINABAI, 6 S. L. R. 146 **374**

——— ——— ——— ss. 13, 14, 15—*Firm party to dispute—Reference by firm or individual members—Jurisdiction of arbitrator to decide the question of partnership of individual members—Finality of the order or otherwise—Award against firm—Remedy of individual alleged to be partner—Separate suit—Decision of question in execution—Whether execution allowed against more than partnership property.*

In an application to file an award under section 11 of the Arbitration Act, the only questions that can be properly considered are questions within the scope of sections 13, 14 and 15 of the Act.

The authority of the arbitrators is directly created, and strictly limited, by the contract containing the submission, and they have no jurisdiction over any person who is not a party to the contract.

Where one of the parties to the dispute to be referred to arbitration is a firm, it is not open to the other party to proceed to arbitration against either the firm, or its members individually.

In the latter case, it is competent for the arbitrators to decide whether a particular individual is or is not a member of the firm and to pass an award in regard to him accordingly. But the decision of the question would not be final, and is open to correction by the Court.

In the former case, however, the arbitrators have no jurisdiction to determine the question of partnership and liability of the individual members of the firm. Any person alleged to be a partner may appear and deny his partnership, and if there are any persons who admit their liability as members of the firm, the arbitrators can note the protest of the objector and proceed with the reference as against the firm, leaving the question of the objector's personal liability to be determined by a competent Court in execution proceedings or by separate suit.

When an award has been given against a firm, and an application is made to file the award in Court, an

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objection by a person that he is not a partner to the firm and not bound by the award, raises questions altogether outside the award. The question whether execution can issue under such award against a particular person is one that must be determined in execution proceedings, or in an appropriate suit.

Per *Hayward, A. J. C.*—*Quære*—Whether execution can issue on such award against anything more than the property of the partnership under Order XXI, rule 50, of the Civil Procedure Code. POKARDAS JASHIOMAL *v.* FORBES, FORBES, CAMPBELL AND CO. LD., 6 S. L. R. 127 **363**

——— ——— ——— **ss. 14, 15** **363**

——— ——— ——— ——— **s. 15** **374**

Arbitrator, fees of **611**

Articled clerk—*Clerk articled to Attorney—Holding other office or employment—Single Judge, if has power to dispense with general order of High Court—Original Side Rule* 98.

The terms of rule 93 of the Original Side of the High Court prohibiting articled clerks of attorneys from holding other office or engaging in any employment, are very stringent. An articled clerk cannot hold any employment during the term of his articled clerkship.

An articled clerk who had four months and twenty days more to complete the period of his service wished to become the Secretary of a Limited Company the shares of which were owned by the members of the clerk's family and the property which the Company was formed to hold and manage was a certain *zemindari* belonging to the family or lately belonging to the family of the clerk, and applied for permission to enter into the service:

Held, that the application must be refused.

It is doubtful whether a single Judge of the High Court has power to dispense with the general order of the Court. AN ARTICLED CLERK, *In re* **578**

Assam Labour and Emigration Act (VI of 1901), s. 91—*Notification thereunder, condition No.* 10—*Validity—Order of suspension and closing the depôt* ultra vires—*Statutory power of dismissal does not include suspension—Liability of the Secretary of State—East India Company—Liability for breach of contract—Liability for tort in transactions of the nature carried on by private persons—Master and servant—Acts done by servants in exercise of sovereign powers—Liability of the officer doing the act—Effect of Indian Enactments on the liability of the Secretary of State in Council—Government of Madras had no authority to ratify Collector's orders—Exercise of statutory power—Suit for damages for libel published by Madras Government incompetent against both the members of the Government and the Secretary of State for India in Council—Absolute privilege—Qualified privilege—Claim for damages too remote—Government of India Act* (21-22 *Vic. C.* 108), *s.* 3.

A., an agent of the Assam Labour Supply Association, brought a suit for damages against the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam, by one of which a local agent serving under *A.* and working under the Assam Labour and Emigration Act, 1901, was suspended and the depôt maintained by him closed to recruiting, while by the other the local agent was dismissed, and also for alleged defamation of the plaintiff by the Governor of Madras in Council in a Government order passed on the appeal of the plaintiff and other interested parties against the Collector's orders above referred to:

Held, (1) that the condition No. 10, specified in the Government of Madras Notification of 6th October 1909, giving the District Magistrate power to cancel the local agent's license for failure to exercise due supervision was valid, and a necessary and a proper one to be made under section 91 of the Act as amended;

(2) that the District Magistrate's order closing the depôt to recruiting and directing the suspension was *ultra vires*;

(3) that the order of the Madras Government complained of was not expressed in sufficiently clear and unambiguous terms to amount to a ratification, but, moreover, the Government of Madras had no authority from the Company, and no authority from the Secretary of State now, whether to commit tortious acts themselves, or to ratify them when committed by others:

(4) that the orders of the District Magistrate, suspending the local agent and closing the depôt to recruiting would appear to have been passed by him as incidental to the statutory power, conferred upon him by the Act of 1901 and the Notification made thereunder, to dismiss the local agent, and if this be so, it is well settled that in exercising such authority or in exceeding it he cannot be considered to have been the agent of the authority appointing him so as to render the latter liable;

(5) that no suit lay against the defendant for a libel published by the Madras Government, at all events, unless it was shown that publication was made under the orders of the Secretary of State, or on his behalf and afterwards ratified by him;

(6) that even if the suit had been brought against the members of the Madras Government at the date of the order and the Court had jurisdiction to entertain such a suit, it must have failed on the ground that the publication having been made by such Government in the execution of its duty and without exceeding it, was absolutely privileged;

(7) that even if the occasion was not one of absolute privilege it was certainly one of qualified privilege;

(8) that the Secretary of State in Council was not liable either in respect of the orders of the Collector or the Madras Government;

(9) that the plaintiff's claim for damages in respect of the Collector's orders was too remote.

A statutory power of dismissal does not include a power of suspension;

As regards liability to be sued, the Secretary of State is to be in no position different from that of the old East India Company before the passing of the Government of India Act, 1858.

The liabilities of the East India Company cannot have been any less than those of the Crown in England on a Petition of Right which extend not only to detention of the land, chattels, or money of the subject, but also to breach of contract.

The East India Company did not enjoy the same immunity as the Crown with regard to torts in

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transactions which might have been carried on by a private individual.

The Company could not have been made liable for the tortious acts done by servants in India in the exercise of sovereign powers, which it had not ordered or ratified, merely on the ground that they were done in the course of employment.

The officer who does the act is himself liable.

An enactment adding to, or taking away from, the liability of the Secretary of State in Council to be sued, as settled by the Government of India Act, 1858, is *ultra vires* of the Indian Legislature, as opposed to the provisions of the Indian Council's Act, 1861.

As regards the liability of the East India Company there was a distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on without having such powers delegated to them. In the latter case, the Company were liable for the negligence of their servants in the course of their employment in the same way as any private employer in a similar case. A. M. Ross *v.* Secretary of State, 24 M. L. J. 429 **353**

Assignment of debt after expiry of period prescribed—Court closed—Suit by assignee not barred if filed on the day Court re opens **820**

——— ——— — of portion of indivisiole decree **304**

———— ———*Suit for royalty and commission—Plaintiff jointly entitled with defendant No. 3—Form of suit whether bad—Payment to one of three persons jointly entitled to receive money, whether good payment against others—Title of assignee when complete—Title dependent on notice to tenants—Tenants paying rents* bona fide *to assignor—Tenants paying rent to assignor after receiving notice of assignment from assignee, whether* bona fide—*Transfer of Property Act (IV of* 1882), *ss.* 37, 50, 109—*Contract Act (IX of* 1872), *s.* 45.

The plaintiffs as assignees were entitled to recover royalty and commission jointly with their assignor, the defendant No. 3, who asserted that he had received from the principal defendants the sums claimed by the plaintiffs:

Held, that the plaintiffs were not bound to sue with defendant No. 3 as a co-plaintiff, that the suit as framed was not bad, and that it was not necessary for the plaintiff to sue for the recovery of the entire sum.

Payment to one of three persons entitled to receive the money, is not a good payment against the others.

Under sections 37, 50 and 109 of the Transfer of Property Act, the title of the assignee is completed upon execution and, where necessary, registration of the deed of assignment; the completion of the title is not postponed till notice has been given either by the assignor, or by the assignee to the tenant.

As soon as the title of the assignee is complete, he is entitled to claim rent. The tenant can escape the liability if he can establish that he has paid rent to the assignor in good faith before he had notice of the assignment.

It is immaterial whether the notice of assignment is received from the assignor or the assignee, and the tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he has received notice of the assignment from the assignee.

Assignment—concld.

A suit for recovery of arrears of royalty and commission, is not one for rent within the meaning of Article 110 of Schedule II of the Limitation Act of 1877, but is governed by Article 116. Peary Lal Daw *v.* Madhoji Jiban, 17 C. L. J. 372 **865**

Attestation, proof of **789**

——— ———Writer when an attestator **451, 589**

——— ——— — **of document**—*Plea of improper attestation taken in appeal is too late—Pleadings.*

A plea as to improper attestation of a document cannot be allowed to be taken for the first time at the hearing of the appeal. Budh Singh *v.* Kawal Nain **430**

——— ——— — **of mortgage-deed** **643**

——— ——— — **of Will** **401**

Attorney, clerk articled to **578**

——— ———Right of audience before officer appointed under section 6 of the Presidency Towns Insolvency Act **421**

——— ——— —Striking Attorney's name off the rolls—Rule, service of—Practice—Grounds, copy of, to be served on Attorney personally—Sufficient time to be given—Disciplinary action against Attorney—Misconduct of Attorney, by whom to be brought to Court's notice—Verification, importance of—Suspicion not enough to justify disciplinary action **993**

Award. *See* Arbitration.

——— ——Parties agreeing to abide by sum named by Pleaders **450**

——— ——Policy of law relating to awards—Award providing for distribution of pension in a particular way **882**

———*Miscalculation—Intention of arbitrators—Jurisdiction of Court—Correction of award—Limitation—Civil Procedure Code (Act V of* 1908), *Sch. II, paras.* 12, 14, 15, 16.

An application to set aside an award falls within clause 15 of the 2nd Schedule of the Code of Civil Procedure and does not include proceedings under clauses 12 and 14.

The Court is bound to correct any obvious mistakes or slips in an award in the same manner in which mistakes in decrees are corrected.

No specific provision is made in the Limitation Act for applications to correct an award.

The award in accordance with which a Court has to pronounce judgment is that which contains the real intention of the parties. Hyder Sahib *v.* Giria Chettiar, (1913) M. W. N. 338; 13 M. L. T. 319; 24 M. L. J. 483 **496**

Bail. *See* Criminal Procedure Code, s. 497.

Bailee and bailor. *See* Railways Act.

Barrister agreeing not to practise for a certain time—Agreement valid—Breach—Injunction—Barristers carrying on business in partnership **822**

Benami purchase—*Money paid by another—Burden of proof.* 770

Bengal Tenancy Act (VIII of 1885), ss. 3 (3), 4 78

——— **s. 5**—Raiyat, *meaning of—Person taking settlement from joint co-sharer without consent of other co-sharers, whether* raiyat. 395

——— **s. 22 (3)** 635

——— **ss. 22, sub-s. (1), 49, 85 sub-s. (2), 167**—*Landlord purchasing* raiyati *holding in execution of rent-decree—Suit for possession against under-*raiyat*—Attempt to create permanent lease-hold interest in favour of under-*raiyat *by* raiyat*—Incumbrance, annulment of—Notice—Whether landlord bound to avoid incumbrance or to give notice in order to sue for* khas *possession.* 652

——— **s. 49** 78, 652

——— **s. 49**—*Notice—Form of notice—Length of notice.* 557

——— **s. 52** 924

——— **ss. 53, 67, 78 (3) (h)** 626

——— **s. 85 (2)** 652

——— **ss. 90, sub-ss. (1), (3); 91, sub-s. (1); 158, sub-s. (2)**—*Measurement of land—Landlord's right—Determination of incidents of tenancy made two years before application for measurement—Application whether maintainable—Local inquiry under section* 158, *if may be deemed as measurement.* 906

——— **s. 91 (1)** 906

——— **ss. 108A, 109A** 916

——— **s. 109 (3)** 924

——— **Ch. XIV** 989

——— **s. 158 (2)** 906

——— **s. 159** 776

——— **s. 167** 652, 776

——— **s. 182** 78

——— **Sch III, Art. 2 (iii) (b)** 564

——— **Sch. III, Art. 3**—*Eastern Bengal and Assam Tenancy Amendment Act (I of* 1908 *E. B. & A.), s.* 61, *cl.* (3)*—Under-*raiyats, *suits by, after amending Act—Cause of action arising before amending Act—Applicability of special rate of limitation—Statutes, construction of—Statutes relating to procedure—Limitation Act (IX of* 1908)*—Retrospective action.* 564

Where property is purchased in the name of *A.*, the burden of proving that *A.* has no beneficial interest in the property, and the purchase is really *benami*, lies on the person alleging it. Mere payment of the purchase-money by another from his own pocket cannot establish the *benami* nature of the transaction, if the facts of the case are such as to show that he had made an advance in favour of the apparent purchaser intending that the purchase should enure to the benefit of the latter. MAHIDITTA MAL *v.* MRS. NICHOLSON, 133 P. W. R. 1913; 224 P. L. R. 1913

A person who obtains a settlement of agricultural land from the holder of undivided share in a *zemindari* without the assent of the other joint holders, is not a *raiyat* within the meaning of the Bengal Tenancy Act. KADER BAKHSH *v.* RAM MANIKYA DAS

An occupancy *raiyat* attempted to create a permanent lease-hold interest in favour of his under-*raiyat* by a registered document. Subsequently, the landlord of the *raiyat* in execution of a decree for rent purchased the *raiyati* holding and brought a suit for *khas* possession against the so-called under-*raiyat*:

Held, that the landlord is entitled to succeed even without annulling the incumbrance under section 167 or giving a notice under section 49 of the Bengal Tenancy Act, as the sub-letting by the *raiyat* was invalid. GANGADHAR MANDAL *v.* RAJENDRA NATH GHOSH, 17 C. W. N. 860

Section 49 of the Bengal Tenancy Act prescribes no form of notice, nor does it give any indication as to the length of notice, because the Act itself protects the under-*raiyat* from ejectment until the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. HARIFULLA GAIN *v.* BENODE BEHARY MONDOL, 17 C. W. N. 932

The special rule of limitation which was extended to under-*raiyats* in Eastern Bengal by the amendment in 1908 of the third Article in the third Schedule of the Bengal Tenancy Act, 1885, does not apply to suits instituted after the commencement of the amending Act in respect of causes of action which arose before the amending Act came into force. Section 61, clause (3), of the Eastern Bengal and Assam Tenancy Amendment Act of 1908 has no retrospective operation.

So *held* by Mookerjee and Chatterjea, JJ. Carnduff, J., dissenting:

Held, by Carnduff, J.—A Limitation Act gives no right of action whatever and is a law relating to procedure and is an exception to the rule that statutes ought not to be given retroactive operation, because no one can be said to have a vested right in any particular form or mode of procedure.

Held, by Chatterjea, J.—Statutes of Limitation or other statutes relating to procedure are to be construed retrospectively, but the principle that even such statutes should not be so construed where such a construction would cause hardship or injustice, is recognised in the majority of the decided cases on the subject. The rule, however, is not given effect

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to where the operation of the statute is postponed for some time after it is passed:

Held, by Mookerjee, J.—No statutes should be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct operation. The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the statute makes, has been disadvantageous to one of the parties. But the new procedure would presumably not apply where its application would prejudice rights established under the old. MANJURI BIBI *v.* AKKEL MAHMUD, 17 C. L. J. 316; 17 C. W. N. 889 **793**

——— ——— ——— **Sch. III, Art. 3**—*Limitation Act (IX of* 1908), *Sch. I, Art.* 95—*Suit for possession of* raiyati *holding after setting aside* ex parte *decree as being fraudulent.*

The period of limitation applicable to a suit for declaration of the plaintiff's *raiyati* right in the disputed land and for *khas* possession of it, after setting aside an *ex parte* decree as being fraudulent and illegal, is that prescribed by Article 95 of the Limitation Act and not that prescribed by Article 3 of Schedule III of the Bengal Tenancy Act, as the setting aside of the *ex parte* decree is the essential feature of the case from which the other remedy will follow; because if the decree is void the plaintiff's right to possession will follow as a necessary consequence. MEHER ABZAL *v.* RAHAMAN ALI **980**

——— ——— ——— ——— **Art. 3**—*Limitation, special—Dispossession by landlord not acting as such but as auction-purchaser—Dispossession by sole landlord and co-sharer landlord, if difference between—Dispossession by delivery of possession by Court—Dispossession to be otherwise than in due course of law.*

The special limitation provided in Article 3, Schedule III of the Bengal Tenancy Act does not apply to the case of an occupancy *raiyat* who is dispossessed from his holding by his landlord, not acting as landlord but in his character or capacity of auction-purchaser.

It would make no difference in principle whether the purchaser is a co-sharer landlord or the sole landlord or the entire body of landlords.

The special limitation is applicable as much to a dispossession by a co-sharer landlord, as to dispossession by a sole landlord or entire body of landlords.

The dispossession effected by the act of delivery of possession by the Court is not "dispossession" by the landlord within the meaning of Article 3, Schedule III, of the Bengal Tenancy Act, which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law. KAMAL DHARI THAKUR *v.* RAMESHWAR SINGH BAHADUR, 17 C. W. N. 817 **545**

Bill of exchange—*Failure to prove presentment—Decree against endorser and drawer—Appeal by endorser only—Dismissal of suit against both defendants though drawer not party to appeal, whether right—Civil Procedure Code (Act V of* 1908), *O. XLI, r.* 33.

A suit was brought by the endorsee of a bill of exchange against the endorser and the drawer. The plaintiff failed to prove presentment, but nevertheless he got a decree. The endorser only appealed, the drawer not being a party to the appeal. The Appellate Court dismissed the whole suit against both the defendants:

Held, that as proof of presentment was essential to the plaintiff's case before he could recover judgment against the drawer, the judgment dismissing the whole suit was right notwithstanding that the drawer, who did not appeal, benefited thereby. SAGAR MAL *v.* BHUDAN SAHU **251**

Bombay Abkari Act (V of 1878), s. 43—*License—Condition prohibiting sale or transfer—Partnership — Admitting partner in business—Contract Act (IX of* 1872), *s.* 23.

A. obtained a license to sell liquor under the provisions of the Bombay Abkari Act. One of the conditions of the license was that he would not sell, transfer or sub-let his right to sell liquor. He, subsequently, joined *B.* as a partner in the business, and was sued by him for an account of the partnership and for recovery of what might be found due to him:

Held, that the contract of partnership was not forbidden by law or opposed to the policy of the Excise Act.

The omission of all reference to the question of subletting a part of the right to vend liquor or to admit partners in the business in the form of license sanctioned by Government in 1903 points to the inference that the Abkari Authorities have decided not to prohibit the taking in of other persons into partnership in the profits derived from the selling of liquor under an Abkari license. KARSAN SADASHIV PATIL *v.* GATLU SHIVAJI PATTILL, 15 BOM. L. R. 227; 37 B. 320 **442**

Bombay District Municipal Act (III of 1901), s. 122 **507**

Bombay District Police Act (IV of 1890), s. 41—*Complaint that a certain person was using a certain house as brothel—Criminal Procedure Code Act (V of* 1898), *ss.* 4 *(o)*, 250—*Complaint—Compensation cannot be awarded.*

A complaint, filed under section 41 of the Bombay District Police Act, is not the complaint of an offence as defined in section 4 *(o)* of the Criminal Procedure Code, and so the Magistrate hearing the complaint has no jurisdiction to order the complainant to pay compensation under section 250, Criminal Procedure Code. IMPERATOR *v. Musammat* KHAIRI, 6 S. L. R. 254; 14 CR. L. J. 320 **1008**

——— ——— ——— ——— **s. 41**—*Ingredients—Brothel—Interpretation.*

There are two ingredients in section 41 of the Bombay District Police Act:

(1) *The character of the house, i.e.,* the use of the house as a common brothel or lodging house or place of resort for prostitutes or disorderly persons of any description.

(2) *The nuisance, i.e.,* the annoyance of the respectable inhabitants of the vicinity.

Nuisance or no nuisance is not an element in the definition of brothel.

A brothel is a place resorted to by persons of both sexes for the purpose of prostitution, who are strangers to the occupancy.

Bombay District Police Act—concld.

If a woman plies the trade of a prostitute in her own house, that does not make the house a brothel. EMPEROR *v.* VERSIMAL BAHAGIOMAL, 6 S. L. R. 224; 14 CR. L. J. 282 **714**

Bombay High Court Rules (Original Side), rr. 105, 106—*Defendant not filing written statement—Right to defend suit* ex tempore *—Civil Procedure Code* (*Act V of* 1908), *O. VIII, r.* 10.

Rules 105 and 106 of the Bombay High Court Rules (Original Side) do not prevent a defendant, who has not filed his written statement, from defending the suit *ex tempore* at the hearing. JAYANTILAL *v.* NAGNATH, 15 BOM. L. R. 126 **95**

——— ——— ——— ——— r. 106 **95**

Bombay Irrigation Act (VII of 1879), s. 23—*Collector's order under the Act—Appeal from the order—Suit to set aside order incompetent till appeal preferred—Bombay Land Revenue Code* (*Act V of* 1879), *s.* 203.

An order made by a Collector under section 23 of the Bombay Irrigation Act, falls within the purview of section 203 of the Bombay Land Revenue Code, and is none-the-less the order of the Collector by reason of the fact that it is a confirmation of an order made by a Canal Officer.

An appeal from such an order lies to the Commissioner, until that appeal has been presented, a suit to set aside the order is incompetent. SECRETARY OF STATE *v.* JERAMDAS KHATONMAL, 6 S. L. R. 241 **726**

Bombay Land Revenue Code (V of 1879), s. 37 **565**

——— ——— ——— ——— s. 79A **891**

——— ——— ——— ——— s. 203 **726**

Bombay Prevention of Gambling Act (IV of 1887), ss. 6, 7—*Common gaming house—Search by Commissioner of Police without warrant, whether legal—Presumption under section* 7, *whether arises—Construction of statutes—Penal enactment—Intention of Legislature.*

The Commissioner of Police in the City of Bombay is entitled to make a search in a common gaming house and to arrest the persons found there, even in the absence of a warrant under section 6 of the Bombay Prevention of Gambling Act.

The Commissioner has himself power to do that which under section 6 he is empowered to authorize a subordinate Police officer to do.

The presumption under section 7 of the Act does not arise where a house is not entered under a special warrant but is raided by the Commissioner of Police without a warrant. The special rule of evidence authorized by section 7 only comes into operation when the imperative provisions of the section have been satisfied.

A penal statute must be construed strictly; the intention of the Legislature being gathered from the language which the Legislature has elected to use. Judges cannot add sections of their own to penal statutes with a view to improve them by some fancied completeness or consistency. EMPEROR *v.* JAFFUR MAHOMED, 15 BOM. L. R. 106; 14 CR. L. J. 204; 37 B. 402 **204**

Bombay Prevention of Gambling Act—concld.

——— ——— ——— ——— s. 7 **204**

——— ——— ——— ——— s. 12 (a)—*Public place—Murgi-Swami Math at Haveri.*

The Murgi-Swami Math at Haveri, in the Dharwar District of the Bombay Presidency which is enclosed in a compound wall, is off the highway, is managed by a Swami as trustee for the Lingayet community who has power to keep people out if he chooses, and is not a public place within the meaning of section 12 (*a*) of the Bombay Prevention of Gambling Act, 1887. EMPEROR *v.* CHENNAPPA, 15 BOM. L. R. 101; 14 CR. L. J. 167 **167**

Bombay Regulation II of 1827, s. 56—*Pleader—Misbehaviour not limited to professional misconduct—High Court—Jurisdiction disciplinary.*

The occurrence of the word "misbehaviour" in juxtaposition with the case of a Pleader merely accused of a criminal offence suggests that the misbehaviour need not necessarily be restricted to professional misbehaviour.

The jurisdiction of the Bombay High Court in such matters is not limited to cases where a Pleader's alleged misconduct is committed in the course of his professional duties.

There is no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England. GOVERNMENT PLEADER *v.* ANNAJI NARAYAN DESHPANDE, 15 BOM. L. R. 231; 14 CR. L. J. 257; 37 B. 354 **529**

Bombay Regulation V of 1827, s. 1—*Limitation Act* (*XIV of* 1859), *ss.* 1 (12), 2—*Limitation Act* (*IX of* 1871), *s.* 2—*Repeal of section* 1 *of Regulation—Interpretation of statutes—Act XI of* 1861—*Positive prescription, rule of—Repeal by limitation statute—Construction of grant—Trust property—Gift—Construction of deed—Possession of donee from trustee for thirty years—Title.*

In 1678-79, a village was given in *inam* to the Swami of a Math for the purpose of meeting the expenses of camphor for the idol used in the ceremony of "Karpur Mangalarti." In 1830, the then Swami gave the village by way of gift (*Krishnarpana*) to *A.*, who went into possession as proprietor of the property in 1830. *A.* paid a small sum equivalent to Rs. 20 as *judi* on the land till 1840, after which the payment was stopped. In 1908, the present Swami of the Math sued to obtain a declaration of his title to the village and to recover possession from the heirs of *A.*:

Held, (1) that the original grant to the Swami was in his capacity of a trustee as the legal property was vested in the Swami while the equitable state was in the judicial person, the idol;

(2) that the successors of the Swami held the village as trustees;

(3) that the gift to *A.* was an absolute gift with possession, the word *Krishnarpana* specifically denoting which is irrevocable and absolute;

(4) that the mere temporary condition that a trivial sum of money should be paid as *judi* did not deprive the transfer of its character as a gift;

(5) that by virtue of section 1 of the Bombay Regulation V of 1827, the possession of *A.* ripened into title by the year 1860;

Bombay Regulation V of 1827—concld.

(6) that the effect of Act XI of 1861 was to suspend the coming into force of the Limitation Act XIV of 1859 until 1st January 1862;

(7) that section 1 of the Bombay Regulation V of 1827 being an enactment of positive prescription was not affected by Act XIV of 1859, which was a statute of Limitation;

(8) that the Regulation stood unrepealed till it was repealed by the Limitation Act of 1871;

(9) that the fact that *A.* was an alienee from a trustee did not weaken his case, as section 2 of Act XIV of 1859 did not involve any interference with the prescriptive rights conferred by the Regulation.

Where a later Act does not purport or affect to supersede an earlier Act, the Court will endeavour to read the two enactments together and to avoid conflict, if possible. RANGACHARYA APPACHARYA *v.* DASACHARYA SANKHALPACHARYA, 15 BOM. L. R. 178; 37 B. 231 **387**

Bombay Regulation XII of 1827, s. 27—*Conditions in bond to be imposed by the District Magistrate himself—Interference with suspect's liberty or means of livelihood.*

The restrictions in a bond taken under section 27 of the Bombay Regulation XII of 1827 should be imposed by the District Magistrate himself, and should not unreasonably affect the personal liberty of the suspect, or have the effect of depriving him of the means of procuring a livelihood. EMPEROR *v.* UMAR, 6 S. L. R. 177; 14 CR. L. J. 255 **511**

——— ——— ——— ——— **s. 37**—*Neglect—Cowardice not included—Exemption of particular hamlets or individuals—Imposing separate fines on Hindus and Muhammadans.*

Neglect under section 37 of the Bombay Regulation XII of 1827 must at least consist of acts or omissions which lead to the inference that the inhabitants of a village were in sympathy with the robbers and endeavoured to obstruct or defeat the Police investigation. Mere cowardice is irrelevant to the matter.

The section imposes responsibility on the whole community residing within the boundaries of a village, and a Magistrate proceeding under the section has no jurisdiction to exempt particular hamlets, or to exempt particular villagers from his order. It is incompetent to impose separate fines on Muhammadan and on Hindu residents. EMPEROR *v.* THE ENTIRE DEH (VILLAGE) OF CHAKARKOTE, 6 S. L. R. 124; 14 CR. L. J. 249 **505**

Brothel **714**

Buddhist Law—*Inheritance — Dissolution of marriage—Rights of children—Abandonment of each other by husband and wife for more than prescribed period—Re-marriage by both—Dissolution of marriage tie—Disposition of children in case of divorce—No filial relations—No right of inheritance.*

Where there was mutual abandonment of each other by a husband and a wife for more than the prescribed periods, and both re-married, each starting a new home:

Held, that the marriage tie between them was dissolved.

In a case of divorce or dissolution of marriage where the children are of tender years, it is the will of

Buddhist Law—concld.

the parents which decides the disposition of the children and the children lose the right to inherit the property of the parent who has abandoned them unless filial relations are resumed. MA YI *v.* MA GALE, 6 L. B. R. 167; 6 BUR. L. T. 75 **85**

Burden of proof—*Benami* purchase **770**

——— ——— — ———Impartible *zemindari*—Alienability **596**

——— — ——— —Malicious prosecution **665**

— ——— ——— ———Novation of contract **981**

———— — — ———, shifting of **565**

——— — ———— —Suit for patni land—Defence that land is *lakheraj* **64**

——— ——— ———Widow's right to claim partition **702**

——— ——— ———*Malicious prosecution, suit for—Plaintiff to prove his innocence—Finding in criminal case not conclusive.*

In a suit for malicious prosecution, it is incumbent upon the plaintiff in the first place to prove his innocence, at least to justify the inference that the prosecution was commenced without reasonable and probable cause. The finding in the criminal case is not conclusive upon this matter in the civil suit. MUCHI OSTA *v.* HORSMULL MARWARI, 17 C. W. N. 434 **24**

Calcutta High Court Original Side Rules, r. 98 **578**

Canals Act (VIII of 1873), s. 70 (4)—*Authorised distribution means distribution expressly made by canal authorities—Private arrangement of water, disturbance of—Offence—Civil remedy.*

The 'authorized distribution' spoken of in section 70 (4), Canals Act, 1873, refers only to such distribution as has been expressly made by the Canal authorities, and any further distribution between a landlord and his tenant is a matter of private contract which merely entitles the tenant to bring a Civil claim. BASAN *v.* EMPEROR, 14 CR. L. J. 281; 217 P. L. R. 1913; 21 P. W. R. 1913 CR.; 19 P. R. 1913 CR. **713**

Carriers. *See* COMMON CARRIER.

Carriers Act (III of 1865). *See* COMMON CARRIERS ACT.

Cause of action. *See* RIGHT TO SUE.

——— ——— ——— ———*Wrong entry in revenue papers—Suit for declaration—Limitation Act (IX of 1908), Sch. I, Art. 120.*

A. mortgaged his occupancy holding with possession to *J.* in 1877. In 1880 the name of *A.* was expunged from the revenue papers and that of *J.* was recorded as tenant-in-chief. In 1907 *A.* applied to the Settlement Officer for correction of the revenue papers, but the application was dismissed. Thereafter *A.* brought a suit for declaration that he was the mortgagor and *J.* was the mortgagee:

Held, that the suit was time-barred inasmuch as the cause of action to bring the suit accrued in 1880. TARA CHAND *v.* BOTI RAM **751**

Central Provinces Court of Wards Act (XVII of 1885), s. 18—*Hindu Law—Managing member of joint Hindu family placing whole joint family property under the management of Court of Wards—Interest of a member of the family—Power of the managing members—Power of the Chief Commissioner under the Act—Proposal for mortgage of property under Court of Wards sanctioned—No necessity for a particular transaction of mortgage or its precise terms—Applicability of the Act to joint Hindu families—Conveyancing little understood in country parts of India.*

M. and *D.*, two brothers, the senior and managing members of a *Mitakshara* joint Hindu family, consisting of ten persons, describing themselves as *zemindars* of several villages in the Central Provinces, made a written application to the Deputy Commissioner of their District, stating therein that they were indebted to a large extent, and that they were neither able to arrange for the liquidation of the debt nor to manage the estate, and, therefore, praying that the Deputy Commissioner would assume the management of their *malguzari* villages under section 7 (*c*) clause 4 of Act XVII of 1885, and arrange for the discharge of their debt.

The petition was duly forwarded to the Chief Commissioner for sanction which was given, accepting also the proposals for the liquidation of the debt, and in the result the mortgage was made upon which a suit for possession of the mortgaged property or in the alternative for a decree for sale was brought by the mortgagees.

Held:

(*i*) that the interest of a member of an undivided *Mitakshara* family in the family property is not individual property;

(*ii*) that *M.* and *D.* in making the application to the Deputy Commissioner were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their individual interests;

(*iii*) that under the circumstances of the family *M.* and *D.* acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner;

(*iv*) that they in making the application acted within their powers and authority as the managing members of the joint family;

(*v*) that all the immoveable property constituting the ancestral estate of the joint family was placed and taken under the superintendence of the Court of Wards;

(*vi*) that Act XVII of 1885 was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others;

(*vii*) that the Chief Commissioner had power to sanction the superintendence of the joint family property and had given sanction to the proposal of mortgaging the property;

(*viii*) that it was not necessary under section 18 of Act XVII of 1885 that the actual mortgage to be made should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage;

(*ix*) that a large amount of the mortgage-money remaining unpaid, and the Court of Wards failing to transfer the mortgaged property to the mortgagees and relinquishing the management of the estate, the mortgagees were entitled under the terms of the mortgage to bring the suit for sale;

(*x*) that conveyancing is but little understood in the country parts of India. GULAB SINGH *v.* RAJA SETH GOKULDAS, 17 C. L. J. 619; 17 C. W. N. 918; 15 Bom. L. R. 613; (1913) M. W. N. 542; 14 M. L. T. 55; 9 N. L. R. 117 **521**

Central Provinces Tenancy Act (XI of 1898), s. 35 (4)—*'Leaves his holding uncultivated'—Interpretation—Jurisdiction—Suit by tenant for possession of land against landlord as alienee from guardian of the tenant when minor—Civil Court competent to hear*—Venue, *how decided—Practice—Decision of District Judge binding on Subordinate Judge as regards jurisdiction.*

The expression 'leaves his holding uncultivated' in section 35 (4) of the Tenancy Act means 'omits to cultivate the holding himself or to arrange for its cultivation.' The provision applies also to cases where a minor's guardian makes a bad bargain in surrendering on his behalf.

The nature of the claim as brought decides the *venue* in a case.

Where according to the plaint the possession of the landlord is due to a sale by the tenant's guardian, and the authority of the guardian to alienate is challenged, and recovery of possession prayed for, the suit is not between the landlord and tenant as such and the jurisdiction of the ordinary Civil Court is not ousted.

It is a well-known rule of construction that an Act by which the jurisdiction of the ordinary Courts of judicature is taken away must be construed strictly.

Where a Subordinate Judge returned a plaint with the endorsement that the suit was between landlord and tenant, and the plaint having been presented to an Extra Assistant Commissioner and Additional Judge was again returned by that officer to the Court of the Subordinate Judge as being within the jurisdiction of the Subordinate Judge and on appeal to the District Judge this last order was confirmed:

Held, that the Subordinate Judge was bound by the decision of the District Judge and was competent to try the suit. GANPAT *v.* TIMBAK, 9 N. L. R. 54 **59**

Charge—Opportunity to answer charge to be given **920**

———*Criminal breach of trust—Penal Code (Act XLV of 1860), s. 406—Specification of dates between which offence committed—Offence committed after specified period—Illegality of charge—Acquittal of accused—Criminal Procedure Code (Act V of 1898), ss. 222, cl. (2) proviso, 537—Books of account—Locked up in boxes—One item of property.*

The accused was charged with committing criminal breach of trust in respect of a large sum of money between August 17, 1909, and August 15, 1910. There is evidence to prove that in February and May 1911

Charge—contd.

be appropriated part of the sum to his own use; but there the evidence of the commission of such an offence before August 15, 1910, was insufficient:

Held, that it is not enough to show that there was embezzlement at some time, before, during or after that period; that the charge being framed under the special provision contained in clause (2) of section 222 of the Criminal Procedure Code and the proviso thereto, it is at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named, or some part of it, committed within the space of one year, that this error in the charge and the discrepancy between the dates specified and the actual dates on which the offence appears to have been committed was not a mere irregularity which might be cured by the provisions of section 537 of the Criminal Procedure Code.

As the evidence did not disclose any completed act of breach of trust between the dates specified in the charge, the accused was entitled to an acquittal.

The accused was charged with having committed the offence of criminal breach of trust in respect of certain account books between July 11, 1910, and August 15, 1910. He was called upon to produce them on August 15, 1910:

Held, that as those books, forming one set of account books, were found together in two locked boxes, the keys being with the accused, they may be fairly regarded as one item of property with which the accused was dealing in one particular way; and, therefore, the objection of the accused that the charge was bad inasmuch as there was a separate offence as regards each book, and the accused could not be tried for more than three of such offences, is untenable; that the accused could not be said to have committed an offence under section 406, Indian Penal Code, as regards the books until after August 15, 1910, when he was called upon to produce them; that as there was no evidence to show how he dealt with the books before that date there was no evidence of any dishonest dealing before that date, and that the accused ought to be acquitted on this charge also. PROMOTHA NATH RAY *v.* EMPEROR, 17 C. W. N. 479; 14 CR. L. J. 219 **315**

—— ——*Two persons charged with causing hurt to three—One charge—Irregularity—No case of hurt by one of the accused—Prejudice to accused in trial—Re-trial by another Magistrate—Criminal Procedure Code (Act V of* 1898), *ss.* 233, 239.

In one charge two persons were charged with causing hurt to three others with a *dao*, but there was no case of hurt by *dao* by one of the accused and he was convicted under section 352 for using a *lathi* against two of the complainants:

Held, that this was an irregularity which might have prejudiced the accused in their trial and that a re-trial by a new Magistrate must be held on charges properly framed. SITAL CHANDRA MAITRA *v.* EMPEROR, 17 C. W. N. 419; 14 CR. L. J. 212 **308**

——— **or mortgage**—Intention to create charge **221**

——— ——— ———*Mere covenant not to alienate property.*

A mere covenant not to alienate property is insufficient to create a charge.

Where a compromise decree set forth that "until the said amount of Rs. 13,000 is paid, the items 17, 18, 19, 20, 21, immoveables of A schedule should not be dealt with by the first and second defendants in any manner":

Held, that the stipulation amounting only to a covenant not to create any interest in it in favour of others was insufficient to create a charge. SIVANNA *v.* VENKATAKRISHNAMURTHY, (1913) M. W. N. 337; 24 M. L. J. 474 **478**

Charge—concld.

Charitable Endowment. *See* TRUST.

Cheating. *See* PENAL CODE, s. 420.

Chota Nagpur Tenancy Act (Beng. Act VI of 1908), ss. 4, 41—*Under*-raiyat—*Non-occupancy* raiyat, *difference between—Ejectment of under*-raiyat *by* raiyat—*Notice in writing if necessary—Tenancy from year to year—Notice given in previous* Pous, *whether sufficient.*

An under-*raiyat* must, for the purposes of the Chota Nagpur Tenancy Act, be treated as belonging to a class of tenants quite distinct from the class of non-occupancy *raiyats*. And as there is no provision in the Act dealing separately with the class "under-*raiyats*," only those provisions of the Act which deal with tenants generally can be applied to under-*raiyats*.

Consequently, for the purpose of deciding the questions raised in a suit for the ejectment of an under-*raiyat* by a *raiyat*, the Court can have regard only to the relations established between the parties either by contract or by custom. In the absence of a lease the tenancy would ordinarily be held to be a tenancy from year to year.

There is no statutory provision that the tenancy of an under-*raiyat* in Chota Nagpur can be terminated only by a notice in writing.

Therefore, where the *raiyat* plaintiff asked the under-*raiyat* defendant to give up possession in *Pous* of the previous year:

Held, that the tenancy was terminated according to law and that the plaintiff should succeed in his suit for ejectment of the defendant. GURU CHARAN HAJAM *v.* SUKLAL HAJAM, 17 C. W. N. 810 **588**

——— ——— ——— **s. 41** **588**

Circumstantial evidence—Conviction **196**

Civil Procedure Code (Act XIV of 1882), s. 13 is not exhaustive **656**

——— ——— ——— **s. 13**—*Res judicata* **291**

——— ——— ——— **s. 111** **901**

——— ——— ——— ——— **s. 230** **391, 899**

——— ——— ——— **s. 245B** **394**

——— ——— ——— ——— **ss. 311, 312, 588**

—*Execution of decree—Irregularities in publishing and conducting of sale—Gross under valuation and sale for a low price—Substantial injury—Setting aside sale—Final orders under section* 588—*Appealable to Privy Council—Court of Ward taking over management of a portion of infant's property—Other property sold in execution of decree—Mother competent to protect that property as natural guardian.*

In execution of a decree the property to be sold consisted of 109 villages and the order for the proclamation of sale directed that the proclamation

Civil Procedure Code—(1882)—contd.

should be served on each of the villages by announcement to the public with beat of drum, and that a copy of it should be fixed at a conspicuous place on each property. The proclamation, however, was read out without beat of drum in one only of the villages, and affixed to a tree in that village alone. The schedule of the property attached to the proclamation contained no statement of the encumbrances to which the property was liable, and grossly undervalued the property. At the time of sale with the exception of the Collector and the decree-holder no bidder was present, and the property was knocked down to the decree-holder for a sum far below its actual price:

Held, that the sale must be set aside, as the matters above referred to constituted material irregularities in the publishing and conducting the sale within the meaning of section 311 of the Code of Civil Procedure, 1882, and the judgment-debtor sustained substantial injury through such irregularities.

The provision at the end of section 588 of the Code of Civil Procedure, 1882, providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in Council from them, and, therefore, the orders for confirming or setting aside a sale under sections 311 and 312 are appealable under Chapter XLV of the Code.

Where the interests of an infant with regard to a particular property are not in fact represented by the Court of Wards, that has taken over the management of some part only of the property of the infant, it is open to the mother of the infant as natural guardian to appear in the name of the infant to protect this particular property from sale. TEKAIT KRISHNA PRASAD SINGH *v.* MOTI CHAND, 17 C. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 BOM. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 140) **296 P. C.**

——— ——— ——— **s. 312** **296**

——— ——— ——— ——— **s. 315** – *Suit by auction-purchaser to recover purchase-money on the ground that judgment-debtor had no saleable interest in property—Limitation Act (IX of* 1908*), Sch. I, Art.* 120.

A suit brought by an auction-purchaser to recover the purchase-money, in pursuance of section 315 of the Code of Civil Procedure, 1882, on the ground that the judgment-debtor had no saleable interest in the property, is governed by Article 120 of the Limitation Act. SIDHESWARI PROSAD NARAINSINGH *v.* MAYANAND GIR, 11 A. L. J. 606 **986**

——— ——— ——— ——— **s. 317**—"*Certified purchaser*," *whether includes his successor-in-title—Judgment-debtor purchasing his own property in* benami *to defraud creditor—His suit for confirmation of possession—Defence by transferee of auction-purchaser that plaintiff not entitled to relief as he defrauded creditor—Whether defence available to him.*

The term "certified purchaser" in section 317 of the Civil Procedure Code of 1882 must be strictly construed, and, does not include his successor-in-title.

The plaintiff was the owner of the property in suit, and he purchased it in the name of defendant No. 1 in execution of a decree against himself obtained by defendant No. 3. The defendant No. 1 sold the property to defendant No. 2. The plaintiff brought a suit for declaration of title and confirmation of possession:

Held, that it was open to the defendant No. 2, the transferee from the certified purchaser, to avail himself of the defence that the plaintiff could not seek assistance in the Court as he had placed his property in the name of another with a view to commit fraud, that is, to defraud one of his creditors and that purpose had been accomplished. NISAKAR DAS *v.* BAIRAGI SAMAL **909**

Civil Procedure Code—(1882)—concld.

——— ——— ——— **s. 332** **968**

——— ——— ——— ——— **s. 375** – *Compromise—Subject of claim - Proceeding of Court - Registration—Stamp duty—Registration Act (III of* 1877*), s.* 17.

When a *solenamah* refers to the subject of the claim, it becomes when recorded a proceeding of the Court and does not require registration or stamp duty. AMBICA CHARAN SHER KAIBARTA *v.* SRINATH DUTTA **551**

——— ——— ——— **s. 462**—*Father guardian* ad litem *of his minor son—Compromise—Without leave of Court—Not binding on minor—Joint Hindu family—Father or managing member—Their power to bind minor members controlled in suits by law.*

A father or managing member of a joint Hindu family may, in certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family.

But when in a suit he is the next friend or guardian of the minor his powers are controlled by the provisions of the law (section 462, Civil Procedure Code) and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. GANESHA ROW *v.* TULJA RAM ROW, 17 C. W. N. 765; 25 M. L. J. 150; 11 A. L. J. 589; 36 M. 295; 18 C. L. J. 1; 15 BOM. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575 **515 P. C.**

——— ——— ——— ——— **s. 588** **296**

Civil Procedure Code (Act V of 1908), s. 2 – Order dismissing appeal as time-barred **931**

——— ——— ——— **s. 2 (12)** **974**

——— ——— ——— **s. 9** – Gift of funeral offerings **990**

——— ——— ——— **s. 9**—*Honours in temple—Jurisdiction of Civil Courts—Emolument attached to office—Legality.*

Per *Sadasiva Aiyar, J.*—Section 9 of the Civil Procedure Code gives Civil Courts jurisdiction to try only suits of a civil nature and the explanation shows that questions as to religious rites or ceremonies (and religious honours, by parity of reasoning) should not be tried by Civil Courts.

If the honours are attached to an office as emoluments, a suit would lie for them.

Courts should require strong evidence before attaching mere honours to a temple office.

When such honours are shown to persons only as marks of pure grace of the deity they cannot be legally claimed by anybody as receivable by him in a temple. ATHAN SADAGOPA CHARIAR SWAMIGAL *v.* ELIAVALLI SRINIVASA CHARIAR, 13 M. L. T. 340; (1913) M. W. N. 289 **257**

Civil Procedure Code—(1908)—contd.

——— ——— ——— s. 9, Sch. II, s. 20—*Enabling Court to entertain application in respect of subject-matter partly lying within jurisdiction—Not controlled by section 9 of the Code—Policy of law relating to awards—Award providing for distribution of pension in a particular way—Pensions Act (XXIII of 1871).*

Section 20 of the second Schedule of the Code of Civil Procedure, 1908, was devised for the purpose of enabling any Court having jurisdiction where the subject-matter of the award lies within more than one jurisdiction, to direct that the award be filed.

The section does not suggest any disability of the kind that arises on a consideration of section 9 of the Code.

Provided that there is something to arbitrate on, that there is a reference and an award, than the policy of the law is that that award should be given effect to without minute inquiry by the Court.

A decree in accordance with an award providing for the distribution in a certain manner of a pension when received from Government does not contravene the provisions of the Pensions Act. RAGHAVENDRA AYYAJI DESAI *v.* GURURAO RAGHAVENDRA DESAI, 15 BOM. L. R. 362; 37 B. 442 **882**

——— ——— ——— s. 11—*Res judicata*—First suit to recover property on allegation of mortgage—Suit dismissed—Second suit to recover property on allegation of mortgage **558**

——— ——— ——— s. 11, O. II, r. 2—*Mortgage—Redemption suit dismissed as premature—Subsequent suit for redemption not barred—First suit for declaration and account—Fixing time for payment—Power of Appellate Court.*

Plaintiff, who was in possession of the property mortgaged by him to the defendant, sued for a declaration that the mortgage had been satisfied and for recovery of a certain sum of money which had been overpaid to the mortgagee. The suit was dismissed as premature on the ground that the mortgage-debt had not been satisfied.

Subsequently plaintiff sued for redemption:

Held, (1) that treating the first suit as a redemption suit, the second suit was not barred by the operation of *res judicata*;

(2) that the first suit was more than a mere suit for account and did not bar the second suit by Order II, rule 2, of the Code of Civil Procedure.

An Appellate Court when making its own decree is at liberty to fix a fresh date for redemption with reference to the date of its own decree.

Obiter dictum.—Though a redemption decree does not extinguish the equity of redemption until an order for sale is made on an application by the mortgagee, the remedy of the mortgagor to bring a second suit may be barred by *res judicata*. BIKHOMAL *v.* RAJALMAL, 6 S. L. R. 140 **393**

——— ——— ——— s. 11—*Limitation, decision on the issue of—Question of law—Mixed question of law and fact*—Res judicata.

Where in a redemption suit the issue of limitation was decided in favour of the plaintiff but on a subsequent date the suit was dismissed under Order IX, rule 2:

Held, on the institution of a fresh redemption suit by the plaintiff, that the decision on the question of limitation in the first suit operated as *res judicata* inasmuch as the issue involved not merely a question of law but a mixed question of law and fact. JHANDA *v.* BUDHA, 99 P. W. R. 1913; 156 P. L. R. 1913 **399**

——— ——— ——— s. 11—Res judicata—*Question of law—Defendant held not to be a tenant.*

A. sued *B.* for ejectment on the ground that *B.* was his non-occupancy tenant. *B.* pleaded that he was not a tenant but a mortgagee of *A.*

The suit was dismissed on the ground that *B.* was not a tenant of *A.* but his mortgagee.

The deed of mortgage was an unregistered document and was on that account inadmissible in evidence. In a subsequent suit by *A.* for ejectment:

Held, that the decision in the first suit operated as *res judicata* on the question that *B.* was not *A.*'s tenant.

Obiter dictum.—A decision in a previous suit on a question of law, even if erroneous, would operate as *res judicata* in a subsequent suit. LATORE *v.* BINDRABAN **244**

——— ——— ——— s. 11—Res judicata—*Rent suit—Defendant pleading rent-free title—Title not found—Subsequent suit on same title for different land, whether barred by* res judicata.

In a suit for rent, the defendant set up a rent-free title. Issue was joined upon that plea and the Court found against him. He subsequently brought a title suit against the then plaintiff, relating not to precisely the same land but involving precisely the same question of title:

Held, that the subsequent suit was barred by *res judicata*. RAHIMUNNESSA KHATUN *v.* KARAM ALI KHAN **632**

——— ——— ——— s. 11—Res judicata—*Two appeals raising same question of title—One appeal abating—Other appeal barred.*

A. instituted two suits, one against *B.* and the other against *B.* and *C.* on the same day. Both the suits involved the same questions of title and were disposed of by one and the same judgment: separate decrees were passed in the two suits allowing *A.*'s claims. Appeals were preferred against both the decrees.

From the decree in which there were two defendants, only *C.* appealed; from the other decree *B.* preferred an appeal. Before the appeal by *B.* was heard, *C.* died and the appeal preferred by him abated and the decision of the Court in that case became final:

Held, that the decision in the case against *B.* and *C.* operated as *res judicata* for the purpose of the case against *B.* alone and that the appeal of *B.* was, consequently, barred. ANANT DAS *v.* UDAIBHAN PARGAS, 11 A. L. J. 214; 35 A. 187 **76**

——— ——— ——— s. 24—*Suit remanded to be tried again by the first Court—Power of District Judge to transfer it to his own file.*

Where an Appellate Court remands a suit for fresh decision on the merits by the Court which first decided it, the District Judge is competent, under section 24 of the Code of Civil Procedure, 1908, to transfer the suit to his own file and decide it. RAZA HUSSAIN *v.* SHIOSAHAI, 9 N. L. R. 40 **552**

——— ——— ——— s. 35, Sch. II, para. 13—*Costs of arbitration—Court competent to order costs—Fees of arbitrator.*

Civil Procedure Code—(1908)—contd.

Where there is no sufficient provision in the award made in arbitration proceedings in a suit, or if the award has not been made, the Court has power to award the costs of the arbitration as costs of a proceeding incident to the suit under section 35 of the Code of Civil Procedure.

The power of Court to award the arbitrator's fees as costs is not limited to cases when an award has been made.

No appeal will lie merely as to costs unless there has been violation of an established principle. GURDINOMAL *v.* WADHUMAL, 6 S L. R. 226 **611**

——— ——— ——— ——— **s. 47** **904**

——— ——— ——— **s. 47**—*Execution of decree—Sale of judgment-debtor's property—Objection by judgment-debtor—Separate suit not allowed—Hindu widow—Right of residence against creditors of husband.*

The objection of two Hindu widows to the sale of certain house property without reserving rooms for their residence having been disallowed, they filed a declaratory suit to establish their right. One of the widows was a party to the decree in execution of which the houses were sought to be sold:

Held, that the plaintiff who was a party to the decree, was not competent to file the suit, for section 47 of the Civil Procedure Code lays down that the execution Court only is competent to determine the claim. MATHRA SINGH *v. Musammat* KUSHAL DEVI, 134 P. L. R. 1913 **921**

——— ——— ——— **s. 47**—*Partition suit—Compromise-decree—Execution—Objection that decree-holder realised certain debts due to judgment-debtor—Distinct cause of action—Separate suit.*

In a partition suit, a compromise-decree was passed whereby certain debts due to the family were allotted to the decree-holder, and certain other debts were allotted to the judgment-debtor. Besides, the judgment-debtor had to pay a certain fixed sum of money to the decree-holder which he did not do, consequently, an application was made to execute the decree. The judgment-debtor objected that the decree-holder's application should be rejected inasmuch as he had realised certain debts which had been allotted to him:

Held, (1) that the plea could not be raised in execution proceeding as it did not fall within the scope of section 47 of the Civil Procedure Code and that the judgment-debtor could recover the money so wrongfully realised by the decree-holder by a separate suit;

(2) that the objection could not be treated as a plaint. MOHANLAL *v.* JAGANNATH, 11 A. L. J. 282; 35 A. 243 **622**

——— ——— ——— ——— **s. 47, O. XXI, r. 66**—*Question relating to execution—Dispute between co-defendants—Appeal—Test.*

In the execution of a mortgage decree an order passed as between co-defendants that a certain item of property should be brought to sale first falls within the purview of section 47, Civil Procedure Code, and is, consequently, appealable.

The expression "between the parties to the suit" means parties opposed to one another and not necessarily those who are plaintiff and defendant in a suit respectively.

Civil Procedure Code—(1908)—contd.

In deciding whether an appeal is competent, the substance of the order should be looked at; the provision of law quoted by the Court passing the order is not decisive. SAMALAPALLI MANGAYYA *v.* SAMALAPALLI SRIRAMULU, 13 M. L. T. 347; 24 M. L. J. 477; (1913) M. W. N. 382 **448**

——— ——— ——— ——— **s. 48** **391, 899**

——— ——— ——— ——— **s. 53**—*Costs in partition suit against father—Liability of son—Assets in the hands of the son.*

In a partition suit, costs were awarded against one *A.* After the decree, *A.* died. The decree-holder proceeded to execute the decree for costs and attached the share which had fallen to *A.* at the partition but which after his death had passed into the hands of his sons:

Held, that the sons were liable for the costs and the property in their hands was liable to attachment under section 53 of the Civil Procedure Code. KRISHNA RAO *v.* DANKAR RAO **252**

——— ——— ——— ——— **s. 55 (3), (4)** **981**

——— ——— ——— ——— **s. 60** **591**

——— ——— ——— **s. 60**—*Insurance policy—Wife named as beneficiary—Attachment in execution of decree against assured's assets—Transfer of Property Act (IV of 1882), s. 130—Trusts Act (II of 1882), s. 5.*

A. had effected a policy of insurance upon his own life for the benefit of his wife. The Insurance Company had promised, on proof of the death of the assured, to pay the policy monies to the trustee or trustees who might be appointed by the assured by separate writing and in default to the beneficiary, his widow. *A.* died without appointing any trustee or making an assignment of the policy in writing. His creditors sought to attach the policy in execution of their decrees against *A.*'s estate:

Held, (1) that the policy, on *A.*'s death, formed part of his estate, the right of action against the company being in his executors or other representatives untrammelled by any trust in favour of his wife;

(2) that *A.* could divest himself of his beneficial interest under the policy only by assignment in writing as provided by section 130 of the Transfer of Property Act, or by signed declaration of trust as provided by section 5 of the Trusts Act. SHANKAR VISHVANATH WAGH *v.* UMABAI SADASHIV WAGLE, 15 BOM. L. R. 320 **736**

——— ——— ——— **s. 60 (c)**—*Agriculturist—Proof—Attachment of house of agriculturist.*

Where a person, who is both a *zemindar* and a cultivator, wants to have his house exempted from attachment on the ground that it is a house of an agriculturist, he must prove that the main source of his income is from cultivation and that he is an agriculturist in the strict sense of the term. JAMNA PROSAD *v.* RAGHUNATH PROSAD, 11 A. L. J. 437; 35 A. 307 **125**

——— ——— ——— **s. 67**—*Not re-enacting second paragraph of section 327 of the old Code, effect of—Rule made under the paragraph inoperative—Sanction of Commissioner of Division to sale of an agricultural land in execution unnecessary.*

Civil Procedure Code—(1908)—contd.

From the date on which the new Code of Civil Procedure of 1908, came into force, the sanction of the Commissioner of a Division is no longer required as a condition precedent to the sale of agricultural land in execution of a decree for money. KISHORE CHAND *v.* ISHAR SINGH, 167 P. L. R. 1913; 123 P. W. R. 1913 **479**

——— ——— ——— ——— **s. 73, O. XXI, rr. 89, 92**—*Sale in execution—Setting aside sale—Deposit within thirty days—Notice when to be served—"Decree-holder", meaning of—Rateable distribution, application for—Amount specified in sale proclamation.*

Although the deposit required by rule 89, Order XXI, Civil Procedure Code, 1908, must be made within 30 days from the date of sale, it is not necessary that the notice required to be given under rule 92 should be given within 30 days of the date of sale. Once notice has been given to all parties of an application under rule 89, the Court has full authority to set aside the sale.

The word "decree-holder" in rule 89 means that person alone for the satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale-proceeds under section 73 of the Code.

Rule 89, clause (2), provides for a deposit for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. GANESH BAB NAIK *v.* VITHAL VAMAN MAHALYA, 15 BOM. L. R. 244; 37 B. 387 **475**

——— ——— ——— ——— **s. 80** **565**

——— ——— ——— ——— **s. 80**—*Suit for injunction against Secretary of State for India in Council—Notice necessary.*

In default of notice under section 80, Civil Procedure Code, 1908, a suit for injunction will not lie against the Secretary of State, and the plaint must be rejected. SABRO *v.* SECRETARY OF STATE, 6 S. L. R. 123 **361**

——— ——— ——— ——— **s. 80**—*Suit for injunction—Cause of action already arisen—Courts in India not to invoke equitable jurisdiction of Chancery Court to override Indian statutes.*

Section 80 of the Code of Civil Procedure, 1908, applies to a suit for an injunction where the cause of action for the injunction is an act detrimental to the plaintiff's interests and already done by the public officer.

Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Act of the Indian Legislature. ABDUL WAHID *v.* MANAGER, ENCUMBERED ESTATES, 6 S. L. R. 250 **838**

——— ——— ——— ——— **s. 89, O. XXIII, r. 3**—*Submission and award, whether can be recorded as an adjustment or compromise—Pending suit—Reference to arbitration without the intervention of the Court—Power of Court to inquire whether the award is proper.*

Where a suit is referred by parties to arbitration and an award is made, the submission and the award may be recorded as an agreement, adjusting or compromising the suit, and a decree passed in terms of such award.

The addition of the words "where it is proved to the satisfaction of the Court" in Order XXIII, rule 3, give the Court power to inquire into a disputed compromise and to record it, if satisfied that it was properly arrived at.

The provisions of the second Schedule to the Civil Procedure Code do not contemplate a reference to arbitration by the parties to a pending suit without the intervention of the Court. But the words "any other law for the time being in force" in section 89, of the Code apply to Order XXIII, rule 3, and, therefore, where an award, made on reference to arbitration in a pending suit without the intervention of the Court, is disputed by a party, the Court should inquire whether the award, which is alleged to be an adjustment or compromise, was justly, legally and properly arrived at. HARAKHBAI *v.* JAMNABAI, 15 BOM. L. R. 340 **786**

——— ——— ——— ——— **s. 92**—Suit to remove a trustee—Suit to enforce private rights **740**

——— ——— ——— ——— **s. 92**—*Suit by a Hindu on behalf of Hindu community to recover* Thakurdwara *property from a trespasser — Permission of Legal Remembrancer unnecessary.*

Any member of the Hindu community can institute a suit on behalf of that community, with the permission of the Court, to eject a trespasser from a property belonging to a *Thakurdwara* in a village.

The permission of the Legal Remembrancer for such a suit is not necessary. TIKA RAM *v.* RATAN LAL **973**

——— ——— ——— ——— **s. 92 (1)** is applicable to *Mutts* **694**

——— ——— ——— ——— **s. 96, O. XLI, r. 1**—*Decree—Suit for damages—Set-off claimed—Suit decided to be barred—No decree—No appeal—Preliminary decree enumerated.*

The plaintiff sued for damages for breach of contract. The defendant claimed a set-off.

The lower Court decided on a preliminary issue that the plaintiff's claim was barred by limitation:

Held, on appeal by the plaintiff,

(*i*) that the suit was one embracing both the claim and the set-off, and hence the decision of the plaintiff's claim was not a decision of the suit and, therefore, no decree could be passed:

(*ii*) that, no appeal lay under section 96 of the Civil Procedure Code (Act V of 1908) and it was also incompetent for want of compliance with the provisions of Order XLI, rule 1.

Preliminary decrees are passed when after the decision of the suit, the Court has to stay its hand in order to work out the consequences on which the complete disposal of the suit depends. They are enumerated in Order XX, rules 12 to 16 and 18, and in Order XXXIV, rules 2 to 5, and 7 and 8. UDHARAM *v.* SECRETARY OF STATE, 6 S. L. R. 287 **922**

——— ——— ——— **s. 97**—*Preliminary iss—Finding but no decree drawn up—Right of appeal against the finding not barred by section 97—Waiver.*

Civil Procedure Code—(1908)—contd.

A preliminary issue was raised in the first Court and a finding was recorded thereupon. But no decree was drawn up in accordance with that finding. In appeal from the decree in the suit, the finding was appealed against, an issue was framed by the Appellate Court, and it was decided against the plaintiff:

Held, that the Court of first appeal was empowered to hear and decide the preliminary issue.

Where there is only a preliminary finding and no decree is drawn up in accordance with that finding, there is no preliminary decree, and there is consequently no possibility of such an appeal as is contemplated by section 97 of the Civil Procedure Code.

Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases, this inference has come to be looked on as an inference of law. SAKHARAM *v.* SADASHIVE BALSHET LODHA, 15 BOM. L. R. 382 **894**

——— ——— ——— ——— **s. 99**—*Written statement—Set-off—Whether Court-fee to be paid on written statement according to value of set-off claimed—Appellate Court—Error not affecting merit or jurisdiction—Interference by Appellate Court, ground of.*

In a case, the defendant claimed a set-off in his written statement but did not pay any Court-fee for the amount of the set-off. The Court accepted the written statement and allowed the set-off. The plaintiff, in a cross-appeal before the lower Appellate Court, took an objection, which was disallowed, to the effect that the defendant was bound to pay Court-fees for the amount of the set off;

Held, that the error, if error there was, did not affect the merits of the case or the jurisdiction of the Court, and so afforded no ground for reversal, substantial variation or remand, under section 99 of the Civil Procedure Code. ABDUL AZIZ *v.* RAZAK ALI, 17 C. L. J. 365 **918 F. B.**

——— ——— ——— ——— **s. 100**—Order dismissing appeal as time-barred **931**

——— ——— ——— ——— **s. 102**—*Suit for participation in income of religious endowment—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Small Cause suit—Second appeal.*

A suit for participation in the income of an endowment, even if it is a part of the regular income, is not excluded from the cognizance of a Small Cause Court and, therefore, no second appeal lies where the value of the suit is Rs. 100 only. CHINTAMANI *v.* MAHIMA DAT **628**

——— ——— ——— ——— **s. 109 (c)** **435**

——— ——— ——— ——— **s. 115** **197, 237, 363**

——— ——— ——— ——— **s. 115**—*Execution sale—Application to set aside—Rejection of application as time-barred by first Court—Order set aside on appeal—Point of law—Question of jurisdiction.*

The fact that a District Judge has taken an erroneous view of the law does not amount to the exercise of a jurisdiction not vested in him by law, or the exercise of jurisdiction illegally or with material irregularity. PEARY LAL GHOSH *v.* ANIL CHANDRA GHOSH **594**

——— ——— ——— ——— **s. 115**—*Revision—Where appeal lies.*

No revision lies where an appeal is allowed. GANGA CHARAN *v.* BADDEL **736**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **ss. 115, 153, O. VI, rr. 16, 17**—*Suit for declaration to be converted into one for possession—Court incompetent to convert—Amendment of plaint—Revision of order without jurisdiction.*

A plaint may be returned for amendment only if a party applies for it. It is not open to the Court of its own accord to direct a plaint to be returned for amendment or to convert a suit for declaration into one for possession.

When an order directing a plaint to be returned for amendment is without jurisdiction, it is open to revision by the High Court. VENKATTACHELLA CHETTI *v.* NARAYANA AIYAR, 24 M. L. J. 455; (1913) M. W. N. 399 **672**

——— ——— ——— ——— **s. 141** **683**

——— ——— ——— ——— **s. 141, O. IX, r. 4, O. XLIII, r. 1 (c)**—*Suit dismissed in default—Application for restoration also dismissed in default of both parties—Application to set aside the order of dismissal of application for restoration rejected—No appeal lies.*

A suit was dismissed for default, both parties being absent, and the application for restoration of the suit was also dismissed for default of both parties. An application for setting aside the order of dismissal of the application for restoration was rejected:

Held, that no appeal lay from the order of rejection.

Section 141, Civil Procedure Code, (Act V of 1908), relates to procedure only; it cannot confer a right of appeal, which is a matter of substance, and not of procedure.

Clause (*c*) in rule 1 of Order XLIII does not give a right of appeal in cases of dismissal for default of both parties. FARIDBI *v.* MOHAMMAD AMIN, 9 N. L. R. 33 **97**

——— ——— ——— ——— **s. 149**—*Limitation Act (IX of 1908), s. 5—Limitation—Appeal—Court-fee filed after expiry of period of limitation.*

The discretion allowed to Courts by section 149 of the Civil Procedure Code for permitting a deficiency in Court-fees to be made up at any time in the course of an appeal cannot be exercised in favour of an appellant unless he shows reasonable diligence in the prosecution of his appeal.

An appeal was filed on the 25th October 1909, and a Court-fee of Rs. 25 was paid. The appellant should have paid Rs. 625 which he had paid on his plaint. The deficiency was not made up till 26th October 1910:

Held, that the appeal must be dismissed as barred by limitation. DALIP SINGH *v.* UMRAO SINGH, 130 P. L. R. 1913; 55 P. R. 1913 **788**

——— ——— ——— ——— **s. 151**—*Execution of decree—Auction sale set aside—Power of Court to order refund of money paid by auction-purchaser—Subsequent agreement between decree-holder and auction-purchaser—No bar.*

Where in execution of decree an auction sale is set aside, the executing Court is competent under section 151, Civil Procedure Code, 1908, to direct the decree-holder to refund the money paid to him through the Court by the auction-purchaser; th

Civil Procedure Code—(1908)—contd.

Court would not be debarred from doing so simply because the decree-holder set up a subsequent agreement between himself and the auction-purchaser which the latter repudiated. BABU LAL *v.* SUKH DEO SINGH, 105 P. W. R. 1913; 172 P. L. R. 1913 **439**

——— ——— ——— ——— s. 151, O. IX, r. 9

—Plaintiff dying during pendency of suit—Suit dismissed for default—Inapplicability of the provisions —Inherent power of Court.

The rules or orders of the Code of Civil Procedure, 1908, dealing with the case of the non-appearance of a suitor do not apply to the situation which arises when a suitor is dead. DEBI BAKHSH SINGH *v.* HABIB SHAH, 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 BOM. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148 **526 P. C.**

——— ——— ——— s. 152 347

——— ——— ——— ——— s. 153 672

——— ——— ——— ——— s. 154, Sch. II, para. 16—*Invalid award—Decree in accordance with award—Finality—Appeal—Right of appeal—Not a mere matter of procedure—Alteration does not affect right—Interpretation of statutes—Express provision regarding right of appeal under old law.*

Under the Code of Civil Procedure, 1908, in a case falling under paragraph 16 of Schedule II of the Code, the Court giving judgment in accordance with an invalid award must be taken to have decided that the invalid award is valid, the Court having jurisdiction to decide whether or not it has jurisdiction, and that decision is final.

Under the general law a right of appeal is more than a matter of procedure, and an alteration in the law of procedure would not retroact upon it.

Section 154 of the Code of Civil Procedure, however, supersedes the general law by expressly providing that 'nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.'

A reference to arbitration was made under section 506 of Act XIV of 1882. An award was made and a decree passed in accordance therewith after Act V of 1908 had come in force:

Held, that the question of the right of appeal must be determined by Act V of 1908 and not by Act XIV of 1882.

Per *Pratt, J. C.*—A decree passed in terms of an award under the old Civil Procedure Code would be appealable, if the award is void *ab initio*. ALIM *v.* MOLEDINO, 6 S. L. R. 168 **348**

——— ——— ——— ——— Sch. I, O. I, r. 9 963

——— ——— ——— O. 2, r. 2 393

——— ——— ——— ——— O. 2, rr. 2, 4 (c)—Mortgage *without possession—Share of produce to be paid as interest—On default to pay interest possession to be taken—Default—Suit for produce without asking for possession—Subsequent suit for possession barred—Rule 4 (c), object of insertion—Novation of contract—Burden of proof—Mere promise by creditor not to sue, effect of—Jurisdiction of Civil or Revenue Court.*

Civil Procedure Code—(1908)—contd.

Plaintiff-mortgagee sued for possession of certain land mortgaged to him and for recovery of a certain sum on account of produce. The mortgage was without possession and a share of the produce was agreed to be paid as interest to the mortgagee. The only remedy for non-payment specifically provided was the assumption of possession by the mortgagee on default. Default had been made and plaintiff had brought suits for recovery of produce before without claiming possession:

Held, (1) that the suit was cognizable by a Civil Court;

(2) that the terms of a mortgage-deed drawn up by an unskilled draftsman must not be construed too strictly;

(3) that the right to sue for recovery of produce was inherent in the mortgagee and followed upon the obligation of the mortgagor to pay produce;

(4) that the present claim was barred under Order II, rule 2, Civil Procedure Code.

The new clause (*c*) to rule 4 in Order II, Civil Procedure Code, has been inserted in order to avoid the possibility of mistake and to make it perfectly clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both.

The party who relies on a new contract in substitution for an old one must prove that it was supported by consideration.

A mere promise by a creditor made at the request of his debtor to forbear from suing him is regarded as a voluntary promise and is, therefore, of no effect. CHHABIL DAS *v.* MASSU, 243 P. L. R. 1913; 145 P. W. R. 1913 **981**

——— ——— ——— Sch. I, O. 2, r. 4 (c) 981

——— ——— ——— O. 5, r. 20 (2), O. 9, r. 13—*'As effectual', meaning of—Limitation for setting aside decree—Defendant can show for purposes of limitation that he was not duly served—Time from which limitation begins to run.*

The words 'as effectual' in clause (2), of rule 20, of Order V, Civil Procedure Code, Act V of 1908, mean 'as effectual for the purpose of enabling the Court to proceed with the suit.' Where the question of limitation comes in, if the defendant can show that the circumstances in which substituted service, having the effect of personal service, could be legally made did not exist, time begins to run from the date he had knowledge of the decree. HABIBULLAH *v.* KARANJU, 9 N. L. R. 35 **425**

——— ——— ——— ——— O. 6, rr. 16, 17 672

——— ——— ——— ——— O. 6, r. 17 928

——— ——— ——— ——— O. 6, r. 17—*Amendment of plaint.*

The amendment of a plaint may be allowed to avoid multiplicity of actions. MUMTAZ ALI *v.* KASIM ALI, 11 A. L. J. 423 **250**

——— ——— ——— ——— O. 6, r. 18 472

——— ——— ——— ——— O. 7, r. 10 427

——— ——— ——— ——— O. 7, r. 11 472

——— ——— ——— ——— O. 8, r. 10 95

Civil Procedure Code—(1908)—contd.

——————— **Sch. I, O. 9, r. 4** 97

——————— **O. 9, r. 9** 526

——————— **O. 9, r. 9**—*Non-appearance of plaintiff—Dismissal of suit—Sufficient cause for non-appearance*—Karpardraz *missed train, whether sufficient cause.*

The failure to be in time to catch a train, in order to attend a case, is not a sufficient cause within Order IX, rule 9, of the Civil Procedure Code. KALI PROSAD TEWARY *v.* PRAYAG RAJ **234**

——————— **O. 9, r. 13** 425

——————— **O. 9, r. 13,** whether applicable to execution proceedings **683**

——————— **O. 9, r. 14**—Ex parte *decree, setting aside of—Notice to opposite party imperative.*

Order IX, rule 14, is imperative and no *ex parte* decree against the defendant can be set aside unless notice has been served on the plaintiff.

Oral notice given to the Pleader, who appeared in execution proceedings in connection with the same decree but who was different from the Pleader who appeared in the case, was considered not sufficient. YERRAKANTLA SUBBIAH *v.* DELAVAR KHAN, 13 M. L. T. 344; (1913) M. W. N. 340; 24 M. L. J. 482 **241**

——————— **O. 17, r. 3, O. 7, r. 11, O. 6, r. 18**—*Plaintiff not complying with order to file agreement to arbitrate under section 20 of the second Schedule—Suit not to be dismissed.*

A plaint was rejected on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under clause 20 of the second Schedule of the Civil Procedure Code:

Held, that neither Order XVII, rule 3, nor Order VII, rule 11, nor Order VI, rule 18, of the Code of Civil Procedure applied.

Order XVII, rule 3, applies only to cases where time has been granted to a party on his own application to do anything which falls within the purview of the rule.

Under Order VI, rule 18, the Court has no power to reject the plaint or to dismiss the suit, but must proceed to try the suit on the original plaint. MURLI DHAR-KANSHI RAM *v.* NARAIN DAS, 107 P. W. R. 1913; 169 P. L. R. 1913 **472**

——————— **O. 20, r. 2**—*Judgment written after the Judge ceased to be the Judge—Pronouncement of judgment by successor, validity of.*

A Judge may pronounce a judgment written but not pronounced by his predecessor. A judgment so pronounced is not vitiated by the mere fact that it was written after the Judge writing it had ceased to have jurisdiction in that particular locality. BASANT BIHARI *v.* SECRETARY OF STATE, 11 A. L. J. 411 **785**

——————— **O. 20, rr. 3, 14** 347

——————— **O. 21, r. 2**—*Execution of decree—Satisfaction of decree certified by manager of joint Hindu family—Whether binding on other members of family—Hindu Law—Power of manager.*

Civil Procedure Code—(1908)—contd.

The managing member of a joint Hindu family can have satisfaction of a decree certified so as to bind the other members of the joint family. ACHHAIBAR SINGH *v.* RAM SARUP SAHU, 11 A. L. J. 463 **645**

——————— **Sch. I, O. 21, r. 50** 363

——————— **O. 21, r. 16**—*Indivisible decree for dower and costs—Separate execution—Transfer of portion of decree—Execution.*

A decree for recovery of a dower debt and the costs incurred in the suit, made against the heirs of the husband of the plaintiff, is one and indivisible: the bare fact that a portion of the sum decreed is made recoverable only from the assets of the deceased does not make the decree one which can be divided into two separate decrees thereby enabling the decree-holder to execute separately.

Rule 16 of Order XXI lays down distinctly that in cases of transfer the decree can be executed in the same manner and subject to the same condition as if the application were made by such decree-holder.

Therefore, the transferee of a portion of an indivisible decree is not entitled to take out execution for the portion transferred to him. RAM CHANDER NAIK KALIA *v.* ABDUL HAKIM, 11 A. L. J. 249; 35 A. 204 **304**

——————— **O. 21, r. 66** 448

——————— **O. 21, rr. 89, 92** 475

——————— **O. 21, r. 100** *not applicable to cases where execution transferred to Collector—Wrongful dispossession by Collector—Court cannot interfere.*

Order XXI, rule 100, of the Civil Procedure Code has no application to a case where the execution of decree has been transferred to the Collector. If a person is wrongly ousted or dispossessed under the Collector's order, he may apply to the Collector and not to the Court, complaining of such ouster or dispossession. RAGHO CHANDRARAO KADAM *v.* HANMATI CHANDRARAO KADAM, 15 BOM. L. R. 389 **903**

——————— **O. 22, r. 4**—*Alternative defence—Power of legal representative.*

Where a party to a suit puts forward an alternative defence, his legal representative may, on his death, rely on the alternative defence set up by him.

In doing so, the legal representative would not be making a defence inconsistent with that set up by the deceased party or inappropriate to his character as his legal representative. BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS, 15 BOM. L. R. 209 **401**

——————— **O. 23, r. 3** 786

——————— **O. 26, r. 4** 643

——————— **O. 29** 595

——————— **O. 32, r. 7**—*Arbitration—Agreement of reference on behalf of minor—Award—Leave of Court not obtained—Minor not bound.*

A reference to arbitration is itself an agreement and is, in the case of minor parties, subject to the provisions of Order XXXII, rule 7, Civil Procedure Code, 1908.

Civil Procedure Code—(1908)—contd.

A suit for partition was filed on behalf of a minor by his next friend, a lady, who gave a *Mukhtarpatra* n general terms to a male relation. The *Mukhtarpatra* did not refer expressly to submission to arbitration. Subsequently, the *Mukhtar* without bringing to the notice of the Court that he was consenting to a reference on behalf of the minor, agreed to a reference to arbitration.

An award was made on this reference. Meanwhile, the plaintiff attained majority and declined to be bound by the award:

Held, that the plaintiff was entitled to have the award set aside. ATMARAM YEKOBA VANI *v.* BHILA GANPAT VANI, 15 BOM. L. R. 223 **424**

——————————— **Sch. I, O. 34, rr. 7, 8,** *applicability of—Punjab Alienation of Land Act (XIII of 1900), s. 16 (1)—Mortgage - Interest—Heavy rate—No undue influence or fraud proved, mortgagor bound to perform his contract—Form of decree—Redemption decree not executed does not bar fresh suit—Court Fees Act (VII of 1870), s. 12 (2)—Court-fees to be paid on memorandum of appeal—Duty of Chief Court to order deficiency to be made good*

In 1894 plaintiff mortgaged his land for Rs. 80. The interest to be paid was at the rate of Rs. 25 per cent. compound interest. Nothing was paid to the mortgagee up to the date of suit for redemption instituted by the mortgagor. According to the terms of the mortgage-deed the amount due from the mortgagor up to the date of the decree of the first Court was Rs. 2,550. The decree ordered redemption conditionally upon the payment of Rs. 2,550 within six months, and also declared that in default of such payment the property was to be sold:

Held,

(*i*) that the Court did not pass a preliminary decree, and consequently rule 7 of Order XXXIV of the Civil Procedure Code was not in terms applicable:

(*ii*) rule 8 (4) of the Order authorised the Court to pass a decree that the mortgaged property be sold only when the defendant (the mortgagee) made an application in that behalf:

(*iii*) that in view of the specific provisions of section 16 (1) of the Punjab Alienation of Land Act, 1900, the Court had no power to direct the sale of land of the plaintiff who was a member of an agricultural tribe:

(*iv*) that the decree should have been limited to granting plaintiff the right to redeem the mortgage upon payment of the sum found to be due from him. This decree the mortgagor could execute at any time within the period of limitation, and if he failed to execute it, he would have the right to sue again for redemption so long as his right to redeem remained alive:

(*v*) that in the absence of evidence to prove that the mortgagor did not understand the terms of his contract, or that the mortgagee exercised undue influence over him or was guilty of fraud, he could not be relieved of the results of his bargain simply because that bargain was foolish on his part and had entailed hard consequences:

(*vi*) that the plaintiff, while appealing from the decree of the first Court, should have paid Court-fee upon the sum of Rs. 2,550 less the sum of Rs. 80 which he admitted to be due from him;

(*vii*) that under section 12 (2) of the Court Fees Act, the Chief Court was bound to require the plaintiff to make good the deficiency. NIHAL CHAND *v.* GHULAM MUHAMMAD, 235 P. L. R. 1913; 146 P. W. R. 1913 **856**

——————————— **O. 34, r. 8** **856**

——————————— **O. 34, r. 10**—*Mortgage decree—Cost of the Appellate Court, whether recoverable personally from judgment-debtor.*

In a mortgage suit, the mortgagee obtained a decree for foreclosure. One of the defendants appealed to the High Court which dismissed his appeal and ordered as to costs: "The appellant aforesaid do pay to the respondents present aforesaid the sum of Rs. 88-4 the amount of costs incurred by the latter in this Court:"

Held, that the costs of the High Court were awarded against the appellant personally. AMBA SAHAI *v.* BHAGWAN DIN **729**

——————————— **O. 34, r. 10**—*Mortgage suit—Costs in appeal—Personal decree against the judgment-debtor.*

In a mortgage suit the plaintiffs obtained a decree for sale of the mortgaged property. The defendant appealed. The Appellate Court dismissed the appeal and ordered that the appellant should pay the costs of the appeal to the respondents:

Held, that the decree as to costs in appeal was a personal decree against the judgment-debtor. BANS GOPAL SINGH *v.* RUP NARAIN SINGH **384**

——————————— **O. 39, r. 1** **553**

——————————— **O. 39, r. 7** **219**

——————————— **O. 41** **572**

——————————— **O. 41, r. 1** **922**

——————————— **O. 41, r. 11** **435**

——————————— **O. 41, rr. 25, 27**—*New case set up in appeal—No fresh evidence to improve case permissible—New question requiring evidence for solution not entertainable at the stage of argument in the first Court—Practice—Pleadings.*

Plaintiff's case in the first Court was that his vendors were co-owners with the defendant. In the Appellate Court, however, he tried to make out that the defendant was constructive trustee for his (plaintiff's) vendors:

Held, that this new case ought not to have been entertained even if an amendment of the plaint had been applied for.

Under Order XLI, rule 25, remand can only be made when the lower Court has omitted to frame or try any issue or to determine any question of fact essential to the right decision of the suit.

Even under Order XLI, rule 27, the Appellate Court is not justified in giving the respondent an opportunity to improve his case by calling fresh evidence except for some substantial cause. The rule refers primarily to cases where on examining the evidence as it stands some inherent lacuna or defect becomes apparent.

Civil Procedure Code—(1908)—contd.

An original Court is not justified in entertaining, at the stage of argument and after the close of the evidence, a new question, the solution of which is dependent upon evidence. *Musammat* ASSAT *v.* DHAMANMAL, 6 S. L. R. 127 **368**

——— ——— ——— **Sch. I, O. 41, rr. 25, 28**—*Delegation of powers by Court to which the case is remanded—Illegal—Absence of objections to jurisdiction does not give jurisdiction—Rule* 28, *whether applicable to remand under rule* 25.

Order XLI, rule 25, Civil Procedure Code, does not give the Court, to which the case is remanded any power to delegate its duties or make a further remand to any other Court.

Mere absence of objections does not give a Court jurisdiction which it does not possess. LAHORE BANK, LD. *v.* LAKHI RAM, 242 P. L. R. 1913; 144 P. W. R. 1913 **970**

——— ——— ——— ——— **O. 41, r. 27** **368**

——— ——— ——— ——— **O. 41, r. 28** **970**

——— ——— ——— ——— **O. 41, r. 33**—*Appellate Court deciding case upon point not taken by plaintiff in Court of first instance—Contending mortgagees—Priority—Registration Act (III of* 1877*), s.* 48*—Power of Appellate Court to decide upon plea not taken in first Court—Where no evidence in rebuttal necessary.*

In a suit between contending mortgagees, the Appellate Court found against the plaintiff's plea as to the fraudulent nature of the defendant's mortgage, but instead of dismissing the suit, made out a fresh case for the plaintiff, namely, that her registered mortgage took effect before the defendant's oral mortgage. On second appeal to the Chief Court:

Held, (1) that, having regard to the provisions of Order XLI, rule 33, Code of Civil Procedure, the lower Appellate Court was right in determining the respective legal rights of the contending mortgagees with reference to the Registration Act in spite of the plaintiff's defective pleading.

(2) that the mortgaged property having been sold in pursuance of the defendant's oral mortgage without reference to the plaintiff's mortgage, the sale should be annulled.

An appellant is not allowed to raise in the Court of Appeal a plea which he did not raise in the lower Court where the nature of the plea is such that if raised originally the respondent might have been able to rebut it. MAUNG SEIN *v.* NGWE NU, 6 L. B. R. 144; 6 BUR. L. T. 72 **2**

——— ——— ——— ——— **O. 41, r. 33** **251**

——— ——— ——— **O. 43, r. 1 (c)** **97**

——— ——— ——— ——— **O. 43, r. 1 (r)** **553**

——— ——— ——— ——— **O. 47**—*Review — Order summarily dismissing application for revision.*

A review of an order, summarily rejecting an application for revision of the judgment of the lower Court, may be granted on the ground that the judgment, as it stands, is open to misconstruction, and that the points raised involve questions of great importance, and of frequent occurrence, and that it is desirable to have the views of the Appellate Court declared. POKARDAS JASHIOMAL *v.* FORBES, FORBES, CAMPBELL AND CO. LD., 6 S. L. R. 127 **363**

Civil Procedure Code—(1908)—concld.

——— ——— ——— **Sch. I, O. 47, r. 1**—*Review—Sufficient cause.*

In a mortgage suit the defendant raised several pleas one being of limitation. The Court of first instance arrived at a decision on all of them but dismissed the suit mainly on the ground of limitation. The plaintiff appealed to the District Judge who agreed with the Munsif that limitation barred the claim. In second appeal the High Court differing from the Courts below on the point of limitation decreed the plaintiff's suit. The fact that there were other points also to be determined by the lower Appellate Court was, somehow, not brought to the notice of the Court at the time of the pronouncement of its judgment:

Held, that the circumstances of the case did not furnish sufficient cause for review of the judgment of the High Court. *Musammat* RAMDEI *v.* NANDAN SINGH **689**

——— ——— ——— **O. 47, r. 1 (1), r. 7 (1)**—*Suit dismissed in default—Application for restoration not made within time—Review competent—Objections to the granting of review taken in appeal from the final decree limited by the Code.*

Under Order XLVII, rule 7 (1), Civil Procedure Code, 1908, an objection to a subordinate Court granting an application for review can be taken in an appeal from the final decree in the suit only upon one of the three grounds specified in the said sub-rule.

Rule 1, sub-rule 1, of Order XLVII is wide enough to enable a Court to entertain an application for review of an order of dismissal for default, even in cases where no application for restoration of the suit is made within the prescribed period of limitation. FATEH CHAND *v. Musammal* MENGHI BAI, 108 P. W. R. 1913; 181 P. L. R. 1913 **481**

——— ——— ——— ——— **O. 47, r. 2**—*Small Cause decree based on finding in original suit—Finding reversed in appeal—Proper procedure—Review—Discovery of new and important matter.*

Where a decree in a Small Cause suit was based on a finding in an original suit and the judgment in the original suit was reversed on appeal:

Held, that the proper procedure was to apply to the Court that passed the Small Cause decree to review its decision under Order XLVII, rule 2, of the Civil Procedure Code. MUTHUSAWMY PILLAI *v.* SHUNMUGASUNDARAM PILLAI, 13 M. L. T. 225 **214**

——— ——— ——— ——— **O. 47, r. 7 (1)** **481**

——— ——— ——— ——— **Sch. II, para. 12** **496**

——— ——— ——— ——— **para. 13** **611**

——— ——— ——— ——— **paras. 14, 15** **496, 941**

——— ——— ——— ——— **para. 16** **496, 348**

——— ——— ——— ——— **para. 20** **941**

——— ——— ——— ——— **para. 20**—*Jurisdiction* **882**

——— ——— ——— **para. 21** **941**

Claim—Claim allowed decree-holder not appearing—Subsequent setting aside of order—Jurisdiction **683**

Clerk. *See* ARTICLED CLERK.

Commission—Examination of witness—Discretion of Court—Defendant applying to have another defendant examined on commission—Application for issue **643**

——— —— ——— *when to be granted—Civil Procedure Code (Act V of* 1908*), O. XXVI, r.* 4.

The issue of a commission to examine a witness or witnesses in a suit is a matter of judicial discretion.

An application for the examination of a witness by commission will not be granted unless the Court is satisfied, *first*, that the application is made *bona fide*; *secondly*, that the issue in respect of which the evidence is required is one which the Court ought to try; *thirdly*, that the witness to be examined would give evidence material to the issue, and, *fourthly*, there are some good reasons why the witness cannot be examined in Court. A. E. SALEJI *v.* AHMED MUSAJI SALEJI **643**

Commitment, when to be quashed **960**

Common carrier—*Carrier—Liability for loss of property—Negligence or criminal act—Merchandize property delivered to carrier to be carried as luggage—Onus—Proof of negligence—Common Carriers' Act (III of* 1865), *ss.* 3, 4, 8, 9.

Although a common carrier is not liable for the loss of or damage to property of certain description above one hundred rupees in value, unless the value and description thereof are expressly declared by the person delivering them to be carried and although the carrier is entitled to charge a higher rate for such properties, he is liable for the loss of or damage to such property if such loss or damage arises from the negligence or criminal act of the carrier or any of his agents or servants. This liability does not cease to exist even if the property is delivered to the carrier as luggage, but which is in fact merchandize.

The onus of proving negligence of the carrier is not upon the plaintiff who seeks to make the carrier liable. INDIA G. S. N. CO. LD. *v.* GOPAL CHANDRA GUIN, 17 C. W. N. 970 **756**

——— ——— —— *Steamer Company — Negligence or criminal act of common carrier—Liability of common carrier—Loss of goods*—Prima facie *evidence of negligence etc.*—Onus—Prima facie *case of care and caution to be made by defendant—Carriers' Act (III of* 1865), *ss.* 6, 8.

A special contract exempted a steamer Company, common carriers, from liability for any loss or damage unless it arose from the negligence or criminal act of their servants or agents:

Held, that if the carriers seek to exempt themselves from liability, they must prove that the loss was or must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents, for the loss of the goods is *prima facie* evidence of the negligence or criminal act of the carriers, their servants or agents. INDIA GENERAL STEAM NAVIGATION CO. LD. *v.* BHAGWAN CHANDRA PAUL, 17 C. W. N. 632; 17 C. L. J. 639 **245**

Common Carriers' Act (III of 1865), ss. 3, 4 **756**

——— ——— ——— **ss. 6, 8** **243**

——— ——— ——— **ss. 8, 9** **756**

Companies Act (VI of 1882), ss. 7, 41, 61—*Contract Act (IX of* 1872), *s.* 230—*Civil Procedure Code (Act V of* 1908), *O. XXIX—Pleadings—Suit for salary due from an incorporated Company.*

A suit to recover salary or wages due from a Company lies against the Company and is not maintainable against its Secretary or the Managing Director [Sections 7, 41 and 61 of Act VI of 1882, section 230 of Act IX of 1872 and Order XXIX of the Civil Procedure Code (Act V of 1908)]. ABDUL HAQ *v.* DAS MAL, 43 P. W. R. 1913; 190 P. L. R. 1913 **595**

——— ——— —— **ss. 41, 61** **595**

——— —— ——— **s. 169**—*Notice of appeal—Power of Appellate Court to hear appeal where no notice given of intention to appeal in matter of winding-up of a Company.*

Where no notice is given under section 169 of the Companies Act of the intention to appeal against an order which is given in the matter of winding-up of a Company, the Appellate Court cannot hear the appeal. G. J. BOWER *v.* IMPERIAL BANK LTD., 11 A. L. J. 200; 35 A. 177 **53**

Compensation. *See* CRIMINAL PROCEDURE CODE, s. 250; IMPROVEMENTS.

Compromise. *See* CIVIL PROCEDURE CODE, 1882, ss. 375, 462.

——— ——— —— of disputed and doubtful rights—Consideration **411**

——— ——— —— Submission and award, whether can be recorded as an adjustment or compromise **786**

——— ——— —— *Adjustment—Parties agreeing to abide by the sum named by Pleaders—Award—Reference to arbitration.*

An agreement by the parties to a suit to abide by a sum to be named by their Pleaders is not a lawful adjustment until that sum is named and the parties inform the Court that they are willing to have a decree for the sum so named.

The decision given by the Pleaders is not an award. SEUMAL NIHALCHAND *v.* PURSOMAL, 6 S. L. R. 166 **450**

——— ——— —— **decree**—*Compromise between appellant and defendant who appeard - Right reserved in favour of defendant not appearing—Whether right enforceable by that defendant in separate suit—Execution of compromise decree by defendant who appeared—Objection by defendant who did not appear—Whether the fact estops him from enforcing right in suit.*

In an appeal, *D.* was the appellant, and *R.*, *N.* and *S.* were respondents. *N.* and *S.* did not appear, and the case was compromised between *D.* and *R.* by which certain shares in certain properties were given to *N.* and *S.* A decree was passed in accordance with the compromise. *D.* applied to execute the decree, but *N.* objected on the ground that not having been a party to the compromise he could not be made liable for anything to be done or paid by him under the decree. The execution was eventually thrown out on other grounds. *N.* now sued for the share to which he was entitled under the compromise decree:

Compromise—concld.

Hled, that *N.* was entitled to the property claimed although he was not a party to the *solehnamah* and that he could enforce the decree upon it in this suit, the mere fact that he objected to the execution could not preclude him from now asserting the right which the decree gave him. DEBENDRA NARAIN SINHA *v.* NARENDRA NARAIN SINHA **915**

Concurrent sentences **336**

Confession of accomplice retracted **179**

——— ——— Oral evidence not admissible—Confession must be voluntary **307**

——— ——— Statement by accused exculpating himself **508**

Consideration—Compromise of disputed and doubtful rights **411**

——— ——— ——— Negotiable instrument—Antecedent debt **789**

——— ——— ——— Reward for searching missing boy **576**

Conspiracy **331, 497**

Construction of deed—Gift **387**

——— ——— **of document.** *See* PARTITION DEED.

——— ——— ——— *Charge or mortgage—Simple bond—Intention to create charge*—'Thanakha'.

A document purporting to be a simple bond contained a clause "I and my heirs with all my property moveable and immoveable as '*thanakha*' shall be liable":

Held, that this could not be regarded as apt language to create a mortgage or a charge.

No charge can be created without an intention to do so.

The inclusion of the moveable property of the executant taken with the fact that the document purports to be a simple bond clearly shows the non-existence of such an intention.

The mere use of the word 'thanakha' after the expression "my moveable and immoveable property" does not create a charge or mortgage. KAMAYYA *v.* YERAKOLA, 13 M. L. T. 327; (1913) M. W. N. 335; 24 M. L. J. 479 **221**

——— ——— **of grant**—*Inam* **440**

——— ——— ——— Trust property **387**

——— ——— **of mortgage-deed** **658, 661**

——— ——— **of statutes** **765**

——— ——— ——— . *See* INTERPRETATION OF STATUTES.

——— ——— **of wajib-ul-arz.** *See* PRE-EMPTION.

——— ——— **of wakf deeds** **896**

——— ——— **of Wills.** *See* WILL.

Contempt—*Comments on pending cases—Intention of offender to be considered—Pre-possess or prejudice minds of person—Prejudice trial—Intention to preserve honour being discussed in papers before judgment.*

Comments on cases pending or allegations against parties to suits that are pending, if published, amount to contempt on the part of the offender. But it would not be right to lose sight of the intention by which a person giving publicity to a matter which is the subject of the charge of contempt, is actuated.

The plaintiff in this case is the daughter of the defendant. She instituted a suit against him for the recovery of certain properties left by her mother. On the day after the suit was instituted there appeared in two newspapers a paragraph in each with a sensational heading "Suit against an Attorney" which made reference to some of the allegations set out in the plaint. The defendant who is an old Attorney replied by two letters addressed to the Editor of the two newspapers being only anxious to preserve his honour being discussed in the papers before a judicial declaration had been made by a competent Court. On the statements contained in those two letters, an application has been founded for proceedings for contempt against him:

Held, that as the intention of the defendant was not to pre-possess or prejudice the mind of any person in reference to the matter in dispute, and as the publications in question do not tend to prejudice a trial the date of which is not yet fixed and which is very distant, the defendant was not guilty of contempt. KETRA MONI DASI *v.* SHAMAL DHONE DUTT, 14 CR. L. J. 267 **539**

Contract for purchase of bales of yarn—Condition to take delivery within specified time—Failure to take delivery entitling defendant to sell goods and recover damages—Time essence of the contract **93**

——— ——— if legally valid must be enforced—Court not to dictate terms to parties **48**

——— ——— , novation of **981**

——— ——— to supply bricks—Receipt of bricks—Promise to pay—Pro-note—Evidence of supply of bricks even when document inadmissible for want of stamp **436**

——— ——— *Barrister agreeing not to practice for a certain time—Agreement valid—Breach—Injunction—Barristers carrying on business in partnership.*

Where two branches of the legal profession (Barrister and Solicitor) are amalgamated in a particular place, a person who carries on both branches and is a legal practitioner in that place, may enter into an agreement not to practise for a reasonable time.

In case of breach of such an agreement without justification or excuse an injunction will be granted.

There is no objection to the Barristers carrying on business in partnership in such a place. NOEL CHARLES MINCHIN HOME *v.* JOHN CHARLES EDWARD DOUGLAS, 17 C. W. N. 215 **822**

——— ——— *Offer and acceptance—Parties not of one mind—Alteration of document—Material alteration—Document vitiated if antedated—Duty of party propounding the document—Failure of suit based on*

Contract—contd.

it—Contract—Acceptance—Altered document admissible in evidence for a collateral purpose—Earnest-money—Addition of conditions of forfeiture of earnest-money and re-sale, effect of—What is earnest-money—Measure of damages—Mitigation of damages.

In a contract for the purchase of a piece of land, the negotiations were conducted by a broker acting for both the plaintiff and the defendant. The defendant gave the broker a letter in which he expressly agreed to buy the land and to pay a certain sum as earnest-money after three days. On this, the broker prepared a *kabala* in terms of the offer of the defendant with the additional conditions as to forfeiture of earnest-money and as to re-sale in case of default, and got it signed by the plaintiff. It was then brought to the defendant for his signature, who refused to sign it. Subsequently, it was represented to the defendant that there were other purchasers for ¾ths of the land and that he would be only liable for ¼th. He signed on this representation and added the words 'and others' to show that he was not the sole purchaser. No such purchasers were forthcoming and the defendant refused to take the land. The plaintiff sued for damages resulting on a re-sale. The *kabala* was found to have been altered by being antedated:

Held, (1) that the *kabala* was not a contract, the parties not being *ad idem*;

(2) that even if the *kabala* were the contract, it was vitiated by alteration of the date;

(3) that the party who presented an instrument which was an essential part of his case in an apparently altered and suspicious state must fail from the mere infirmity or doubtful complexion of his proof, unless he could satisfactorily explain the existing state of the document;

(4) that the alteration of the date was material, and such an alteration had the effect of cancelling the document, and a suit brought on such a document must fail;

(5) that there was a valid contract when the plaintiff accepted the defendant's offer;

(6) that the plaintiff could sue on the basis of the contract, created by the acceptance of the defendant's offer, the contract never having been reduced to the form of a document;

(7) that though the altered document could not be made the foundation of plaintiff's claim, yet it might be used for the collateral purpose of proving the acceptance;

(8) that if the *kabala* had contained any special condition that was not in the offer, there would have been no unqualified acceptance;

(9) that the addition of the conditions as to forfeiture of earnest-money and as to re-sale, and the sending of the *kabala* did not imply any qualification of the acceptance;

(10) that earnest-money was not only part-payment but a guarantee of performance;

(11) that the condition as to re-sale also was nothing more than a statement of legal rights of the parties created by the acceptance of an offer of purchase;

(12) that it was not incumbent on any party to break his contract with *A*. to mitigate the damages of *B*.;

Contract—concld.

(13) that the price realized at the auction afforded a fair measure for the calculation of damages. TAHILRAM *v.* J. A. BLACKWELL, 6 S. L. R. 228 **616**

—— —— *to supply stone for building purpose—Stone not fit for the purpose—Duty of purchaser to return the stone at his own expense.*

Where *A*. refused to take delivery of certain stones supplied to him by *B*. for purposes of building on the ground that it was not fit for the purpose, it was not his duty to return the stone to *B*. from the place of delivery at his own expense. PHAGGU MAL *v.* BABU LAL, 11 A. L. J. 315; 35 A. 325 **254**

Contract Act (IX of 1872), s. 2 (a), (b), (d)—*Offer by advertisement—Acceptance without knowledge—Contract—Consideration.*

There can be no acceptance unless there is knowledge of an offer.

The nephew of *A*. absconded from home and no trace of him could be found. *A*. sent his servant *B*. to search for the boy. After *B*. had gone, *A*. offered a reward to any one who found the boy. *B*., who had no knowledge of *A*.'s offer, found the boy and claimed the reward on the basis of a contract:

Held, (1) that there was no contract between *A*. and *B*.;

(2) that, though it was not the duty of *B*. as a servant to search for the missing boy yet, having undertaken the task before the offer, he was bound to perform it and, therefore, his search for the boy could not be regarded as a consideration of *A*.'s promise. LALMAN SHUKUL *v.* GAURI DAT, 11 A. L. J. 489 **576**

—— —— **s. 2 (i)**—*Suit by person not party to contract.*

There is nothing in the Contract Act to show an intention that a person not a party to the contract can sue on it. So far as it goes, section 2 (*i*) is an indication to the contrary. SHANKAR VISHVANATH *v.* UMABAI SADASHIV WAGLE, 15 BOM. L. R. 320 **736**

—— —— **s. 11** — *Minor—Sale executed in favour of minor—Minor deprived of property at the instance of third person—Suit by minor to recover the consideration money.*

A sale-deed was executed in favour of a minor. The consideration was paid to the vendor and the vendee was put in possession of the property. Subsequently the vendee was dispossessed of the property at the instance of a third person:

Held, that the vendee, although he was a minor at the date of the execution of the sale, was entitled to recover the consideration money from the vendor. WALIDAD KHAN *v.* JANAK SINGH, 11 A. L. J. 512; 35 A 370 **610**

—— — —— **s. 23** **378**

—— —— — **s. 23**—Admitting partner in exercise business **442**

—— —— — **s. 38** **12**

—— —— **ss. 39, 73**—*Breach of contract—Sale of goods deliverable at future date—Rights of injured party—Damages, measure of—Promisor becoming insolvent—Duty of Official Receiver in assessing damages.*

Contract Act—contd.

Where a party to a contract for the sale of goods, before the time for the delivery of the goods has arrived, repudiates it or disables himself entirely from performing his part of the contract, the other party may rescind, and without waiting for the date of delivery, sue for damages at once.

The right to rescind and to damages is enacted in sections 39 and 73 of the Contract Act.

The law as to damages on forward contracts may be summed up as follows:

(1) Damages are to be assessed with reference to the date fixed for delivery.

(2) If that date is in future the Court must estimate the rate as best it can—and it matters not that the estimate is to a great extent speculative.

(3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made a fresh contract, at better rates, or that acting reasonably and as a prudent man he might have made such a contract—this will be considered a ground for abatement of damages.

(4) If plaintiff after rescission makes a fresh contract he does so at his own risk—and if he gets a worse rate he cannot make use of that for the purpose of enhancing his damages.

In the case of insolvency of a party to a contract for the sale of goods, damages may be claimed and proof may be given before the Official Receiver, such claims being in the nature of contingent debts—contingent

(1) on non-performance by the Official Receiver; and

(2) on the rates at the date of the delivery being lower than the contract rate.

The function of the Receiver is precisely that of a Court assessing damages on the expected rates of a future date in the case of an anticipatory breach, and the same principles of assessment apply in either case.

In estimating the rates of the future date of delivery an important factor will be the rate at which at the time of the Receiver's valuation a future contract for that date could be made. *In re* JIVANJI PIRBHOY, 6 S. L. R. 187 **653**

——— ——— **s. 43** **989**

——— ——— ——— **s. 45** **12, 865**

——— ——— **s. 46** **752**

——— ——— **ss. 51, 52, 53, 54** **48**

——— ——— **ss. 55, 120**—*Contract for purchase of bales of yarn—Condition to take delivery within specified time—Failure to take delivery entitling defendant to sell goods and recover damages—Time essence of the contract.*

A. purchased some bales of yarn from *B.*, the condition being that *A.* would take delivery of the goods within a certain period on payment, that if *A.* failed to take delivery before the expiry of the term, *B.* would, in his discretion, sell the goods whenever he thought fit, and realize damages in respect of rent, insurance and interest, from the date of contract to the date of sale:

Held, that the general rule in a sale of this description was that time was of the essence of contract: and as the terms of the contract were in accordance with this rule, the second paragraph of section 55 of the Contract Act did not apply.

Under section 120 of the Contract Act, wrongful refusal by the purchaser to accept the goods sold to him amounts to a breach of a contract of sale. DELHI CLOTH AND GENERAL MILLS CO. LD. *v.* KANHIYA, 144 P. L. R. 1913; 111 P. W. R. 1913; 80 P. R. 1913 **93**

——— ——— ——— **s. 64** **624**

——— ——— ——— **s. 73** **370**

——— ——— **s. 73**—Breach of contract—Promisor becoming insolvent—Damages **653**

——— ——— ——— **s. 120** **93**

——— ——— ——— **ss. 151, 152** **242**

——— ——— ——— **s. 161** **370**

——— ——— ——— ——— **ss. 201, 207**—*Termination of agent's authority*—Lambardar *acting as agent of the proprietary body—Imperfect partition of village does not terminate* lambardar's *agency.*

A *lambardar*, acting as agent for the proprietary body of the village, sued a defaulting tenant for arrears of rent, and obtained a decree. Immediately afterwards, an imperfect partition of the village came into force. There was no change, however, in the office of *lambardar*:

Held, that the *lambardar* was competent to execute the decree.

In the absence of any of the circumstances which terminate an agency as laid down in section 201 of the Contract Act and of evidence of conduct implying revocation or renunciation, under section 207 thereof, the mere coming into force of an imperfect partition does not terminate the *lambardar's* authority to act as agent of the village proprietors. RAM CHANDRA *v.* TATYA, 9 N. L. R. 46 **549**

——— ——— **s. 207** **549**

——— ——— ——— **s. 230** **595**

——— ——— ——— **s. 241** **406**

——— ——— ——— ——— **ss. 257, 259** **250**

Contributory negligence **485**

Conviction—Prosecution evidence disbelieved in most parts—Conviction, if can be based on rest of evidence to be considered by Judge—Judge disbelieving almost entirely accounts of occurrence given by prosecution and substituting his own theory founded on surmise and conjecture—Conviction whether ought to be set aside **1002**

Co-sharer *landlord purchasing* raiyati *interest—Right to* khas *possession.*

When a co-sharer landlord purchases the interest of a *raiyati*, he does not thereby obtain all the privileges which the *raiyat* has under the law; but he has the right to possession of the land which he has purchased; and if he has purchased the rights of a person who was in *khas* possession, he is entitled to those rights and entitled to *khas* possession. CHERAGH ALI PRODHANIA *v.* MOHINI MOHAN BARDHAN **615**

Costs—Discretion 98

—— —— Mortgage suit 474

—— —— Partition suit—Liability 252

—— of Appellate Court in mortgage suit 729

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—— —— Pre-emptor appellant praying for reduction of amount payable by heir 961

—— —— to be paid on memorandum of appeal—Duty of Chief Court to order deficiency to be made good 856

Court Fees Act (VII of 1870), s. 7 (iv) (c) and (d)—*Alienation by Hindu widow—Suit by reversioner for declaration—Appointment of Receiver and restoration of property to* status quo—*Suit valued by plaintiff—Court-fee to be paid* ad valorem.

A suit for declaration that certain alienations made by a Hindu widow will not after her death affect the interest of the plaintiff, reversioner, for appointment of a Receiver, and for restoration of the property to the *status quo ante* certain arbitration proceedings was valued for purposes of jurisdiction and Court-fees at Rs. 31,849-1-9:

Held, that section 7 (*iv*) (*c*) and (*d*) of the Court Fees Act applied and that *ad valorem* Court-fees, calculated on the valuation by the plaintiff of the suit, was leviable. LAKHMI DAS *v. Musammat* DAROPATI, 134 P. W. R. 1913; 232 P. L. R. 1913 859

—— —— —— **s. 7, cl. VI, Sch. I, Art. I**—*Pre-emption suit—Appeal—Pre-emptor appellant praying for reduction of amount payable by him—Amount to be assessed—Vendee contesting pre-emptor's right to land—Subject-matter of his appeal—Court-fee to be levied under section 7, clause VI.*

In an appeal in a pre-emption case, in which the appellant asks the Court, to reduce by a certain sum the amount payable by him under the orders of the first Court that sum represents the value of the subject-matter of his appeal, and it is upon that sum, that he must pay the *ad valorem* fee specified in Article 1 of the first Schedule to the Court Fees Act.

Where, however, the appeal is by the vendee who objects that the plaintiff is not entitled to the land in suit, the Court-fee to be affixed to the memorandum of appeal must be computed in accordance with the provisions of section 7, clause VI, of the Court Fees Act. WARYAM SINGH *v.* MAHTAB SINGH, 76 P. R. 1913; 240 P. L. R. 1913; 141 P. W. R. 1913 961 F. B.

—— —— —— **s. 12 (2)** 856

—— —— —— **Sch. I, Art. I** 961

Court of Ward taking over management of a portion of infant's property—Other property sold in execution of decree—Mother competent to protect that property as natural guardian 296

Court of Wards Act (IX of 1879), ss. 10 A, 10 B—*Document not produced before Court of Wards not to be admissible in evidence subsequently—Claim not destroyed—Promissory-note inadmissible in evidence—Claim founded on original consideration may be enforced—Interest, claim for, under inadmissible promissory-note, not enforceable—Damages in lieu of interest may be awarded by Court.*

If a document in the possession of a creditor is not produced by him as required by sub-section (1) of section 10B of the Court of Wards Act, 1879, then under sub-section (3) of the section, it is not admissible in evidence as against the ward. But it does not follow that the effect of such omission on the part of the creditor is to destroy his rights or claim under the document.

Where a promissory-note is not admissible in evidence under the law, the true question to be considered is, whether the note has been taken in discharge of the claim or whether it is merely taken on account of the debt; in other words, if the claim is founded on the original consideration, it can be enforced, provided that the original consideration has not merged in the promissory-note. The loan itself implies a promise to re-pay, and if the promissory-note be treated merely as evidence of the loan although such evidence may be excluded by operation of law, there is no good reason why the plaintiff should not be permitted to sue on the original consideration.

Where a promissory-note is inadmissible in evidence, oral evidence is not admissible under section 91 of the Evidence Act, to prove the terms of the contract for the payment of interest and, therefore, the claim for interest under the document cannot be sustained, but the Court may allow damages in lieu of interest. RAM BAHADUR *v.* DASURI RAM, 17 C. L. J. 399 840

—— —— —— **s. 10B** 840

Covenant for quiet enjoyment 815

—— —— running with land—Agreement to reserve land revenue free—Enforcement of agreement 67

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Criminal breach of trust. *See* PENAL CODE, s. 405.

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—— —— —— **s. 4 (o)** 1008

—— —— —— **ss. 4 (l), 4 (k), 242, 256 (1), 423**—*Appellate Court setting aside conviction and sentence ordering re-trial after framing fresh charge on recorded evidence—Trial when begins (a) in warrant-cases, (b) in summons cases—Competency of Court to order.*

An Appellate Court, when setting aside the conviction and sentence in a warrant-case on the ground that the accused has been illegally tried along with another person, is competent to direct that the

Criminal Procedure Code—contd.

accused be re-tried on a fresh charge framed on the evidence already recorded for the prosecution.

In a warrant-case, the trial does not begin till a charge has been framed and the accused claims to be tried. In summons-cases, the intimation prescribed by section 242 of the Code of Criminal Procedure takes the place of a formal charge. MANNA *v.* EMPEROR, 9 N. L. R. 42; 14 CR. L. J. 230 **326**

——— ——— ——— **s. 35**—*Concurrent sentences—Conviction at two separate trials by different Courts.*

A Sessions Judge has no power to order a sentence passed by him to run concurrently with the sentence passed by another Court in some another trial. MAKBUL HUSAIN *v.* EMPEROR, 11 A. L. J. 263; 14 CR. L. J. 240 **336**

——— ——— ——— **s. 35 (2)** **510**

——— ——— ——— ——— **ss. 88, 89** — *Accused absconding—Proclamation—Attachment of property—Application for restoration—Period of limitation—Nature of proof.*

The adverbial phrase "within two years from the date of the attachment" in section 89, Criminal Procedure Code, qualifies not only the word "appears" but also the word "proves" which is connected with the word "appears" by the conjunction "and".

Under section 89, it is necessary that the proof that the accused person had not absconded should be offered or given within two years from the date of attachment.

It is not enough to show that the accused appeared voluntarily or was apprehended or brought before the Court within that period.

The section contemplates and requires proof that the offender did not abscond or conceal himself for the purpose of avoiding arrest, and that he had not such notice of the proclamation as to enable him to attend within the time prescribed.

Semble.—It is not necessary that the absconding accused should himself personally apply for the restoration of his property. The application can be made by any one on his behalf if it satisfies the other requirements of section 89. *In re* NILKANTH RAMCHANDRA KULKARNI, 15 BOM. L. R. 175; 14 CR. L. J. 237 **333**

——— ——— ——— **s. 89** **333**

——— ——— ——— **s. 107**—*Security to keep peace—Boycotting servants of* zemindar—*No sufficient ground.*

Where the tenants were boycotting the servants of the *zemindar* but beyond that they were doing nothing from which it might be apprehended that they were likely to commit a breach of the peace or disturb the public tranquility:

Held, that the tenants were not liable to be bound down under section 107, Criminal Procedure Code, to keep peace. BEHARI *v.* EMPEROR, 14 CR. L. J. 238 **334**

——— ——— ——— **s. 110**—*Security—Sufficient cause to refuse to accept surety.*

A Magistrate refused to accept sureties on the ground that they lived at a distance of nine miles from the residence of the accused and, consequently, had no influence over him and could not be expected to exercise proper vigilance over his actions:

Held, that the reason for refusing was insufficient. MASHUK ALI *v.* EMPEROR, 14 CR. L. J. 214 **310**

——— ——— ——— **s. 119**—*Discharge of person informed against on ground that Police report of date mentioned in proceedings not in existence—Mistake of date—Second proceeding based on report of real date, if barred.*

Proceedings were drawn up against the petitioners and terminated in their discharge under section 119 of the Criminal Procedure Code. The proceedings purported to have been based on a Police report dated July 27th, 1912, and the Magistrate discharged the petitioners on the ground that no such report was in existence. The Police report was dated July 29th, 1912, but in the proceedings by mistake, July 27th, 1912, was put down. Another Magistrate drew up the present proceedings against the petitioners on the Police report of July 29th, 1912:

Held, that as the present proceedings were based on a Police report which was not the foundation of the former proceedings, these proceedings were not invalid. CHANDAN SAHU *v.* BHADAI RAI, 14 CR. L. J. 189 **189**

——— ——— ——— **s. 145**—*Joint family—Property belonging to joint family—Exclusive possession of member—Jurisdiction of Magistrate—Title to possession, joint or separate, foreign to inquiry.*

The question whether the parties have a joint title to the land, is one which the Magistrate cannot investigate under section 145 of the Criminal Procedure Code. The only question for him is whether either party has actual possession, and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order irrespective of the titles of the parties.

Co-sharers in an estate may by express or tacit arrangement be each separately in actual possession of specified and demarcated portions of the estate. In that case there is nothing to prevent the application of section 145.

When property is found as a fact to be, not constructively, but actually in the joint possession of the parties, the section cannot apply. But if it is found that one co-sharer is in actual possession and the other is not, the Magistrate may make an order under section 145. BASANTA KUMARI DASI *v.* MOHESH CHANDRA LAHA, 14 CR. L. J. 269; 17 C. W. N. 944 **541**

——— ——— ——— ——— **s. 145**—*Order of Magistrate without compliance with the provisions of the section—Revision.*

Where a Magistrate closes a proceeding under section 145 of the Criminal Procedure Code without complying with all the provisions of the section and to the prejudice of one of the parties, a revision lies to the High Court. JHENGAR *v.* BAIJ NATH, 14 CR. L. J. 277; 11 A. L. J. 586 **709**

——— ——— ——— **s. 145, cl. (4)**—*Presumption—Jurisdiction—Actual possession.*

The jurisdiction of a Magistrate, to initiate proceedings under section 145 of the Criminal Procedure Code is not determined by the date of dispossess-

sion of one of the parties claiming the land. It is determined by an apprehension, based on reliable information, that a dispute likely to cause a breach of the peace exists between two parties concerning some land situate within the local limits of the Magistrate's jurisdiction.

The proviso to clause 4 of section 145 of the Criminal Procedure Code merely recites a circumstance under which presumption of possession may be made in favour of one of the disputants.

A Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in clause 4 of section 145 of the Code. SHEORAJ SINGH *v.* EMPEROR, 11 A. L. J. 305; 14 CR. L. J. 223 **319**

——— ——— ——— ——— ss. 145, 148 (2)—

Local inquiry—Report of person deputed to make local inquiry—Evidence.

In a case under section 145 of the Criminal Procedure Code, an application for time for filing written statements by the parties was rejected. The Magistrate then directed a local inquiry and on the report of the person deputed to make the inquiry, decided the case:

Held, that the Magistrate acted within his jurisdiction. PIZIRUDDIN MOLLAH *v.* TOTAJANNISSA BIBI, 14 CR. L. J. 302 **958**

——— ——— ——— ——— s. 147 and proviso, Sch. V, Form XXIV—*Easement—Dispute concerning easement—Order without finding that right was exercised within three months before inquiry—Jurisdiction.*

An order under section 147 of the Criminal Procedure Code is without jurisdiction if it is made in the absence of any finding that the right was exercised within three months anterior to the inquiry. GURU PROSAD DHAR *v.* LACHMAN RAM GHOSE, 14 CR. L. J. 303 **959**

——— ——— ——— ——— s. 148 (2) 958

——— ——— ——— ——— s. 148 (3) — *Costs — Penalty on document not properly stamped—Jurisdiction of Magistrate.*

A Magistrate has no jurisdiction under section 148 (3) of the Criminal Procedure Code to include in costs the penalty paid on a document not properly stamped. TUMMALAGUNTA KOTIAH *v.* POPURI PEDDANNA, 13 M. L. T. 224; 14 CR. L. J. 210 **306**

——— ——— ——— ——— ss. 161, 162, 476

—Statement made to the Police—Signature obtained to it—Examination as witness as to that signature—Order to prosecute in respect of the explanation given—Illegal.

To obtain the signature of a witness to his statement before the Police; then to examine him as to that signature; and then to prosecute him in respect of the explanation which he gives in respect of it, is a procedure which contravenes the policy of sections 161 and 162 of the Criminal Procedure Code and cannot be permitted to form the basis of a prosecution under section 193 of the Indian Penal Code. EMPEROR *v.* MAHOMED, 6 S. L. R. 277; 14 CR. L. J. 302 **958**

——— ——— ——— s. 162 190, 958

——— ——— ——— ss. 173, 190 cl. (c), 200—*Information of theft case to Police—Report that case true but no evidence—Making over of case to Honorary Magistrate who reported that alleged stolen property belonged to accused—Issue of summons by Magistrate, whether proper—Proceedings before Honorary Magistrate, whether legal.*

Information was given of the theft by the accused of a bullock to the Police who submitted a report to the Magistrate that the case against the accused might be true but that the evidence to prove it was not forthcoming. Thereupon the Magistrate made over the case to an Honorary Magistrate for inquiry and report. The Honorary Magistrate examined witnesses on both sides and reported that it was proved that the bullock was purchased by the accused and that no trial of the accused could be recommended. On receipt of this report, the Magistrate ordered the issue of summons against the accused with the remark that the purchase of the animal by the accused should be proved in Court:

Held, that (1) upon the report of the Police under section 173 of the Criminal Procedure Code, it was open to the Magistrate to take cognizance of the case under section 190, clause (*b*), but instead of doing so, he made over the case for inquiry and report as though he was dealing with the matter on a complaint under section 200; the proceedings before the Honorary Magistrate were not in consonance with the provisions of the law; and (2) after the report of the Police and the Honorary Magistrate, the Magistrate ought not to have summoned the accused; and (3) the proceedings should not be allowed to go on. ABDULLAH MANDAL *v.* EMPEROR, 14 CR. L. J. 297; 17 C. W. N. 1004 **953**

——— ——— ——— ——— ss. 188, 192, 537

—Native Indian Subject committing offence in foreign country—Sanction of Local Government not obtained—Proviso to section 188 applicable—Trial illegal or irregular—Section 537 cannot be applied at intermediate stage of case—Order of District Magistrate under section 192 does not decide questions of law or fact in the case.

The accused, a Native Indian Subject of the King, was charged with the offence of criminal breach of trust committed at Las Palmas in Spain. He objected to his trial by the City Magistrate, Hyderabad, on the ground that it was illegal for want of sanction of the Local Government.

The Magistrate decided that he had jurisdiction as the case had been made over to him, under section 192, Criminal Procedure Code, by the District Magistrate:

Held, on revision

(*i*) that an order by a District Magistrate under section 192, Criminal Procedure Code, does not import a decision of any question either of law or fact arising in the case;

(*ii*) that the proviso to section 188, Criminal Procedure Code, is universal in its application and is not restricted to Native States in India;

(*iii*) that whether the proceedings of the Magistrate were irregular or illegal for want of sanction of the Local Government, section

Criminal Procedure Code—contd.

537, Criminal Procedure Code, could not be applied at an intermediate stage of the case so as to allow the error to remain uncorrected. IMPERATOR *v.* CHELLARAM NARAINDAS, 6 S. L. R. 260; 14 CR. L. J. 260 **954**

——— ——— **ss. 190, 191, 537**—*Chalan case—Accused added by Magistrate—Not bound to act under section* 191—*Evidence to be taken afresh—Irregularity not to take evidence again—Curable by section* 537.

L. was chalaned by the Police, and the Magistrate after examining the investigating officer, considered that *S.* should be joined as an accused person. Process was accordingly issued to *S.* and he was tried with *L.* Both were convicted:

Held, that the Magistrate took cognizance of *S.*'s offence under clause (*b*), not under clause (*c*) of subsection (1), section 190, Criminal Procedure Code, and was, consequently, not bound to act under section 191 of the Code;

That the Magistrate committed an irregularity in simply reading over the investigating officer's deposition to *S.* who then cross-examined, instead of examining the witness again.

That the mistake having not prejudiced *S.* it might, therefore, be taken as cured by section 537 of the Criminal Procedure Code. SARWA *v.* EMPEROR, 9 N. L. R. 65; 14 CR. L. J. 290 **946**

——— ——— **ss. 190, 203**—*Cognizance of an offence—Procedure—"Police report."*

Before proceedings are taken against an accused person, such as would bring him before a Court of justice, a Magistrate must have before him knowledge, independent of his own knowledge, based either upon a complaint or upon a Police report. If he chooses to take action without such independent report he is bound to inform the accused that he is entitled to have the case tried by another Court.

The term 'Police report' in section 190 is not limited to the report mentioned in section 170, Criminal Procedure Code. A report made by the Police in a non-cognizable case under the order of a Magistrate is a Police report. SARFERAZ KHAN *v.* EMPEROR, 11 A. L. J. 331; 14 CR. L. J. 218 **314**

——— ——— ——— **s. 190 (c)** **953**

——— ——— ——— **s. 191** **946**

——— ——— ——— **s. 192** **954**

——— ——— ——— **ss. 195, 235 (1), 236, 403**—*Penal Code (Act XLV of* 1860*), ss.* 182, 211—*Charge under section* 211—*Acquittal bar to subsequent trial under section* 182—*Competency of Court—Interpretation—Sanction—No condition of competency of Court.*

Once a person is acquitted of a charge under section 211, Indian Penal Code, he cannot subsequently be tried on the same facts for an offence under section 182 of the Penal Code.

Section 235 (1) of the Criminal Procedure Code is inapplicable when it is sought to charge the accused with another offence on the identical facts on which he was charged before with one offence.

Criminal Procedure Code—contd.

Section 236 of the Criminal Procedure Code applies to a case where on the same facts it is doubtful whether the accused has committed one offence only or both that offence and another.

Clause 4 of section 403 of the Criminal Procedure Code refers to the character and status of the tribunal when it refers to competency to try the offence.

A sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal, it is only a condition precedent for the institution of proceedings before the tribunal. The fact that at the time of the previous trial, sanction had not been obtained for the institution of proceedings under section 182, does not prevent the operation of section 403. GANAPATHI BHATTA *v.* EMPEROR, 24 M. L. J. 463; 13 M. L. T. 360; 14 CR. L. J. 214; 36 M. 308 **310**

——— ——— ——— **s. 195**—*Fabricating false evidence—Fabricating document—Lodging suit on same—Calling original to be produced—Offence, whether committed in relation to judicial proceeding—Sanction for prosecution, whether necessary—Penal Code (Act XLV of* 1860*), s.* 193.

One *A. M.* fabricated a document and caused it to be rigistered: he brought a suit on the basis of this document filing a certified copy with the plaint and asked that the defendant be summoned to produce the original; this the defendant was unable to do so, an application was made to have the document produced from the Sub-Registry Office. A complaint was then made against *A. M.* of an offence under section 193 of the Penal Code without obtaining the sanction of the Civil Court in which the suit was brought; the complaint was dismissed upon the ground among others that no sanction had been accorded:

Held, that the offence imputed was committed in relation to a judicial proceeding in Court and that previous sanction for the prosecution must be obtained from the Court under clause (*c*) of section 195 of the Criminal Procedure Code. ABDUL MAJID KHAN *v.* NOROL HAQUE, 14 CR. L. J. 289; 17 C. W. N. 937 **945**

——— ——— ——— **s. 195**—*Powers of Appellate Court—Order of remand without jurisdiction—Subsequent proceedings void—Court of Subordinate Judge—Judge transferred from District Co urt of the Judge taking over charge not identical.*

Section 195 of the Criminal Procedure Code merely enables an Appellate Court to grant sanction which has been refused, or to revoke sanction which has been granted; it has no power to remand an application for fresh decision. Where an order of remand is *ultra vires*, all subsequent proceedings in consequence thereof are a nullity.

Though there is a class of Courts called Courts of Subordinate Judges, there is no Court of a Subordinate Judge as a permanent Court with a perpetual succession of Judges, and on the transfer of a Sub-Judge from a District, the Court of the Sub-Judge who takes over the pending work is not identical with the Court of the Sub-Judge, who has been transferred. MUHAMMAD ISHAQ *v.* MUQIM-UD-DIN, 14 CR. L. J. 178; 7 P. R. 1913 CR.; 207 P. L. R. 1913 **178**

Criminal Procedure Code—contd.

——————— **ss. 195, 537**—*Sanction to prosecute—Absence of sanction—Sanction losing force by lapse of time—Failure of justice.*

Absence of the sanction under section 195 of the Criminal Procedure Code or the sanction having become ineffective under clause (6) of section 195, does not entail the reversal of a conviction unless it is shown to have occasioned a failure of justice.

The fact that an objection as to absence of sanction was taken at the beginning of the trial before a Magistrate would not of itself indicate that a failure of justice has occurred though as laid down in the explanation to section 537 of the Criminal Procedure Code it is a point to be considered.

Under section 195 of the Criminal Procedure Code, sanction to prosecute was granted for perjury and forgery on the 14th August 1909; complaint was filed on the 20th *idem* and on the 23rd, a warrant for the arrest of the accused was issued. On the 27th October 1909, sanction was revoked on appeal. The accused was discharged on the 2nd November 1909. On the 15th January 1910, the Chief Court on revision set aside the order revoking the sanction and ordered a re-hearing of the appeal. The appeal was re-heard and on the 4th April 1910, sanction for perjury was revoked but it was upheld for forgery. On the 14th May 1910, the accused applied to the Chief Court for revision. On the 13th July 1910, another complaint was filed in the Court of the Magistrate. On the 3rd December 1910, the application for revision was rejected. On the 7th April 1911, the complainant's Pleader appeared before the Magistrate and stated that the complainant wished to proceed with the case. On the 8th June, the complainant was examined and a warrant was issued for the arrest of the accused:

Held, that the sanction could not be said to have lost its force on account of the time occupied in the above mentioned proceedings.

When a person, holding a sanction to prosecute, brings his complaint before a Magistrate within six months from the date of sanction, the subsequent delay of the Court does not affect the cognizance of the case. PIRBHU DIAL *v.* EMPEROR, 52 P. L. R. 1913; 4 P. R. 1913 CR.; 14 CR. L. J. 183 **183**

——————— **s. 195, sub-s. (1) cls. (a) and (b)**—*Sanction of Court—Application made by same body, if necessary—Police report, whether sufficient application—Penal Code (Act XLV of 1860), s. 183—Disobedience of order.*

Sanction to prosecute a person under section 180 of the Indian Penal Code was given by a Magistrate on a Police report setting forth the facts of the disobedience of the order and also containing a request that the accused should be prosecuted under the section:

Held, that the Police report was a sufficient application for the purposes of the law to justify the Magistrate in giving the sanction under section 195 of the Criminal Procedure Code if an application was needed at all.

Per *Chapman, J.*—Even if a Court ought not to proceed except upon an application when acting under section 195, sub-section (1), clause (*b*), an application is not necessary in cases which come under section 195, sub-section (1), clause (*a*), of the Criminal Procedure Code. PANCHU MANDAL *v.* EMPEROR, 14 CR. L. J. 948; 17 C. W. N. 976 **948**

Criminal Procedure Code—contd.

——————— **ss. 195, sub-ss. (6) and (7), 367, 408, 409, 424**—*Additional Sessions Judge—Magistrate—Subordination—Sanction to prosecute—Reasons.*

Section 408 of the Criminal Procedure Code makes sentences of a Magistrate appealable to the Court of Session and under section 409, read with section 9 of the Code, an Additional Sessions Judge has jurisdiction to hear such appeals. For the purpose of section 195, sub-section (7), therefore, a Magistrate is subordinate to an Additional Sessions Judge and consequently an Additional Sessions Judge has jurisdiction to grant sanction refused by a Magistrate.

A Court should give reasons for granting or refusing sanction. NISHI CHANDRA CHAUDHURY *v.* ROMESH CHANDRA SEN, 14 CR. L. J. 195 **195**

——————— **s. 199**—*Rape — Accused convicted of rape—Acquitted—Cannot be convicted of adultery without complaint by the husband.*

Where a conviction for rape is set aside on the ground that it was only a case of adultery, the accused cannot be convicted of adultery, if no complaint has been made by the husband to give jurisdiction to the Court under section 199 of the Code of Criminal Procedure. NGA PO THAW *v.* EMPEROR, U. B. R. (1912) 155; 14 CR. L. J. 284 **716**

——————— **s. 200** **953**

——————— **s. 203** **314**

——————— **ss. 205, 255, 342, 366**—*Accused exempted from personal appearance—Appearance by Pleader—Involving performance of all acts—Section to be liberally exercised.*

Section 205 of the Criminal Procedure Code of 1898 allows the accused to appear by Pleader, and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial, such as answering the examination by the Court under section 342, or pleading, or refusing to plead to the charge under section 255 of the Code.

The discretion under section 205 of the Code is one that should be liberally exercised in the Province of Sind. EMPEROR *v.* JAMAL KHATUN, 14 CR. L. J. 272; 6 S. L. R. 206 **544**

——————— **ss. 207, 215**—*Commitments by Magistrates to Court of Session, when to be quashed.*

Under section 215 of the Code of Criminal Procedure, a commitment can be quashed by the High Court only on a point of law.

Where a Magistrate is of opinion that he cannot adequately punish an accused person, and commits him to the Court of Session under section 207, the commitment is legal and cannot be quashed by the High Court on the mere ground that the punishment which the Magistrate could have awarded would have been sufficient. EMPEROR *v.* BALDEO, 11 A. L. J. 439; 14 CR. L. J. 304 **960**

——————— **s. 211** **310**

——————— **s. 215** **960**

——————— **s. 222 (2)** **315**

——————— **ss. 235 (1), 236** **310**

——————— **s. 239** **949**

Criminal Procedure Code—contd.

——————— **s. 242** **326**

——————— **s. 250**—Complaint that certain person was using house as brothel **1008**

——————— **s. 255** **544**

——————— **s. 256 (1)** **326**

——————— **ss. 288, 364, 533**—*Evidence Act (I of 1872), s. 91—Confession—Oral evidence not admissible—Statement of witness in the absence of accused not admissible—Confession must be voluntary.*

The confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act.

No evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure.

Section 533 of the Code does not apply to a case where no record whatever has been made of such a confession.

The statement of a witness made in the absence of the accused is not admissible in evidence under section 288 of the Criminal Procedure Code.

A confession in order to be admissible in evidence must be made voluntarily and without any pressure.

Where a Tahsildar, having the powers of a Magistrate, third class, and being invested by the Local Government with powers to take cognizance of offences upon complaint or upon Police report, conducts an inquiry on information received in the shape of a complaint, he must be deemed to have conducted the inquiry as a Magistrate. EMPEROR *v.* GULABU, 11 A. L. J. 286; 14 CR. L. J. 211; 35 A. 260 **307**

——————— **s. 342** **544**

——————— **s. 345 (6)**—*Composition of an offence—Out of Court—Magistrate to inquire into when pleaded—Proof ousts jurisdiction.*

The provisions of section 345 (6) indicate that the composition of an offence has the same effect in a criminal trial as it would have in a civil suit. It operates as a complete bar to the prosecution.

The composition need not be effected in Court, and the plea by the accused that the offence charged has been compounded out of Court, must be inquired into by the Magistrate trying the accused, and, if proved, would bar the jurisdiction of the Magistrate to go on with the trial. IMPERATOR *v.* MULO, 6 S. L. R. 284; 14 CR. L. J. 292 **948**

——————— **ss. 350, 537**—*Demand or refusal—Omission of Magistrate to ask accused whether he would exercise right—No material irregularity or failure of justice.*

Section 350 of the Criminal Procedure Code, 1898, confers on an accused person the right to demand a re-hearing of evidence, and does not actually prescribe that the Magistrate shall ask the accused. Where there is no demand or refusal but merely an omission to exercise the right reserved by proviso (*a*) to section 350, the accused is not necessarily materially prejudiced, nor is a failure of justice occasioned by the omission, the error being one which is curable under section 537 of the Criminal Procedure Code.

Criminal Procedure Code—contd.

The mere fact that an accused stated before a Magistrate at the time of the framing of the charge that he did not wish the witness to be re-called, should not deter the Magistrate's successor from acting under section 350. NGA PO TEIN *v.* EMPEROR, U. B. R. (1912) 151; 14 CR. L. J. 175 **175**

——————— **ss. 353, 537**—*Recording defence evidence in the absence of absconding accused—Irregularity, whether curable.*

Where an accused person, who was being tried, under section 323 of the Indian Penal Code together with three others, absconded after the evidence for the prosecution had been recorded, but before the witness for the defence named by him had been examined:

Held, that recording the defence evidence in the absence of the accused was an irregularity which could not be cured under section 537 of the Criminal Procedure Code, and, therefore, the conviction of the accused must be set aside.

The wording of section 353 of the Criminal Procedure Code, laying down that all evidence shall be taken in the presence of the accused, includes the evidence for the defence as well as for the prosecution. NGA PO SHEIN *v.* EMPEROR, U. B. R. (1912) 152; 14 CR. L. J. 287 **719**

——————— **s. 364** **307**

——————— **s. 366** **544**

——————— **s. 367** **195**

——————— **s. 376**—*Penal Code (Act XLV of 1860), ss. 201, 302—Accused charged with murder and concealment of murder—Sessions Court convicting of murder—No finding on the minor charge—Chief Court acquitting of murder—Competent to convict of concealment of murder.*

The appellant was tried for murder and concealment of murder, but the Sessions Judge convicted him on the main charge of murder, expressing no opinion whether the minor charge under section 201, Indian Penal Code, had been established or not. The appellant was acquitted by the Chief Court on the murder charge:

Held, that the Chief Court was competent to convict the appellant on the minor charge, provided there was sufficient evidence on the record to support it. MOHAMMAD SHAH *v.* EMPEROR, 8 P. R. 1913 CR.; 14 CR. L. J. 278; 223 P. L. R. 1913; 22 P. W. R. 1913 CR. **710**

——————— **s. 399** **512**

——————— **s. 403**—Acquittal under section 211 bars subsequent trial under section 182 **310**

——————— **ss. 403 (4), 439**—*Revision—Order of acquittal—Court acquitting without calling any evidence at all.*

As a general rule, the High Court will not interfere with an order of acquittal, but it will do so where such an order is passed without examining the witnesses for the prosecution, on the mere denial of the accused that he was guilty. EMPEROR *v.* NGA SAN WEIN, U. B. R. (1912) 148; 14 CR. L. J. 177 **177**

——————— **ss. 408, 409** **195**

——————— **s. 413**—*Joint trial by first class Magistrate—Appealable sentence against one of accused—Right of appeal of other accused.*

Criminal Procedure Code—contd.

If at a joint trial of two or more persons by a first class Magistrate, an appealable sentence is passed against any one of them, all the persons convicted have the same right of appeal even though their sentences may be of the kind against which an appeal would be barred by section 413 of the Criminal Procedure Code, if the trial had not been joint. SHEOPAL *v.* EMPEROR, 15 O. C. 386; 14 CR. L. J. 170 **170**

——— ——— ——— **s. 423** **182, 326**

——— ——— ——— **s. 423**—*Altering the conviction—Penal Code (Act XLV of* 1860), *ss.* 183, 353.

An Appellate Court has power under section 423, Criminal Procedure Code, to alter a conviction from one under section 353 of the Penal Code to one under section 183, Indian Penal Code. KUNHAMSU *v.* EMPEROR, (1912) M. W. N. 1110; 14 CR. L. J. 239 **335**

——— ——— ——— ——— **s. 424** **195**

——— ——— ——— ——— **s. 435** **197**

——— ——— ——— ——— **s. 439** **177, 197**

——— ——— ——— ——— **s. 439**—*Revision—First Report—Concurrent findiny—Doubt.*

Where, with reference to the first report at the *Thana* and other circumstances, the case against an accused person is very doubtful, the benefit of the doubt should be given to the accused and in such cases even the concurrent findings of facts by the lower Courts are liable to be set aside on revision. KESAR SINGH *v.* EMPEROR, 5 P. W. R. 1913 CR.; 152 P. L. R. 1913; 14 CR. L. J. 320 **1008**

——— ——— ——— ——— **s. 476** **197, 958**

——— ——— ——— ——— **s. 488**—*Neglect or refusal by words or by conduct—Denying paternity of child—Tantamount to neglect—Neglect or refusal beiny established—Maintenance order to be made.*

Under section 488 of the Criminal Procedure Code, the neglect or refusal may be by words or by conduct. It may be express or implied, and when the opponent has denied the paternity of a child, that is a fact from which Court may infer neglect to maintain.

Where the paternity and the neglect are established a maintenance order should be made. *Musammat* HIDAYAT KHATUN *v.* MAHMED HAYAT, 14 CR. L. J. 303; 6 S. L. R. 208 **959**

——— ——— ——— ——— **s. 497**—*Bail in non-bailable cases—High Court's power to release on bail—General law to be followed as a rule—Exceptional circumstances.*

Section 497 of the Criminal Procedure Code of 1898 says nothing about taking into consideration the likelihood or unlikelihood of an accused person absconding, or any other matter except whether or not there are reasonable grounds for believing that the accused is guilty of the offence charged against him.

Magistrates are bound to follow the provisions of section 497 in dealing with the question of admitting a person to bail who is accused of a non-bailable offence.

Although a High Court is not limited within the bounds of section 497 and has absolute discretion in the matter, yet as the Legislature has placed the initial stage of dealing with crimes upon Magistrates and has in effect enacted that persons accused of non-bailable offences shall be detained in custody except when, in the opinion of the Magistrate, there are no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is as a rule bound to follow the general law and to depart from it only under very special circumstances, especially in the initial stages of a case. HENDERSON *v.* EMPEROR, 6 L. B. R. 172; 14 CR. L. J. 171; 6 BUR. L. T. 73 **171**

Criminal Procedure Code—concld.

——— ——— ——— ——— **s. 522**—*Restoration to possession—Time when order to be made—Whether to be made simultaneously with order of conviction—Notice to accused if necessary.*

It is not essential in law that an order restoring possession, should find a place in the actual judgment. It must be immediate, that is directly arising out of the judgment of the Court convicting in the case and without any fresh materials having in the meantime been produced.

Before an order under section 522 is made, the accused is in law not entitled to any notice.

Therefore, such an order passed four days after the conviction of an accused, on the express findings in the judgment without any fresh materials and without any notice to the accused, is competent and not without jurisdiction. JATINDRA NATH *v.* EMPEROR, 14 CR. L. J. 172 **172**

——— ——— ——— ——— **s. 526**—*Accused under bona fide impression of not having fair trial—Ground of transfer.*

Where an accused person is under the *bona fide* impression that he may not have an impartial trial before a Magistrate it is desirable that the case should be transferred from his Court to another Court. JIT SINGH *v.* EMPEROR, 4 P. W. R. 1913 CR.; 14 CR. L. J. 286; 154 P. L. R. 1913 **718**

——— ——— ——— ——— **s. 533** **307**

——— ——— ——— ——— **s. 537** **175, 183, 315, 946, 954**

——— ——— ——— ——— **s. 537**—Recording defence evidence in absence of absconding accused **719**

——— ——— ——— ——— **Sch. V, Form 24** **959**

Culpable Homicide. *See* PENAL CODE, ss. 299, 300.

Custom—Pasturage **890**

——— ——— *Village Bet Punnunhan, Tahsil Alipur, District Muzaffargarh*—Wajib-ul-arz—*Alluvion, diluvian—Rights of* ala maliks inter se.

A plot of land in the village Bet Punnunhan, Tahsil Alipur, District Muzaffargarh, belonging to some of the *ala* proprietors before submersion and taken possession of by them on re-appearance, cannot be treated as the joint property of all the *ala* proprietors of the vlilage, on the strength of paragraph 15 (2) of the *Wajib-ul-arz*, which relates only to land belonging to *adna* proprietors and has nothing whatever to do with the rights of *ala maliks inter se* in such a case. KAURA *v.* MUMAMMAD BAKHSH, 137 P. W. R. 1913; 233 P. L. R. 1913 **851**

——— ——— **Adoption**—Collateral succession **944**

Custom—contd.

———**Adoption**—*Adoption of only son—Burden of proof as to invalidity of adoption.*

Where the custom of adoption prevails in the parties' tribe the *onus* of proving that a particular adoption is invalid by reason of any restrictive custom lies upon the person who says that it is invalid.

Ordinarily, it is no valid objection that the appointed heir is the only son of his natural father.

According to Hindu Law the adoption of an only son is valid. WARYAM SINGH *v.* JIWAN SINGH, 205 P. L. R. 1913 **254**

———*Agarwal* Banias *of Zira, Ferozepore District—Hindu Law or custom—Unequivocal declaration and subsequent treatment—Case not satisfactory precedent.*

The finding, that the Agarwal *Banias* of Zira, Ferozepore District, do not in matters of adoption follow the general rules of Hindu Law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption, though conclusive between the parties, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal *Banias* of Zira should be forthcoming. CHIMAN LAL *v.* HARI CHAND, 17 C. W. N. 885; 126 P. W. R. 1913; 187 P. L. R. 1913; (1913) M. W. N. 509; 18 C. L. J. 70; 15 BOM. L. R. 646; 14 M. L. T. 83 **669 P. C.**

———Randhawa Jats — Mauzah *Bhangli Tahsil and District Amritsar*—Riwaj-i-am—*Degree of relationship immaterial—Age limit only recommendatory—Execution of deed—Sufficient—Registration sufficient publicity—No other ceremonies necessary.*

The *Riwaj-i-am* of the Amritsar District (1865) permits a *Randhawa Jat* to adopt a person from among his collaterals irrespective of his degree of relationship to him, and the provision as regards the age of the adopted son is of a recommendatory and not of a mandatory character. The execution of a deed of adoption before the brotherhood is sufficient, and the registration of it is sufficient publicity of adoption, and the non-performance of other ceremonies is immaterial. JIWAN SINGH *v.* PAL SINGH, 22 P. R. 1913; 214 P. L. R. 1913 **747**

———**Alienation** — Widow's power to allow redemption of land inherited from her husband—Reversioner's right **8**

———Widow's power to dispose of husband's acquired property **215**

———Widow's power to receive mortgage money due to her husband **122**

———Awans *of Talagang Tahsil, Attock District—Unequal distribution of ancestral land by father among his sons not proved—Burden of proof—Instances.*

Notwithstanding that *Awans* have a somewhat larger power of alienation than is usual in the Punjab, yet an *Awan* of Talagang Tahsil, Attock District, is not competent to distribute ancestral land unequally among his sons. The person alleging his competency to do so must prove it.

Custom—contd.

Mere assertions of a power in the absence of instances are useless to prove a custom. KHUDA BAKHSH *v.* AHMAD KHAN, 151 P. L. R. 1913; 124 P. W. R. 1913 **459**

———**Alienation**—*Gift—Ludhiana* Tahsil, *Mauza* Jatana—*Gift by widow to daughter's son—Collaterals in the 7th degree—Daughters preferred to collaterals in 7th degree—Acceleration of succession—Niece not an heir.*

Among *Jats* of Mangat *gôt*, residing at *Jatana*, in the Ludhiana Tahsil, a daughter is entitled to succeed to the ancestral property of her father in preference to his collaterals in the 7th degree.

A gift of ancestral property to a daughter's son, consented to by the daughter, merely accelerates his succession as her heir; and the collaterals in the 7th degree have no right to contest such disposition of the property.

A brother's daughter is not an heir of her paternal uncle. His collaterals in the 6th degree are entitled to succeed to his ancestral property in preference to his brother's daughter and to control his gift of the property in favour of her son. *Musammat* PARTAPO *v.* ASA RAM, 208 P. L. R. 1913 **211**

———*Gift by sonless agriculturist in favour of his daughter and sister's sons—Incompetency of his after-born son to object—Collusive suit.*

A gift by a sonless Muhammadan agriculturist of ½ of his non-ancestral holding in favour of his daughter's and sister's sons is valid both according to Muhammadan Law and custom and cannot be questioned by an after-born son specially when the latter is in collusion with his father. DUR MUHAMMAD KHAN *v.* PIRAN DITTA, 64 P. L. R. 1913; 13 P. W. R. 1913 **434**

———*Village Karampura, Tahsil Mailsi, Multan District—Alienation of house by non-proprietor—Distinction drawn between* Aroras *and others—Acquiescence by proprietors in previous sales does not amount to renunciation.*

In the village of Karampura in the Mailsi Tahsil of the Multan District, a non-proprietor cannot dispose by sale of his house with a right of residence therein.

The *Wajib-ul-arz* of the village draws a distinction in this respect between *Aroras* and the ordinary menials, permitting the former to sell as before.

Mere acquiescence in previous sales will not imply a renunciation of the discretionary right of the proprietors to object to a subsequent sale. TAJ MUHAMMAD *v.* KANSHI MAL, 135 P. W. R. 1913; 237 P. L. R. 1913 **864**

———**by widow** — *Hindu Law or custom—Gift in favour of daughter and her son—Khatris of Kauntrila in Gujar Khan Tahsil of Rawalpindi District—Incompetency of reversioners to object—Value of the Punjab rulings.*

Khatries of Kauntrila in the Gujar Khan Tahsil of the Rawalpindi District follow Hindu Law and not agricultural custom in matters of alienation and inheritance, consequently, a gift by a widow of her husband's separate property in favour of her daughter and daughter's son cannot be questioned by reversioners.

Questions of custom which arise in a case should be put in issue and decided upon the evidence, but should not be concluded on the authority of any ruling. The rulings of the Chief Court on similar points are instances of great weight but are not conclusive. LABH SINGH *v.* GURCHARAN SINGH, 62 P. W. R. 1913; 131 P. L. R. 1913; 54 P. R. 1913 **730**

——— ——**Gift**—Brahmans *of Tahsil Gujar Khan, Rawalpindi—Hindu Law or custom—Gift of ancestral land to daughter's son—Daughter and her husband living with the donor and serving him—Gift valid.*

A *Brahman* of a village, in Tahsil Gujar Khan, Rawalpindi District, made a gift of ancestral land to his daughter's son. The donor and his wife were blind, and the donee's parents lived with them, so far as was compatible with the donee's father being in the army, and served and maintained them:

Held, that the parties were governed by the ordinary agricultural custom limiting alienation of ancestral property.

That the evidence on the record and the Customary Law applicable justified the gift. TAHL DAS *v.* MALIK SINGH, 138 P. W. R. 1913; 231 P. L. R. 1913 **855**

——— ——**Marriage**—Sikh Jats *of Tahsil Shakargarh, Gurdaspur District—Repudiation of woman by husband—Woman free to marry again—Marriage legal without* chadarandazi*—Legitimacy of offspring.*

Among *Sikh Jats* of Chak Kotla, Tahsil Shakargarh, District Gurdaspur, a woman expelled and repudiated by her husband, is according to custom free to remarry. She may become the lawful wife of another man without even the ceremony of *chadarandazi*, and the offspring of such a union would be regarded as legitimate. ISHAR SINGH *v.* BUDHI, 177 P. L. R. 1913; 125 P. W. R. 1913 **460**

——— ——**Mortgage**—*South Canara—Usufructuary mortgagee entitled to the value of improvements—Improvements, meaning of.*

According to the custom in South Canara, a usufructuary mortgagee is entitled to the value of improvements effected by him, provided, however, that the parties have not contracted themselves in the particular transaction out of the custom.

Improvements are understood to imply any work beneficial to the property, or, in other words, to which a reasonable owner would have consented. DARAMMA *v.* MARIAMMA, 24 M. L. J. 397 **371**

——— ——**Pre-emption.** *See* PRE-EMPTION.

——— ——**Succession**—Collateral succession of appointed heir **944**

——— ——— ———*Appointed heir does not succeed to collaterals of the adoptive father.*

Among *Jat Sikhs* of the Tarn Taran Tahsil, Amritsar District, an heir appointed under Customary Law does not acquire a right to suceeed to the collateral relatives of the person who appoints him. CHITU *v.* JAWAND SINGH, 239 P. L. R. 1913; 140 P. W. R. 1913 **944**

——— ——— ———Bhatias — *Hindu Law—Right of daughter's son to succeed in presence of collaterals*—Bhatias *rank as twice-born*—Kangarh *in Muzaffargarh District.*

Bhatias of the small town of Kangarh in the District of Muzaffargarh, though owning agricultural land, generally follow Hindu Law in the matters of succession and there exists among them no custom modifying that law to the extent of excluding daughters and their sons in favour of separated collaterals.

Bhatias rank as twice-born but below *Aroras* and *Banias*. AYA RAM *v.* THARI BAI, 34 P. W. R. 1913; 74 P. L. R. 1913; 78 P. R. 1913 **87**

——— ——— **Succession**—Ghorewaha Rajputs *of Garhshankar Tahsil, Hoshiarpur District—Inheritance to ancestral estate—Daughters and daughter's sons not excluded by collaterals of more than seven degrees distant*—Onus probandi—Riwaj-i-am *of the Tahsil—Of no weight.*

Among *Ghorewaha Rajputs* of the Garhshankar Tahsil of the Hoshiarpur District, daughter and daughter's sons are not excluded from inheritance to the ancestral estate by collaterals more distantly related than the 7th degree.

The onus lies heavily upon the party alleging such exclusion.

No weight can be attached to the *Riwaj-i-am* of the Tahsil. RAHMAT KHAN *v.* BISAN, 136 P. W. R. 1913; 234 P. L. R. 1913 **850**

——— ——— ——— ———Gour Brahmins—Mauzah *Kharkhanda, District Rohtak—Hindu Law—Tribe notified agricultural—Matter deserving consideration in decision of the question of law or custom—Alienation—Widow—Power to dispose of husband's acquired property.*

In matters of succession the *Gour Brahmins of Mauzah* Kharkhanda, District Rohtak, do not follow the principles of Hindu Law, but are regulated by the ordinary rules observed by the agricultural community of the Province.

The circumstance of a tribe having been notified as an agricultural tribe for the purposes of the Punjab Land Alienation Act, though not conclusive proof of the tribe being subject to the ordinary rules of Customary Law, cannot, nevertheless, be left entirely out of consideration.

Where a family has been in the main agricultural, the mere fact that of late years some members of it have been educated and have taken service under Government, does not free them from being governed by the Customary Law obtaining among agriculturists.

It is not competent to a widow governed by Customary Law to alienate the property of her late husband to which she has succeeded on the ordinary life tenure, even though such property was acquired by her late husband. MUKANDI *v.* BAKHTAWAR SINGH, 210 P. L. R. 1913 **215**

——— ——— ——— *Hindu Law*—Brahmins *of* Mauza *Bahtiwal, Tahsil Hoshiarpr—Right of daughter to succeed to self-acquired land in presence of collaterals of fifth degree—Ancestral land*—Hasilat.

Brahmins of *Mauza* Bahtiwal, Tahsil and District Hoshiarpur, in matters of succession follow Hindu Law although they have owned land for several generations and partly depend upon its produce; and among them daughters succeed to the self-acquired land of their father in the presence of collaterals related to him in the fifth degree.

Land not acquired by the common ancestor of a land-owner and his collaterals is not ancestral *qua* the latter.

Custom—contd.

The word '*hasilat*' does not mean land revenue, but the produce of the land. SANTA *v. Musammat* DAROPTI, 47 P. W. R. 1912; 191 P. L. R. 1913 **612**

——————**Succession** — *Incompetency of adopted son to succeed collaterally*—Gujars *of Ludhiana Tahsil.*

Among *Gujars* of Ludhiana Tahsil an adopted son does not succeed collaterally. BUTA *v.* MAULA, 63 P. L. R. 1913; 14 P. W. R. 1913 **430**

——————————*Muhammadan Rajputs—Widow of pre-deceased son.*

Among the Muhammadan Rajputs of the Hoshiarpur District, the widow of a pre-deceased son succeeds with the brothers of her husband to a share of the estate of her father-in-law. FATTEH MUHAMMAD *v.* SULTAN MUHAMMAD, 97 P. W. R. 1913; 137 P. L. R. 1913 **122**

——————————*Mianwali District—Sister excluded by mother and step-mother.*

According to the Customary Law of the Mianwali District the mother and step-mother of the last male proprietor succeed to his property to the exclusion of his sister. *Musammat* AMIRAN *v. Musammat* JANO, 23 P. R. 1913; 216 P. L. R. 1913 **750**

——————————*Object of* khanadamadi—*Daughter dying without issue*—Khanadamad *succeeding and marrying another wife—Step-sons' incompetency to succeed—Property, whether reverts to the daughter's blood relations.*

The custom of *khanadamadi* in cases where it obtains is designed to benefit the daughter and her issue.

On the death of a daughter, leaving no issue, the *khanadamad* succeeds to the property of her father for life on the equivalent of a widow's estate, and on his death the property reverts to the daughter's blood relations; his sons by another wife have no *locus standi* to claim it. 65 P. L. R. 1913; 10 P. W. R. 1913; 53 P. R. 1913 **441**

——————**Widow**—Unchastity **253**

——————————*Unchastity of widowed mother—Forfeiture of estate—Pleadings—Appellate Court incompetent to allow new case to be set up in appeal.*

Under the Customary Law of the Punjab, as under Hindu Law, the unchastity of the widowed mother of a deceased proprietor, who is in possession of his estate on a life-tenure, does not work a forfeiture of her interest in the estate.

Where the plaintiff sued for possession of the land held by a female holder on a life-tenure on the ground that by her unchastity she forfeited her life-estate, the Appellate Court is not justified in decreeing the claim upon the ground that the permanent connection formed by the woman with a paramour amounted to a re-marriage under the Customary Law. *Musammat* THAKRI *v.* GURDIT SINGH, 57 P. W. R. 1913; 120 P. L. R. 1913 **253**

——————————*Claiming partition—Burden of proof—Widow to prove her right to partition—Completion of partition proceedings no bar to civil suit for determination of title.*

Custom—concld.

The mere fact of a partition having been completed is no bar to a subsequent civil suit instituted to decide the question of title which has not been disposed of during the partition proceedings.

Where in a suit in which a widow claims partition the parties are governed by custom, the onus lies on the widow of proving that she can claim partition. PARSHOTAM *v.* RAJ DEVI, 129 P. W. R. 1913; 219 P. L. R. 1913 **702**

Damages. *See* CONTRACT ACT, s. 73; RAILWAYS ACT, s. 55.

——————, contemptuous and nominal **98**

——————Disturbance of possession of lessee by owner of paramount title—Liability of lessor for damages to lessee **815**

——————Failure of mortgagee to pay a prior mortgage **676**

——————— for use and occupation—To be calculated on what basis **974**

——————, measure of—Mitigation of damages **616**

——————Negligence—Accident caused by negligence of both parties **485**

——————Suit for damages for libel published by Madras Government is incompetent both against members of the Government and the Secretary of State for India in Council **353**

Death, proof of time of **528**

Declaratory suit—Alienation by widow—Declaratory suit by remoter reversioner while nearer alive **814**

Decree, form of—Practice—Claim for absolute unconditional possession—Property found burdened with mortgage **267**

——————*Transfer of Property Act (IV of 1882), s. 90—Order under section 90, whether decree—Appeal—Court-fee on memorandum.*

An order under section 90 of the Transfer of Property Act is a decree, and an appeal from such an order is an appeal from a decree and, consequently, in such an appeal *ad valorem* Court-fee must be paid on the memorandum of appeal. LAKHI NARAIN JAGDEC *v.* KRITTIBAS DAS, 18 C. L. J. 133 **971**

Defamation—Suit for damages for libel published by Madras Government incompetent against both the members of the Government and the Secretary of State for India in Council—Absolute privilege—Qualified privilege—Claim for damages too remote **353**

——————*Libel—Publication in newspaper—Privilege—Fair comment—Justification—Proof of truth—Damages, contemptuous and nominal—Costs—Discretion—Evidence—Admissibility—Statement of deceased person—Evidence of similar facts—Evidence Act (I of 1872), ss. 14, 15, 32 cl. 3.*

A. offered himself as a candidate for election as a trustee of the charitable funds of the Parsi community. In furtherance of his candidature, he gave certain public lectures. *B.*, who was a frequent contributor to the columns of *Jam-e-Jamshed*, a daily

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newspaper, wrote a letter to that paper criticising the conduct of *A*. In the course of that letter, *B*. stated that the late Sir Jamsetjee Jeejeebhoy on one occasion said to *B*. "What can we do, *B*.? If such persons (meaning *A*.) are not allowed to speak, they send us threats that they will create disturbance and stop the conduct of the business."

A. thereupon sued *B*. as well as the editor, proprietor, printer and publisher of *Jam-e-Jamshed* for the recovery of Rs. 9,000 as damages for injury done to his reputation by the libel. That libel was charged as containing two distinct imputations on the conduct of *A*., *first*, that he had obtained the privilege of being called on to move or second propositions at the meeting of the Parsi Anjuman by sending to the trustees of the Parsi Panchayet, who conveyed those meetings, threats that if he was not allowed to move or second propositions, he would create disturbance at the meetings, and, *secondly*, that *A*. had boasted in the lectures delivered by him of being a greater friend of the late Sir Jamsetjee than he really had been:

Held, (1) that the words complained of were defamatory;

(2) that the statements were not privileged, as they were published in a newspaper, read by the public at large and circulated among all classes of readers besides Parsis;

(3) that as the imputations contained an allegation of fact imputing misconduct, the libel was out of the sphere of fair comment;

(4) that the libel could be justified only on the ground that the allegation was true;

(5) that the statement alleged to have been made by the late Sir Jamsetjee to *B*. was inadmissible in evidence under section 32(3) of the Evidence Act, as, if true, it would not have exposed Sir Jamsetjee to a criminal prosecution or to a suit for damages;

(6) that, consequently, there was no evidence at all in justification of the truth of the libel in substance and fact;

(7) that, even if true, the statement of Sir Jamsetjee was insufficient to prove the truth of the libel as it lacked the test of cross-examination;

(8) that as no misconduct in or with reference to the suit was found against *A*., he ought to be awarded nominal and not merely contemptuous damages;

(9) that it would be fair to allow *A*. Rs. 200 as damages with costs of the suit.

Both privilege and fair comment are two aspects of the law of privilege, with this difference that the former technically so called relates to the special rights of an individual, whereas the latter concerns the common rights of every member of the public at large.

Given facts which are true as regards a matter of public interest, it is open to any member of the public to comment on them fairly, but if any allegation of fact imputing any act of misconduct is made in the course of the comment, the libel is out of the sphere of fair comment, and can be justified only on the ground that the allegation is true.

In a suit on libel, evidence of instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to him in the libellous statement is inadmissible. The defendant can justify the libel as true in substance and in fact by proving *its* truth, not the truth of other acts and occasions having nothing to do with

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the act in question, unless it is intended to show that those acts were parts of the habitual and intentional, not accidental, conduct of the plaintiff.

In a case of libel, the law is that the damages are at large. It is not necessary to prove any particular damage. The Jury may give such damages as they think fit, having regard to the conduct of the parties and all the circumstances of the case.

Although the question of costs is in the discretion of the Judge, thatdiscretion must be exercised on proper materials.

Per *Beaman, J.*—Where a plaintiff claims substantial damages for injury to his reputation, he should himself come before the Court and tell the Court who he is, so that the Court may form some idea of the reputation for injury to which money compensation is claimed.

In Courts of law, there is only one way of proving the truth, and that is by legally admissible and relevant evidence.

The doctrine of privilege is referable to cases in which communications are made in what we may call confidence by one person having special information to give to another person entitled to receive that confidence. NADIRSHAW HORMUSJI SUKHIA *v.* PIROJSHAW RATANJI RATNAGAR, 15 BOM. L. R. 130 **98**

——— ——— ———*Slander—Statement made to official superior not intended for Court of justice—Privilege—Qualified or absolute.*

The only privilege which can be claimed in respect of a slanderous statement made to the official superior of the slandered person, which is not intended to be made in a Court of justice or at any step or stage of a judicial proceeding, is *qualified* and *not absolute* privilege. JUSAB THARIA *v.* MORRISON, 15 BOM. L. R. 249 **480**

Defence of suit *ex tempore* **95**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10-A—*Retrospective—"Agriculturists at date of transaction," meaning of—Applicability—Evidence Act (I of 1872), s. 92—Sale or mortgage—Separate unregistered agreement to convey not admissible in evidence.*

Section 10-A of the Dekkhan Agriculturists' Relief Act is retrospective.

But a person is not entitled to the benefit of that section unless he was earning, at the time of the transaction, his livelihood from agriculture in a District to which the Act applied.

A written agreement to re-convey immoveable property not being registered can only operate as a contract, and, in the absence of fraud, cannot be admitted in evidence to prove a sale-deed to have been a mortgage deed. BILAWAL *v.* CHOITHRAM, 6 S. L. R. 245 **729**

——— ——— ——— **s. 15B**—*Decree in terms of award—Instalments—Inapplicability to filing of award.*

A defendant, though an agriculturist, cannot, in execution of an award filed under section 525 of the old Code of Civil Procedure, get the benefit of section 15B of the Dekkhan Agriculturists' Relief Act. HASSOMAL *v.* KHUSHIRAM, 6 S. L. R. 209 **564**

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——— ——— ——— **s. 20**—*Not applicable to a person not agriculturist at the time of decree.*

Section 20 of the Dekkhan Agricultrists' Relief Act cannot apply to the case of a person who was not an agriculturist when the decree was obtained, whatever his status may be thereafter when execution comes to be taken out against him. BALCHAND CHATURCHAND *v.* CHUNILAL JAGJIVANDAS, 15 BOM. L. R. 387 **901**

——— ——— **s. 22**—*Execution of decree—Attachment of immoveable property of agriculturist—Sale without object—Right to recover property by subsequent suit barred—Burden of proof—Presumption—Proceedings of Court—Civil Procedure Code (Act V of 1908), s. 60—Evidence Act (I of 1872), ss. 101, 102, 103, 114 ill. (e).*

In 1885, *A.* mortgaged to *B.* certain property for 16 years. In 1888, *C.* obtained a money-decree against *A.* in the Vinchur Court. In execution of this decree, the right, title and interest of *A.* in the mortgaged property was put up to sale and purchased by *D.*, who subsequently sold the interest purchased to *B.*

In 1908, *A.* sued *B.* for possession by redemption of the property, alleging that as he was an agriculturist the sale in execution was illegal and of no effect. It was found that *A.* had been an agriculturist since the date of mortgage. There was no evidence to show whether or not *A.* was known to be an agriculturist in the Vinchur Court at the time of the hearing or of the execution proceedings; nor was it shown that *C.* had instituted his suit after obtaining the certificate of a conciliator:

Held, (1) that the suit must be dismissed as there was no reason to treat the immoveable property sold by the Vinchur Court as the property of an agriculturist, as *A.* had not proved in the first suit that he belonged to the privileged class of an agriculturist;

(2) that it could not be assumed that the Judge of the Vinchur Court acted contrary to law in passing orders for a sale of *A.*'s property.

The maxim of law which must be followed in the absence of evidence is that everything which ought to have been done was done by the Court. The ordinary rule is that property belonging to the judgment-debtor is liable to attachment and sale. An agriculturist, in order to resist the application of that general rule, must show that he belongs to the privileged class so as to render section 22 of the Dekkhan Agriculturists' Relief Act applicable to his case.

In Courts of law, only those facts can be taken to exist which are proved. In the absence of proof, the exemption from liability to attachment or sale cannot be held to exist for the purposes of the execution proceedings. NARAYAN ANANDRAM MARWADI *v.* GOWBAI DHONDIBU JAGTAP, 15 BOM. L. R. 278; 37 B. 415 **591**

Discharge—Pro-note—Joint promisees — Discharge by one of entire debt **12**

Discretion—Costs **98**

——— ———Power to set aside decree on ground of fraud **579**

Dismissal in default. *See* CIVIL PROCEDURE CODE, O. IX.

——— ——— ———Plaintiff dying during pendency of suit - Suit dismissed for default—Inapplicability of the provisions—Inherent power of Court **526**

——— ——— **of suit**—Plaintiff not complying with order to file agreement to arbitrate **472**

Divorce Act (IV of 1869), ss. 18, 57—*Marriage contracted within six months of confirmation of decree of dissolution of former marriage—First husband living—Application for maintenance and custody of child of the marriage.*

The terms of section 57 of the Divorce Act are imperative, and there is no alternative to passing a decree of nullity where the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party, and the former husband or wife, as the case may be, is living at the time of the latter marriage.

Application for custody and maintenance of the child of the marriage must be by separate petition. BETTERIDGE *v.* CURRY, 29 P. R. 1913; 222 P. L. R. 1913 **778**

——— ——— **s. 55**—*Appeal from decree refusing to allow dissolution of marriage passed by District Judge in Upper Burma—Jurisdiction of Chief Court.*

As the Upper Burma Civil Courts Regulation of 1896 does not provide for any appeal from a decree or order of a Divisional Court passed in the exercise of Original Civil Jurisdiction, there is no Court to which an appeal lies from a decree or order of such Court under the Indian Divorce Act and, therefore, no such appeal lies to the Chief Court Lower Burma. W. E HARDINGE *v.* H. E. HARDINGE, 6 BUR. L. T. 10; 7 L. B. R. 8 **53**

——— ——— **s. 57** **778**

Document, alteration of. *See* ALTERATION OF DOCUMENT.

——— ———, construction of. *See* CONSTRUCTION OF DOCUMENT.

——— ——— ———Not between parties to suit—Statement in document as to lands in suit—Whether document evidence—Maker of document, whether should be called to depose to truth of statement in document **615**

——— ——— ——— not produced before Court of Wards not to be admissible in evidence subsequently—Claim not destroyed **840**

——— ———, proof of **121**

——— ———*Execution—Attestation, proof of.*

Three persons purported to attest a deed as witnesses, in a suit based upon the deed. One of the witnesses was dead, another denied having attested it and the third, who was illiterate, said that he could not remember. The plaintiff then produced another witness who deposed that one of the executants had himself written the document, and after the executants had signed it, the names of the two attesting witnesses were written with their permission on the document by the executants who had written the document:

Held, that this was sufficient to prove that the document had been duly executed and attested. JAI BEHARI LAL *v.* SAHU PERSHADI LAL, 11 A. L. J. 400 **789**

Earnest-money—Addition of conditions of forfeiture of earnest-money and re-sale, effect of—What is earnest-money **616**

Easement—*Door used by females cannot be used by males—Aggravation of easement.*

If an easement is confined to a particular purpose, it ought not to be extended to any other. Hence the back door of a house which was occasionally used by the sweepress or the ladies of the house or their maids for passage cannot be converted into a main door to be used by males. JAMNA PRASHAD *v.* GOPINATH **984**

——— ——— *Light or air—Easements Act (V of 1882), s. 38—Agreement to release easement by one of several co-owners—Ineffectual against others—Prosecution of individual members, no necessity for alienation of family property—Blocking of light or air—No substantial difference of usefulness of house—No case for injunction.*

An agreement by one of several co-owners of a dominant tenement to release an easement is ineffectual against the other co-owners.

There is no authority for the proposition that the prosecution of individual members of a joint family constitutes necessity such as would justify alienation of the joint property of the whole family.

Where the blocking of an aperture for light and air leaves the house as substantially useful as before, the case is not one for injunction but for damages only. MOTUMAL *v.* JAVHERMAL, 6 S. L. R. 265 **908**

——— ——— ——— *Light and air—Easement of air more important—Closing of ventilators—Depriving of effective ventilation—Serious injury—Damages—Where to be allowed.*

Where by the closing of certain ventilators in a house, a through draft for the house and effective ventilation is not left, the injury is so serious that the house will not be as substantially useful as a residence as it was before.

In India the right to air is more important than the right to light.

Damages should be awarded where the injury is not so serious that the property might not still remain the plainitiff's and be as substantially useful to him as before. THADCMAL *v.* JESUMAL, 6 S. L. R. 255 **843**

——— ——— *Right of way—Unity of possession of tenements in one owner—Severance by conveyances—Single transaction—Rights passing to transferees considered.*

Where the same grantor conveys, in the course of one transaction, portions of his property to several grantees, each grantee, who takes his tenement with the knowledge that the other tenements are or will be conveyed as part of the same transaction, is, in the absence of express stipulation, presumed in law to take the tenement subject to such rights as are created in favour of the other grantees.

When the Official Assignee sells property under an order of Court which is recited in the sale-deed, it must be taken that the sales formed part of one transaction.

Though, in a deed of conveyance, there is no express reference to a right of way, if the further words 'with the same held and enjoyed' are used along with appurtenances,' they are wide enough to convey a way which has never existed as an easement but which, during

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the unity of possession, is in fact used for the convenience of one of the tenements afterwards severed. PENUKONDA VENKIAH *v.* SANKA KRISHNAMOORTHY, 13 M. L. T. 313; (1913) M. W. N. 317; 24 M. L. J. 552 **80**

——— ——— *User as of right—Onus on plaintiff—Presumption from user—Question of fact.*

In a suit under section 26 of the Limitation Act, the onus is on the plaintiff to prove that the user was as of right. But the presumption to be drawn from user must always be a question of fact depending on the circumstances of each case. RAMESHUR MITRA *v.* NUT BEHARI GUIN **66**

Easements Act (V of 1882), s. 38 **908**

East India Company—Liability for breach of contract—Liability for tort in transactions of the nature carried on by private persons **353**

Eastern Bengal and Assam Excise Act (I of 1910), ss. 53, 72 **956**

Eastern Bengal and Assam Tenancy Amendment Act (I of 1908), s. 61 (3) **793**

Ejectment. *See* LANDLORD AND TENANT.

——— ——— **suit.**—*Plaintiff in ejectment suit must recover on the strength of his own title—Agreement forming foundation of plaintiff's title—Declaring him merely partner and entitled to possession only in case of success of contemplated litigation—No present right to possession—Suit for ejectment must fail.*

A plaintiff in an action of ejectment must recover on the strength of his own title, not by the weakness of his adversary's.

Where an agreement forming the basis of the plaintiff's title provides that he should merely be a partner, or co-owner with the other party to the agreement in a certain undivided fraction of the property in dispute, and that in case of success in the contemplated litigation in respect of the said property he should become entitled to the proprietary possession of the said fraction, a present right to the possession of a share in the property is not conferred and hence a suit for ejectment would be incompetent before the successful issue of the contemplated litigation. BASANT SINGH *v.* MAHABIR PERSHAD, 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J 566; 15 BOM. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 35 A. 273; 25 M. L. J. 301 **340 P. C.**

——— ——— ——— *Plaintiff to succeed on his own title.*

In an ejectment suit, the plaintiff can succeed only on the strength of his own title.

He cannot be allowed to abandon his own case and adopt that of the defendant and on that footing claim relief. BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS, 15 BOM. L. R. 209 **401**

Ejusdem generis, doctrine of **765**

Equitable set-off. *See* SET-OFF.

Estoppel—Admission **401**

——— ——— Neglect to answer notice **789**

Estoppel—concld.

———— Reversioner attesting deed of transfer by widow **255**

———— *by judgment—Judgment* in personam—*All necessary parties litigating—No collusion—Effective against all—Civil Procedure Code (Act XIV of* 1882*), s.* 13 *—Not exhaustive on estoppel by judgment.*

If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam* indeed binds third persons in that way: all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion.

Where the question relating to the ownership of a certain piece of land was one entirely between *A.* and *B.*, and *A.* obtained judgment against *B.*, a suit by *B.* against the Secretary of State for a declaration that the land was not liable to assessment would not be maintainable for want of title in *B.* who was estopped by the judgment obtained by *A.* from averring that the land belonged to him and not to *A.*

Section 13 of the Code of Civil Procedure, 1882, does not cover all cases of estoppel by judgment. SAYAM RAMAMOORTHI DHORA *v.* SECRETARY OF STATE, 24 M. L. J. 469; 36 M. 141 **656**

———— *Representation made by father or brother of minor—Minor not bound by such representation—Plea of minority not taken in pleadings—Plea not allowed in argument in second appeal—Practice.*

A minor is not bound by any false representation made by his father, brother or cousin. Even if any of these persons acted as the natural guardian of the minor, it is doubtful if the minor would be bound.

A plea of minority, which was neither raised in the Courts below nor in the memorandum of appeal before the High Court, cannot be raised for the first time in argument in second appeal. DEBI DAS *v.* TULSHI RAM, 11 A. L. J. 202 **55**

Evidence. *See* ADMISSIBILITY.

———— Statement of witness **148**

———— *Contract to supply bricks—Receipt of bricks Promise to pay—Pro-note—Evidence of the supply of bricks even when document inadmissible for want of stamp.*

A contract was entered into between the parties for the supply of bricks to be supplied from time to time. Each time a supply was made, a printed form, evidently used for various purposes, was sent by the plaintiff to be signed by the defendant obviously as a receipt for the bricks. The form showed the amount of bricks supplied, rate to be charged, and the sum chargeable. The signature of the defendant was immediately under the total of bricks supplied, and lower down in the document the words "*qimat indul-talab ada kardunga*" were written in Persian. The document was unstamped:

Held, that the document was not a pro-note, but a mere receipt for bricks.

That even in case of indamissibility of the document for want of stamp the plaintiff was entitled to

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prove the supply of bricks and the amount due in payment therefor *aliunde.*

In interpreting documents of the kind which clearly are not intended to be pro-notes, the intention of the parties and all particulars connected with the transaction must be considered. LEHNA SINGH *v.* AHMAD DIN, 103 P. W. R. 1913; 174 P. L. R. 1913 **436**

———— *Document—Not between parties to suit—Statement in document as to lands in suit—Whether document evidence—Maker of document, whether should be called to depose to truth of statement in document.*

A deed made between persons, who are not parties to a suit, and containing a statement with regard to the property in dispute stating that it belonged to *A.*, is not evidence in the suit; if it was desired to prove the facts stated by the maker of the deed, he should have been called to depose on oath to the truth of what he stated. CHERAGH ALI PRODHANIA *v.* MOHINI MOHAN BARDHAN **615**

———— *Prosecution evidence disbelieved in most parts—Conviction, if can be based on rest of evidence to be considered by Judge—Judge disbelieving almost entirely accounts of occurrence given by prosecution and substituting his own, theory founded on surmise and conjecture—Conviction whether ought to be set aside.*

If a Sessions Judge disbelieves and rejects much of the evidence of the prosecution, he should consider carefully whether a secure basis is left for the verdict against the accused.

If the Judge has discarded almost in their entirety the accounts of the occurrence given by the writnesses for the prosecution and has substituted a narrative of his own founded for the most part on surmise and conjecture and wholly inconsistent with the story told by the witnesses, it cannot be said that his account of the matter is proved by testimony regarded as credible. He ought not to convict the accused under the circumstances. KALU KHALASHI *v.* EMPEROR, 17 C. W. N. 538; 14 CR. L. J. 314 **1002**

———— *Time of death, proof of—Municipal Register not properly proved, whether admissible in evidence.*

In order to prove the time of death of a particular person a Municipal Register was produced. The clerk who produced the register could not say who wrote the particular entries relied on nor could he say who was responsible for keeping the Register nor on whose information the entries were made:

Held, that the entries were inadmissible in evidence. JIWAN BAKHSH *v.* KHAN BAHADUR KHAN **528**

Evidence Act (I of 1872), ss. 14, 15 **98**

———— **ss. 25, 26**—*Statement by accused exculpating himself, admissibility of—Penal Code (Act XLV of* 1860*), s.* 203*—Giving information.*

A statement made by an accused person to a Police officer by way of an explanation in order to exculpate himself is admissible in evidence.

The expression 'gives information' in section 203, Penal Code, means 'volunteers information.' EMPEROR *v.* AKHTIAR, 6 S. L. R. 143; 14 CR. L. J. 252 **508**

Evidence Act—contd.

——————— **s. 26** 508

——— ——— **s. 27**—*Incriminating statement of accused in Police custody while pointing out or producing instrument with which or spot where offence committed—Blood stains on* zemindar's *clothes—Police diaries to be used in interest of accused—Criminal Procedure Code (Act V of* 1898*), s.* 162.

Incriminating statements by way of confession made by an accused person while in Police custody when producing or pointing out articles connected with the commission of a crime, are inadmissible under section 27 of Act I of 1872.

The statement of an accused that he buried the weapon of the offence in a certain place is relevant but not the part of that statement that it was the weapon with which he had committed the crime. So also the statement that he would point out a certain spot and the evidence that at the spot indicated blood stains would be found would be admissible, but not the part of that statement that it was at this spot that he had committed the crime.

Where the accused produces the article himself, though the fact that he actually produced it at a particular place may be proved, yet the accompanying statement to the effect that he buried it there is inadmissible in evidence.

Where an accused person has throughout consistently refused to make any confession before a Magistrate and against whom there is practically no evidence at all, his incriminating statement under section 27 of Act I of 1872, must necessarily be received with the greatest caution and suspicion, although deposed to by respectable Police Officers and the village authorities.

The Police diaries etc. should be referred to under section 162 of the Criminal Procedure Code, 1898, in the interest of the accused person for checking the evidence of the prosecution witnesses to see how far their statements can be relied upon.

Blood stains on a *zemindar's* clothes are very seldom incriminating. SANTA SINGH *v.* EMPEROR, 15 P. W. R. 1913 CR.; 14 CR. L. J. 190; 171 P. L. R. 1913 **190**

——— ——— **s. 30** **179**

——— ——— **s. 32 (3)** **98**

——— ——— **s. 32 (5), (6)** — Recitals in deeds—Evidence of adoption **740**

——— ——— **s. 32 (5), (6)**—Recital in Will about age **452**

——— ——— **s. 34**—*Books 'regularly kept in the course of business', meaning of—Effect of method of keeping books.*

Books are 'regularly kept in the course of business' within the meaning of the provisions of section 34, Indian Evidence Act, if they are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong.

The particular method, however, of keeping the books may affect their value as evidence. RAMCHAND *v.* EMPEROR, 6 S. L. R. 195; 14 CR. L. J. 262 **534**

——— ——— **s. 50** **740**

Evidence Act—contd.

——— ——— **s. 68**—*Evidence of scribe—Proof of document—Attesting witness.*

The evidence of the scribe of a mortgage-deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed.

An attesting witness is a witness who has seen the deed executed and has signed it as a witness. BADRI PRASAD *v.* ABDUL KARIM, 11 A. L. J. 260; 35 A. 254 **451**

——— ——— **s. 69**—*Proof of document—Attesting witnesses dead—Identification of signature of attesting witnesses—Subsequent deed recognizing execution—Document bearing only marks of the executant.*

The executants of a document, being unable to write, made their marks upon it. Before a suit could be brought upon the instrument, all the attesting witnesses were dead. In order to prove the execution of the document, a witness was produced who simply identified the hand-writing of the attesting witnesses.

Further, a subsequent deed of usufructuary mortgage was produced, which was executed by one of the executants of the mortgage in suit and by the representative of the other executants, and referred to and recognised the genuineness of the mortgage in suit. The representatives of the executants of the deed had also executed a sale-deed which recognised the genuineness of the usufructuary mortgage mentioned above:

Held, (1) that the evidence did not comply with the provisions of section 69 of the Evidence Act and the signatures of the executant of the deed were not proved;

(2) that the deeds of usufructuary mortgage and sale were not evidence that the signatures of the executants were in their hand-writing. GOBARDHAN DAS *v.* HORI LAL, 11 A. L. J. 379; 35 A. 364 **121**

——— ——— **s. 83** **572**

——— ——— **s. 90**—*Documents thirty years old to be accepted with care and caution—Question of genuineness of documents—Genuineness admitted and acted upon by third parties, effect of.*

There is a very considerable danger in accepting without care and caution, documents simply because they purport to be more than thirty years old.

Where in a dispute between the proprietors of a *patti* in a certain village and a body of non-proprietors, the question is as to the genuineness of a deed relating to the title of the land in dispute, the Court cannot lose sight of the fact that proprietors of another *patti* of the same village, many years ago, accepted the document and gave up a plot of land upon that basis and in consequence of their being satisfied that it was not forged. GHULAM NABI *v.* ALLAH DIN, 241 P. L. R. 1913; 143 P. W. R. 1913 **964**

——— ——— **s. 91** **307**

——— ——— **s. 92**—Exclusion of oral evidence **679**

——— ——— **s. 92**—Sale or mortgage **729**

——— ——— ——— **ss. 101, 102, 103** **591**

——— ——— **s. 106** **667**

Evidence Act—contd.

——————— **s. 110**—*Possession — Burden of proof, shifting of—Judicial possession—Non-interference by State—Ownership—Presumption of surrender of ownership—Cause of action—Notice sent under section 80 of the Code of Civil Procedure—Bombay Land Revenue Code (Act V of 1879), s. 37—*Ultra vires *order—Suit to set aside—Limitation Act (IX of 1908), Sch. I, Art. 14—Applicability.*

A. was in possession of a graveyard for a number of years. The Collector passed an order handing over the property to *B.* *A.* appealed to the Commissioner and his appeal was rejected. His possession of the property, however, was not interfered with. He brought a suit for declaration that the property belonged to him and that Government had no right or interest in it, and for a perpetual injunction against the Secretary of State restraining the latter from entering into possession of the property or dispossessing *A.*; *Held*,

(1) that *A.* had failed to prove such juridical possession as would raise a presumption of title in his favour and shift the onus on to defendant.

(Per *Fawcett, A. J. C.*)—(2) that the notice sent by the plaintiff under section 80 of the Code of Civil Procedure could not constitute a cause of action giving plaintiff a right to sue for the relief sought by him; his right to sue accrued when the order by the Collector was passed;

(3) that the suit was in effect one to set aside the Collector's order; and under Article 14 of the Limitation Act it should have been brought within one year from the date of that order;

(4) that it not being necessary to sue to set aside an order that was *ultra vires*, Article 14 of the Limitation Act did not apply to the case.

Under section 37 of the Land Revenue Code the Collector can only dispose of lands which are not the property of individuals. The section cannot be construed as conferring upon the Collector the power to determine whether land is the property of Government or not.

Under section 110 of the Evidence Act, possession short of the statutory period, which may give a title by prescription, is sufficient to raise a presumption of ownership and shift the burden of proving title on to the other party. But where neither side can show title, the possession which attracts the presumption of ownership must be a possession founded on a *prima facie* right. Even if the mere wrongful possession is taken to be sufficient to shift the burden of proof, still the circumstances may show that such possession was merely that of a licensee and not of an owner.

In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of ownership, or a grant from him do not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can be otherwise accounted for, on a presumption of a surrender of its ownership. FAKIR SHAH BULDIN *v.* SECRETARY OF STATE, 6 S. L. R. 210 **565**

——————— **s. 114** **179**

——————— **s. 114 Ill. (b)** **321, 534**

——————— **s. 114 Ill. (e)** **591**

Evidence Act—concld.

——————— **s. 122**—*Communication between husband and wife—Disclosure not to be permitted except with consent—Consent cannot be implied—Duty of Court to ask whether consent given or not—Proof of guilt by circumstantial evidence—Nature of evidence required.*

Under section 122 of the Evidence Act, no communication between husband and wife can be disclosed by the one against the other without consent of the party concerned. The consent cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given whether he or she would consent to the evidence being given, and not to admit it unless such consent is given.

Where it is sought to prove an offence on circumstantial evidence only, there must be a chain of evidence, or series of established facts so far complete as to leave no reasonable ground for a conclusion therefrom consistent with the innocence of the accused. BISHEN DAS *v.* EMPEROR, 14 CR. L. J. 316; 244 P. L. R. 1913 **1004**

——————— **s. 122**—*Communication between husband and wife not to be disclosed without consent of the other party.*

Statements alleged by the wife of an accused person to have been made to her in respect of the offence with which he is charged, without the accused or his representative-in-interest consenting to these statements being disclosed, are inadmissible under section 122 of the Indian Evidence Act. MILKHI *v.* EMPEROR, 14 CR. L. J. 273; 218 P. L. R. 1913; 24 P. W. R. 1913 CR. **705**

——————— **s. 133** **179, 321**

——————— **s. 157** **452**

Exchange deed not registered, effect of **236**

——————— **or sale** **301**

Excise Act (I E. B. & A. of 1910), ss. 53, 72—"Kameswar Modak"—*Mixture containing* bhang—Bona fide *medicated article—Manufacture and sale whether punishable.*

The accused, a *Kaviraj*, was convicted under section 53 of the Eastern Bengal and Assam Excise Act for manufacturing and selling an exciseable article, namely, a mixture called *Kameswar Modak* which contains *bhang*.

The defence of the accused throughout was that the article in question was a *bona fide* medicated article prepared by him for medicinal purposes:

Held, that the accused was protected by section 72 of the Act. SATISH CHANDRA ROY *v.* EMPEROR, 14 CR. L. J. 300; 17 C. W. N. 939 **956**

——————— **s. 72** **959**

Execution of decree. *See* CIVIL PROCEDURE CODE, 1882, s. 311 **296**

——————— *See* CIVIL PROCEDURE CODE, 1908, s. 47 AND O. XXI.

——————— Appeal from preliminary decree—Final decree subsequently passed—Preliminary decree set aside on sale **630**

——————— Attachment of immoveable property of agriculturist—Sale without object—Right to recover property by subsequent suit barred—Burden of proof—Presumption—Proceedings of Court **591**

Execution of decree—contd.

——————Auction sale set aside—Power of Court to order refund of money paid by auction-purchaser—Subsequent agreement between decree-holder and auction-purchaser—No bar **439**

——————Compromise between appellant and defendant who appeared—Right reserved in favour of defendant not appearing—Whether right enforceable by that defendant in separate suit—Execution of compromise decree by defendant who appeared—Objection by defendant who did not appear—Whether the fact estops him from enforcing right in suit **915**

——————Mortgage decree under old Code—Several applications for execution—Last application under new Code, but after twelve years from decree—Applicability of the new Code **391**

——————*Claim—Claim allowed decree-holder not appearing—Subsequent setting aside of order—Jurisdiction—Civil Procedure Code (Act V of 1908), O. IX, r. 13, whether applicable to execution proceeding—Civil Procedure Code (Act V of 1908), s. 141.*

Section 141 of the Civil Procedure Code has not the effect of making all the procedure provided by the Code applicable to proceedings in execution.

Order IX, rule 13, does not apply to a proceeding in execution.

Therefore, where a claimant makes an application under Order XXI, rule 100, and the application is granted under rule 101 in the absence of the decree-holder, the Court has no jurisdiction to set aside the *ex parte* order under Order IX, rule 13. HARI CHARAN GHOSH *v.* MANMATHA NATH SEN **683**

——————*Decree giving life-estate to decree-holder—Death of decree-holder—Decree incapable of execution.*

Where a decree is passed giving life-estate to the decree-holder in a property, the decree becomes incapable of execution if the decree-holder dies before the execution of the decree. SHEOKARAN *v.* MAHADEO SINGH, 11 A. L. J. 454 **375**

——————*Decree-holder, whether can discontinue execution proceedings at any stage—Order allowing execution to be withdrawn, if appealable—Appeal—Execution proceedings—Civil Procednre Code (Act V of 1908), s. 47—Bid—Offer—Finality—Acceptance—Bid, if may be withdrawn before acceptance.*

A deree-holder cannot, as a matter of right, discontinue the execution proceedings at any stage at his option.

An order allowing the decree-holder to withdraw the execution proceedings, does not determine any question between the parties to a suit relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, and is not, therefore, appealable.

Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to. Therefore, it is competent to the bidder to witdhraw his bid before the sale has been completed, that is, before the acceptance of the bid. KENARAM *v.* KAILASH CHANDRA, 18 C. L. J. 53 **904**

Execution of decree—contd.

——————*Execution proceeding against deceased judgment-debtor—Minor son and widow not brought on record—Auction sale set aside—Irregularity—Agra Tenancy Act (II of 1901), s. 193.*

A decree was obtained against several persons including one *A*. The decree was put in execution but no steps were taken to bring the minor son of *A*. on the record in place of *A*. who had died. The minor son of *A*. also died before the sale and his heir was also not brought on the record:

Held, that the proceedings were throughout irregular and the sale ought to be set aside. *Musammat* RUKMIN *v.* JODHA SINGH **120**

——————*Limitation—Date of decree—Date of judgment—Delay in complying with Court Fees Act in stamping decree—Payment of Court-fee to complete decree—Step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Art. 182 cl. (5).*

Whatever the date on which a decree may be stamped as required by the Court-Fees Act, the date of the decree for the purposes of Article 182 of Schedule I of the Limitation Act of 1908 must be taken to be the date of the judgment.

The payment of the Court-fee is merely a proceeding for validating the decree, and is not a step-in-aid of execution. BHAJAN BEHARI SHAHA *v.* GIRISH CHANDRA SHAHA, 17 C. W. N. 959 **410**

——————*Mortgage-decree passed when old Civil Proceaure Code in force—Expiry of twelve years—Application for execution—Which Code applicable—Civil Procedure Code (Act XIV of 1882), s. 230—Civil Procedure Code (Act V of 1908), s. 48—General Clauses Act (X of 1897), s. 6 cls. (c) and (e).*

A decrree-holder was entitled to execute a decree passed under the old Code of 1882 in accordance with the provisions of that Code so long as it was in force; he had no vested right in the procedure prescribed by the Code.

Therefore, if he applied for execution of the decree after the passing of the new Code, provisions of the new Code would apply.

Section 230 of the old Code enacted that a money decree should not be executed after the expiration of 12 years from the date of the decree. That section did not apply to a mortgage-decree which could, therefore, be executed at any time. But section 48 of the new Code lays down that no decree should be executed after 12 years from the date of the decree.

Therefore, an application for the execution of a mortgage-decree, passed when the old Act was in force, filed after 12 years from the date of the decree cannot be entertained if the new Act has come into operation at that time. JAIMANGALBATI MISRAIN *v.* BADAN CHAND DAS **899**

——————*Order in execution proceedings binding on parties—Burden of proof that decree cannot be executed.*

An order passed in the course of execution proceedings is binding on the parties to the proceedings.

The onus of showing that a decree cannot be executed lies on the person alleging it. FATEH CHAND *v.* *Musammat* MENGHI BAI, 108 P. W. R. 1913; 181 P. L. R. 1913 **481**

Execution of decree—concld.

———— ———— ———— ———— *Sale — Application to set aside sale on ground that application for execution was time-barred—If maintainable.*

A judgment-debtor seeking to set aside a sale, which had actually taken place, cannot take the point that the application for execution was time-barred. KAMAR-UD-DIN *v.* MANMATHA NATH MANNA **377**

———— ———— ———— ———— *Surety of judgment-debtor—Undertaking that judgment-debtor would apply in insolvency—Death of judgment-debtor before specified time—Right of decree-holder to enforce conditions of undertaking—Civil Procedure Code (Act V of 1908), s. 55, sub-ss. (3), (4).*

The conditions of an undertaking given by a surety that a judgment-debtor would apply in insolvency within a specified time and that he would appear in Court whenever he was required to do so, cannot be enforced if the judgment-debtor die before the time of his appearance in Court had arrived. In that case, it is impossible for the surety to produce the judgment-debtor, and the decree-holder loses his remedy against the surety. NABIN CHANDRA HAZARI *v.* MRITUNJOY BARNIK, 17 C. W. N. 1241 **981**

Executor *de son tort*—Trustee purchasing a permanent tenancy in the estate—Purchase to be held for the benefit of the minor **844**

Ex parte decree. *See* CIVIL PROCEDURE CODE, 1908, O. V, R. 20 **425**

———— ———— ———— ————, setting aside of—Notice imperative **241**

Extension of time fixed in pre-emption decree **347**

Fair Comment. *See* DEFAMATION.

Fishery rights—*Rivers tidal but not navigable, to whom belong—Government or proprietor of estate—Public navigable waters.*

The Government is *prima facie* the owner of fishery rights in all waters which come within the description of public navigable waters, whether tidal or not. But the rights of fishery in small rivers which are tidal but not navigable belong to the proprietors through whose estates they run. SRIMANTA BAGDI *v.* NIRANRTA JELIA, 17 C. W. N. 1108. **893**

Fishing—Tank on village site—Rights of owners—*Taluk* Board—Right of fishing **727**

Forfeiture. *See* LANDLORD AND TENANT.

———— **of grant** **876**

Forgery. *See* PENAL CODE, s. 467.

Form of suit. *See* SUIT.

Fraud in the performance of contract **406**

————, *decree obtained by—Res judicata—Decree to be vacated for fraud—What constitutes fraud on Court—Discretion of Court.*

It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. But an unsuccessful party cannot be allowed to get round the rule of *res judicata* and to prove that the judgment was wrong; because the Court came to a wrong conclusion on the evidence before it.

Fraud—concld.

The mode of rectifying an erroneous judgment is by appeal or by review.

A fraud to vacate the judgment must be extraneous to everything which has been adjudicated upon by the Court and not any fraud which has been already dealt with by the Court. The rule allowing the vacating of judgment for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. The judgment of Court includes the decision of the questions whether the testimony of any witnesses is true or false and whether the document produced in evidence is genuine or not.

The power of Court to set aside a judgment on the ground of fraud is discretionary. LOGADAPATTI CHINNAYYA *v.* KOTLA RAMANNA, (1913) M. W. N. 387; 13 M. L. T. 421; 25 M. L. J. 228 **579**

General Clauses Act (X of 1897), s. 6 (c) and (e) **899**

Ghatwali tenure **776**

Gift—Construction of deed **387**

————*Agreement among members of a* Maha Brahman *family to receive funeral offerings on particular days—Valid agreement—Gift made to individual member of that family—Suit to recover the gift—Civil Procedure Code (Act V of 1908), s 9.*

The members of a certain *Maha Brahman* family, with a view to avoid dispute as to the division of the funeral offerings made to the family, entered into an agreement under which certain members of the family were to get offerings made on certain days of the month and certain other members, those on other days. A man died on a day which belonged to the plaintiff who was a female. The donor being of opinion that the gift would be more efficacious if it were made to a male, made the gift to the defendant:

Held, (*Richards, C. J.*, dissenting) that the plaintiff could not recover the gift made to the defendant inasmuch as it had distinctly been made to the latter in his individulal capacity and not as a member of the *Maha Brahman* family.

Richards, C. J.—If the offering was of the nature which was included in the agreement between the parties, the wishes of the donor could not regulate their rights. The defendant was bound to make over the gift made to him on plaintiff's day. SONA DEI *v.* FAKIR CHAND, 11 A. L. J. 363, **990**

Government of India Act (21 & 22 Vic. C. 108), s. 3 **353**

Grant. *See* CONSTRUCTION OF GRANT: INAMDAR.

———— **of land**—*Bestowal of hereditary office—Coupled with grant of land—Land not resumable—Service or duty sole motive of grant—Failure or refusal to perform service or grant—Forfeiture of grant—Terms of grant unknown—Difficult to decide duty or service to have been the sole motive or condition of grant.*

Where an hereditary office is created, and bestowed hereditarily upon a person's family from generation to generation, and lands are assigned as remuneration therefor, the lands so granted are not resumable.

But where there is a grant of land burdened with duty or service, the duty or service being the sole

Grant—concld.

motive and condition of the grant, on failure or refusal to perform the duty or service, the land is resumable.

Where there is an interest in land coupled with duty, and the grant is not forthcoming so that its actual terms may be known it must always be a matter of great difficulty, and no more than a mere conjecture, to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former. MADHVACHARYA RAMCHANDRACHARYA *v.* SHRIDHAR NARASINHA BHAT, 15 BOM. L. R. 357; 37 B. 409 **876**

Grazing rights **890**

Guardian—*De facto* guardian—Alienation of immoveable property of minor—Powers of guardian *de facto, de jure* **911**

Guardians and Wards Act (VIII of 1890), ss. 7, 15—*Courts to judge the necessity of appointing guardian—No need of guardian when minor's mother is competent to manage her minor son's property,*

It is a mistake to assume that merely because an application is made a guardian must be appointed. The first thing to be done is to consider whether it is really necessary to appoint a guardian at all.

Where the mother of a minor son is managing the affairs of her son properly no guardian need be appointed. *Musammat* DEOKI *v.* BAKHT MAL, 20 P. W. R. 1913; 118 P. L. R. 1913 **783**

——— **s. 7**—*Guardian—Mother—Uncle.*

Until the contrary is proved, a mother is the proper guardian for the person and property of a minor and preference is not to be given over her to the minor's uncle especially when he is separate and was not on good terms with the minor's father during his lifetime. The fact that she will seek the assistance of her relatives in managing the property ordinarily is not objectionable. PERTAP KAUK *v.* JAWALA SHAH, 62 P. L. R. 1913; 12 P. W. R. 1913 **428**

——— ——— ——— **s. 17** — *Competition between minor's maternal grandmother and paternal grandfather's brother — Effect of failure to give security.*

A minor's maternal grandmother should be appointed guardian both of his person and property in the presence of his paternal grandfather's brother when the welfare of the minor so requires it.

The District Court is justified in superseding a guardian who does not furnish security within the fixed time. BUTA *v. Musammat* BHAGAN, 45 P. W. R. 1913; 192 P. L. R. 1913 **609**

——— ——— ——— **s. 26**—*Removal of father from guardianship—Neglect of education of minor—Grounds for removal.*

A father was appointed guardian of the person and the property of his minor sons.

He had precarious means of living, laid claim to his minor sons' money, neglected their education, and took another wife:

Held, that from the point of view of minor's welfare, the father was not a fit person to act as guardian and should be removed. GANGA NARAIN *v.* KAUNSILLA, 11 A. L. J. 209 **65**

Guardians and Wards Act—concld.

——— ——— ——— **ss. 29, 30**—*Permission obtained by guardian from Court to mortgage particular land of minor for specified amount—Mortgage by guardian of larger quantity of land for smaller amount—Mortgage, whether voidable—Suit upon mortgage after ten years—Limitation—Contract Act (IX of 1872), s. 64.*

The guardian of a minor obtained leave to mortgage 7 *kanis* of land in a certain *taluk* belonging to the minor for Rs. 200. The mortgagee knew this, but he advanced Rs. 175 to the guardian on a mortgage of 7 *kanis* in that *taluk* and 6 *kanis* in another *taluk* belonging to the minor. After ten years he brought a suit on the mortgage:

Held, that the mortgage effected was not the mortgage for which leave was given, but was essentially different from it; that the mortgage was entered into with the knowledge of the mortgagee in disobedience of the order of the Court; that the mortgage was, therefore, voidable; that the mortgagee's suit against the guardian is now barred by limitation; and that the mortgagee is not entitled to recover the money as under section 64 of the Contract Act for that claim is barred by limitation. HRIDOYTRRA *v.* SRINATH CHAKRAVARTI **624**

——— ——— ——— **s. 30** **624**

Gujarat Talukdars Act (Bom. Act VI of 1888), ss. 31, 33—*Incumbrance by* jiwaidar—*Adverse possession as an incumbrancer—Inapplicability of sections* 31, 33—*Bombay Land Revenue Code (Bom. Act V of* 1879), *s.* 79A—Talukdari *Settlement Officer incompetent to evict the mortgagee adversely holding as incumbrancer for more than* 12 *years.*

The field in suit was originally part of the *Talukdari* estate owned by one *J.* who, in 1862, granted it to *G.*, father of the defendant, as a cadet of the *Talukdar* family for *jiwai* or maintenance. On the 19th of April 1889 *G.* mortgaged the field with possession to the plaintiff's father. In 1894 the mortgagor died and in 1895 the mortgagee died. But after the death of the mortgagor the mortgagee and subsequently his son remained in possession of the field claiming to hold as mortgagees. In 1907 the *Talukdari* Settlement Officer purporting to act under the provisions of section 79A of the Land Revenue Code, as amended by section 33 of the Gujarat Taulkdars Act, summarily evicted the plaintiff, who brought a suit for possession of the field:

Held, that the plaintiff was entitled to succeed on the ground that he had been in adverse possession claiming title as an incumbrancer for more than twelve years since the death of *G.*

The plaintiff's mortgage was not an incumbrance within the purview of section 31 of the Talukdars Act, 1888, the possession of the incumbrancer claiming by virtue of adverse possession would not be an occupation in contravention of any of the provisions of the Act referred to in section 33 (2), clause (*cc*), for the purpose of supplementing the provisions of section 79A of the Land Revenue Code, hence, the Collector had no authority to interfere with the plaintiff's possession. TALUKDARI SETTLEMENT OFFICER *v.* RIKHAVDAS, 15 BOM. L. R. 378; 37 B. 380 **891**

——— ——— ——— **s. 33** **891**

Hereditary office, bestowal of, with grant of land—Forfeiture **876**

High Court—Jurisdiction—Revision **197**

High Courts Act (24 & 25 Vic. C. 104), ss. 14, 15 197

Hindu Law—Adoption—Agarwal *Banias* of Zira—Custom **669**

——— ——— ——— **by widow** *under authority of son's Will—Consent of* sapinda—*Nearest* sapindas *at the time of adoption objecting—Adoption invalid—Consent given withdrawn.*

In the case of adoption by a Hindu widow, a consent previously obtained from a deceased *sapinda* cannot be efficacious to validate the adoption, if it is not approved by the persons who are the nearest *sapindas* at the time the adoption is actually made.

An adoption made by a Hindu widow with the authority of her deceased son granted under a Will, but contested by the reversioners by suit, is not valid in law.

Semble.—If a *sapinda* who has given his consent withdraws it afterwards, the widow would not be entitled to act upon such consent. MANI *v.* SUBBARAYAR, 24 M. L. J. 484; 36 M. 145 **663**

——— ——**Alienation.** *See* HINDU LAW—WIDOW.

——— ——— ——— ——Power of *Mahant* to alienate property **219**

——— ——— ——— ——— **by widow** — Transferee's right to recover debt—Legal necessity **138**

——— ——— ——— ——— ——*Declaratory suit by remoter reversioner while nearer reversioner is alive.*

The plaintiffs sued for a declaration that an alienation made by the Hindu widow was not binding on them. There was no allegation in the plaint that the plaintiffs were suing as distant reversioners, the nearer reversioners having done something to prevent them from bringing the suit. As a matter of fact, the plaintiffs had sued as next reversioners but were proved to be remote:

Held, that the suit could not be maintained. MEGHU RAI *v.* RAMKHELAWAN RAI, 11 A. L. J. 382; 35 A. 326 **814**

——— ——— **Custom**—Alienation by widow—*Khatris* of Kauntrila **730**

——— ——— ——— ——*Bhalias* **87**

——— ——— ——— ——— ——*Brahmans* of Tahsil Gujjar Khan **855**

——— ——— ——— ——— ——*Gour Brahmans* of Kharkhanda, District Rohtak **215**

——— ——— **Debts**—*Son's liability to pay father's debts—Debt created by decree of Court—Illegal or immoral purpose—Contract Act (IX of* 1872), *s.* 23—*Decree in suit for damages for breach of contract to sell trust property—Execution against ancestral property in the hands of sons.*

Under Hindu law, sons are bound to pay all debts of their father, unless shown to have been contracted for illegal or immoral purposes.

Debts contracted for illegal or immoral purposes are merely debts of which the consideration or object is not lawful or is immoral within the meaning of section 23 of the Indian Contract Act.

Hindu Law—contd.

A decree creates a debt, and in deciding the question of a Hindu son's liability we must look to the purpose for which the debt was created, and not to the circumstances under which the original liability was incurred.

A debt of the father arising out of a decree passed against him for damages for breach of contract to sell property held by him as a trustee, is enforceable against his son's share of the ancestral property of the family. SAMANMAL *v.* MAGHANMAL, 6 S. L. R. 150 **378**

———— **Gift** of funeral offering **990**

——— ——— *executed by father on his own behalf and on behalf of his minor son—Void or voidable.*

A gift executed by a Hindu father on his own behalf and on behalf of his minor son is voidable at the instance of the minor son. SHEO GULAM *v.* BADRI NARAYAN LAL, 11 A. L. J. 798 **560**

——— ——— **Joint family**—Alienation—Necessity—Prosecution of individual members, no necessity for alienation of family property **908**

——— ——— ——— Dispute between father and son—Award—Arbitration **638**

——— ——— ——— ——— Members of Hindu joint family—Act of adult members for minor's benefit—Question taken up by Court *suo motu* **411**

——— ——— ——— Power of father or managing member to bind minors **515**

——— ——— ——— ——Satisfaction of decree certified by manager of joint Hindu family—Whether binding on other members of the family **645**

——— ——— ——— ——Managing member of joint Hindu family placing whole joint family property under the management of Central Provinces Court of Wards—Interest of member of family—Power of managing member—Power of the Chief Commissioner under the Act—Proposal for mortgage of property under Court of Wards sanctioned—No necessity for a particular transaction of mortgage or its precise terms—Applicability of the Act to joint Hindu families—Conveyancing little understood in country parts of India **521**

——— ——— ——— ——*Family trade— Death of father—Inheritance by minor son—Liability of minor son for debts of trade—Liability limited to his share in assets of business.*

A trade, like other property, will descend upon the members of a Hindu undivided family, and is often a valuable inheritance for the preservation of which it is essential that the family manager should be entitled to enter into trade transactions on behalf of all including the minor members of the family.

But a Hindu infant, who on the death of his father becomes entitled to an interest in a joint family business, does not necessarily become a partner in that business.

His liability, therefore, is not the same as that of an adult partner, but should be limited to his share in the assets of the business if any.

A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. ANATH BANDHU SAHA *v.* BIPIN BEHARI PODDAR **6**

Hindu Law—contd.

——— Joint family—*Mortgage by father—Legal necessity—Antecedent debt—Test—Distinction between duty to pay father's debts, and being bound by father's alienations—Alienation by one co-parcener to the extent of his share.*

In the case of a mortgage of ancestral property by the father of a joint Hindu family governed by the *Mitakshara*, legal necessity for cash advanced over and above the amount of a prior mortgage, cannot be presumed, merely from the recital in the mortgage-deed that money was borrowed for private expenses, and the existence of the prior mortgage, and large family of the mortgagor.

In the absence of legal necessity, however, the mortgagee of ancestral property from a Hindu father is at least bound to show that the debts for which the mortgage was effected were antecedent to that transaction.

The true test seems to be whether the payment and the transfer are in reality a single transaction or not.

There is a distinction between a son's pious duty to pay his father's debts and his liability to be bound by his father's alienations of ancestral property, the rule to pay father's debts ought not to be pressed to all its logical consequences.

Provided that an alienation is for value, in the Central Provinces one co-parcener may dispose at his pleasure of ancestral undivided estate by private conveyance to the extent of his own share. HIRA RAM *v.* UDHE RAM, 9 N. L. R. 74 **861**

——— ——— ——— ——— *in partnership with third person—Joint family partition — Annual revenue accounts—Discontinuance—Capital account—Dissolution of partnership—Limitation Act (IX of 1908), Sch. I, Art. 106.*

Plaintiff's family owned a half share along with the defendant in a partnership business carried on in *K*.

Prior to 1891 detailed accounts, suitable to a current partnership business, were annually rendered between the parties.

In 1891, however, the account furnished was not a revenue but a capital account, showing a complete division of the partnership shares.

From that time forward, the defendant managed the business without any interposition or interference by the joint family or any representative thereof in their interest.

In 1901 a letter of the members of the joint family written to the defendant after certain admissions as to the nature and limit of his connection with the business at *K*. narrated their unanimous request for a settlement according to a verbal arrangement made previously between parties.

A partition had taken place of the joint family property:

Held, that the cessation of the annual accounts points to some radical change having taken place, and the other circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm in the year 1891.

The suit, therefore, initiated eleven years after that event is barred by Article 106 of the Limitation Act. JOOPOODY SARAYYA *v.* PULAVATRI LAKSHMANASWAMY, 11 A. L. J. 556; 18 C. L. J. 13; 15 BOM. L. R. 634; 14 M. L. T. 7; 17 C. W. N. 1006; (1913) M. W. N. 571; 36 M. 185; 25 M. L. J. 128 **513 P. C.**

Hindu Law—contd.

——— Joint family—*Separation—Alienation by one member of joint family, whether valid.*

A member of a joint Hindu family cannot mortgage the family property without the consent of the other members of the family even to the extent of his share in the property.

In a joint family portions of the income of the joint family property may, by mutual arrangement, be enjoyed by the different members but such enjoyment does not necessarily have the effect of causing a severance of the joint nature of the joint family property. BUDH SINGH *v.* KAWAL NAIN **430**

——— ——— ——— ——— *Succession—Survivorship—Presumption when rebutted—Will of joint property.*

Where it is shown that for many years past two Hindu brothers had nothing in common except their ancestral house in which they had lived separately and had remained separate in food, income, expenditure and worship, the ordinary presumption of Hindu Law of every family being joint falls to the ground and the rule of survivorship does not apply in such a case. The Will by one brother of his share of the joint property in favour of his distant collateral is valid. SHAM LAL *v.* CHHAJJU MAL, 31 P. W. R. 1913; 76 P. L. R. 1913 **51**

——— ——— Marriage—*Marriage expenses of a co-parcener—Marriage a* samskar *—Expenses—Necessity.*

According to the Hindu Law marriage is a *samskar* and hence the marriage of every co-parcener is a family necessity. The texts referring to the marriage of brothers should be construed as illustrative of the general rule and not as excluding other co-parceners. POHUMAL *v.* NAROOMAL, 6 S. L. R. 246 **835**

——— ——— Minor—*Power to make Will—Majority Act (IX of 1875)—Probate—Burden of proof of age—Recital in a Will—Evidence Act (I of 1872), ss. 32 (5), (6), 157—Admission register—Admissibility under section 157.*

Under Hindu Law a minor is incompetent to perform juristic acts; he cannot make a Will, the law in this respect being the same as for gifts.

The question of the age at which a Hindu can make a Will is governed by the Indian Majority Act.

Where the ground of defence is the minority of the testator, the onus is on the party propounding the Will to prove that the alleged testator was of full age.

The question of onus is not of much importance when the whole of the evidence is before the Court.

The recital in a Will about the age of another person, when that recital is not merely incidental, is admissible in evidence as to the age of that person at that time under section 32, clauses 5 and 6 and illustration (*l*) of the Evidence Act.

The admission register of pupils in a school in which their ages are entered may be used as corroborative evidence under section 157 of the Evidence Act. KRISHNAMA CHARIAR *v.* VEERAVELLI KRISHNAMA CHARIAR, 13 M. L. T. 385; (1913) M. W. N. 355; 24 M. L. J. 517 **452**

——— ——— Mortgage—*Mitakshara*—Mortgage of ancestral property by father—Suit for sale against sons—Money charged on immoveable property **878**

Hindu Law—contd.

———Mortgage by father—*Legal necessity for contracting debt at high rate of interest —Burden of proof on mortgagee.*

It is the duty of a mortgagee to prove necessity for the loan at the high rate of interest agreed on by the manager of a Hindu family. RAO RAGHUNATH SINGH *v.* NAZIR BEGAM **639**

——————— debt — *Alienation by widow—Transferee's right to recover the debt—Legal necessity.*

Where a Hindu widow transfers her right to recover a mortgage-debt due to her husband, the transferee can maintain a suit to recover that debt during the life-time of the widow even though the transfer is without legal necessity. DURGA KUNWAR *v.* MATRUMAL, 11 A. L. J. 317; 35 A. 311 **138**

———Partition—*Ancestral property, partition of, by father, with the consent of co-parceners—Consent of a co-parcener binds his sons—Construction of document.*

A Hindu father has no right to make a partition by Will of ancestral property of the family among its various members without their consent.

When consent is given to such an arrangement, it would bind not only the members, giving it but also their sons, as such members would be representing in the transaction their respective branches of the family.

Where a document makes partition of the family property in fact, and such partition is acted upon by all parties for a long time without any dispute or misunderstanding as to their respective rights under it, the mere fact that the document is called a Will, would not invalidate the partition.

Provision was made in a document of the foregoing nature to the effect that in case of mismanagement or bad character of the sons, amongst whom the father had divided the family property, the document would be cancelled:

Held, that this was merely a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. BRIJRAJ SINGH *v.* SHEODAN SINGH, 17 C. W. N. 949; (1913) M. W. N. 515; 11 A. L. J. 698; 14 M. L. T. 11; 18 C. L. J. 57; 15 BOM. L. R. 652; 35 A. 337 **826 P. C.**

————————*Son's right to separate share*—Aroras.

In the Punjab, an *Arora* son has no right to compel partition during the life-time of his father or to have his share of the ancestral property separated and allotted to him. TULSI RAM *v.* SHIB DAS, 5 P. R. 1913; 228 P. L. R. 1913 **11**

———Shebaitship—*Ballavacharya Gossain temple--Whether* debutter *property—Performance of worship as evidence*—Shebaitship *vested in heirs of the founder—Daughter of Ballavacharya Gossains married to* Bhats *and* Bhat *girls married to Ballavacharya Gossains of the Gossain* kul—*Daughter's sons not of the* kul.

In determining whether certain property in suit is *debutter*, and not the private property of an individual, the performance of worship in accordance with the rites of the sect for whose benefit it is held, may be treated as good evidence of dedication.

Hindu Law—contd.

According to Hindu Law when the worship of a *thakoor* has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution, provided, of course, that the devolution in the ordinary line of descent is not inconsistent with, or opposed to, the purpose the founder had in view in establishing the worship.

Whilst the daughters of the Ballavacharya Gossains married to Bhat husbands continued to live in their father's houses and remain within their father's *kul*, their sons do not acquire that status, thus the sons of daughters being Bhat, not belonging to the Gossain *kul*, are debarred from taking part in the ministrations at the Gossain temples for the benefit of the worshippers.

Bhat girls, however, married into the Gossain *kul* receive the *mantras* for the purposes of initiation and become thenceforth members of that *kul*. MOHAN LALJI *v.* TIKAIT SRI GORDHAN LALJI, 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 BOM. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 35 A. 283 **337 P. C.**

———Succession—*Brahmans* of Bahtiwal, Tahsil Hoshiarpur **612**

————————*Bengal School — Prostitute*—Stridhan *property—Undegraded relations—Outcast—Tie of kindred*

When a person becomes an outcast, he is not, in the contemplation of Hindu Law, civilly dead for all purposes, nor is the tie of relationship which connected him with his kindred completely severed.

Therefore, when a Hindu woman lapses into prostitution, the tie of her relationship with her kindred is not severed so as to render it impossible for the kindred to claim her estate by inheritance. Consequently in the absence of nearer heirs, her *stridhan* property will pass to her brother's son as an heir under the Bengal School of Hindu Law. HARI LAL SINGH *v.* TRIPURA CHARANI ROY, 17 C. L. J. 438: 17 C. W. N. 679 **129 F. B.**

————————*Exclusion — Leprosy as a ground must be sanious or ulcerous—Texts considered.*

The defendant in the case was sought to be excluded from inheriting his paternal uncle's son's estate on the ground of leprosy. The finding of the Courts below was that he was suffering from the anæsthetic form of leprosy and that it was in the medium stage. The medical opinion was that the disease was incurable:

Held, that the defendant was not debarred from inheriting and that, to be a bar, the leprosy must be of the sanious or ulcerous type.

The curability or otherwise of a disease is very much a matter of opinion and what is regarded as incurable at one time may be regarded as curable at another. Many of the grounds of exclusion would not now be enforced by the Courts.

Quære:—Whether in a real case of inheritance to a deceased person, as opposed to a case of partition, even leprosy of the sanious or ulcerous type would be recognized as a bar in this Presidency at the present day.

Hindu Law—contd.

The texts relating to exclusion from inheritance and the grounds therefor discussed. KAYAROHANA PATHAN *v.* SUBBARAYA THEVAN, 13 M. L. T. 460; (1913) M. W. N. 642; 25 M. L. J. 251 **690**

———**Succession**—*Dayabhaga School — Paternal great-grandfather's son's daughter's son—Mother's brother—Who is preferable.*

A paternal great-grandfather's son's daughter's son, that is, a granduncle's daughter's son is the preferable heir according to the Dayabhaga School of Hindu Law, than a mother's brother. KAILASH CHANDRA ADHIKARY *v.* KARUNA KANTHA CHOWDHURY **677**

———*Thakurs — Illegitimate son—Persons living as husband and wife—Presumption as to legitimacy—Burden of proof.*

When two persons live together as husband and wife apparently any one alleging that a child born to such persons is illegitimate must prove it, but when it is admitted that the woman was the wife of another person and was turned out by him on account of adultery the burden is shifted on to the other side.

The illegitimate son of a Thakur cannot inherit as against the legitimate nephews of the deceased. PANCHAM *v.* HAZARI **634**

———**Widow.** *See* HINDU LAW—ALIENATION.

———*Alienation—Mortgage—Portion of husband's estate—Mortgage with consent of next reversionary heir—Without proof of legal necessity or reasonable inquiry and honest belief on mortgagee's part—Validity—Whether binding on actual reversioner—Presumption of validity—Rebuttable by more cogent proof.*

The alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence on the part of the mortgagee, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof. DEBI PROSAD CHOWDHRY *v.* GOLAP BHAGAT, 17 C. W. N. 701; 17 C. L. J. 499 **273 F. B.**

———*Alienation—No legal necessity—Reversioner attesting the deed of transfer—Consent—Estoppel—Presumption from witnessing a document—Reversioner dying during pendency of suit—Legal representatires, right of.*

A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate with the concurrence of the reversionary heirs so as to bind the persons who are the next reversioners when the succession opens out on her death.

The fact of a person witnessing a document raises a strong presumption that he was aware of the nature of the transaction which he was witnessing.

If certain persons are brought on the record as the legal representatives of a deceased reversioner, suing for possession of land alienated by a widow, and it is found that the latter was estopped from maintaining the suit, it is not open to the legal representatives to dispute the validity of the sale in that suit in their own right. ISMAIL JOLAHA *v.* JAGANNATH **255**

Hindu Law—concld.

———**Widow**—*Mother succeeding son—Power of endowment—Temple built by husband—Idol installed without husband's authority by widow—Validity of endowment—Spiritual benefit.*

If a Hindu widow exceeds her power in making a religious endowment in respect of her husband's property, the entire settlement is void.

A Hindu built a temple but did not instal any idol therein nor did he authorise the installation of any idol. There was no evidence that he intended to set up an idol. After his death his son succeeded and after the death of the son, the son's mother succeeded. She executed a deed of endowment in respect of certain properties inherited by her from her son and established an idol:

Held, that she had only a very limited power of alienating property for religious purposes and that only when it could conduce to the spiritual welfare of her deceased husband; that the installation of an idol and the endowment of its temple did not come within the category of acts which conduce to the spiritual benefits of the deceased husband; that a Hindu widow cannot, therefore, endow an idol with her husband's property or a portion thereof to the detriment of the reversioners, for such a dedication could only be supposed to conduce to the spiritual benefit of the widow herself; that a mother's powers to conduce to the spiritual welfare of her son, whose property she has inherited, are less than those of a widow to promote the spiritual benefit of her husband, and that, consequently, the endowment in the present case was invalid. HARMANGE NARAIN SINGH *v.* RAM GOPAL ACHARI, 17 C. W. N. 782 **417**

Husband and wife—Communication between husband and wife not to be disclosed without consent of the other party **705**

Impartible Zemindari — Alienability — Burden of proof **596**

Improvements, meaning of—Usufructuary mortgagee in South Canara entitled to value of improvements **371**

Inam. *See* VILLAGE SERVICE INAMS ACT.

———, lease of **694**

——— Service *inam* land inalienable **881**

Inamdar—*Presumption of grant of* melvaram *only—Not in possession—Suit for ejectment of occupant—Burden of proof*—Melvaram *and* Kudivaram *rights—Grant by Government or by* zemindar—*Waste land.*

Where an *Inamdar* is not in possession and he seeks to eject the person who is, it would lie on him to show that both the *melvaram* and *kudivaram* rights are vested in him on the ground that he was in occupation when the *inam* was granted.

It is immaterial whether the grant of the *inam* is by the Government or by the *zemindar*.

The presumption that *melvaram* right alone was granted applies as well to grants made by the Government as to grants by the *zemindar*.

In the case of waste lands, however, the *inamdar* can ask the Court to hold that the *inam* consisted of the entire right in the property, if he can show that the lands were waste at the time of the grant. YEDDAMAPUDDI LAKSHMI NARASIMHA ROW *v.* REPALLI SITARAMASWAMI, 24 M. L. J. 288; (1913) M. W. N. 282 **440**

Incumbrance. *See* REVENUE SALE.

Inherent power of Court—Plaintiff dying during pendency of suit **526**

———————*Preservation of accuracy of record—Appeal—Bengal Tenancy Act (VIII of 1885), ss. 108A, 109A—Correction of entries*—Bona fide *mistake of Settlement Officer.*

Every Court has the inherent power to take steps for the preservation and the accuracy of its records, and to amend them when it is found that what has been recorded does not accurately represent what has been directed by the Court.

In a case where what was ordered by the Court was correctly recorded but was subsequently altered without authority and the alteration was sought to be supported by forged initials of the Judicial Officer of the Court so as to make detection difficult if not impossible, the Court has inherent authority to set the record right.

A Record of Rights had been prepared accurately, but an unauthorised interpolation had been made in it, which the Settlement Officer corrected:

Held, that the entry had not been made owing to a *bona fide* mistake of the Settlement Officer or of any of the parties within section 108A of the Bengal Tenancy Act; that no appeal lay to the Special Judge under section 109A; that, therefore, no second appeal lay to the High Court, and that the High Court could interfere in revision.

Held, further, that, if it be held that as the Settlement Officer purported to set under section 108A, an appeal lay to the Special Judge, then he having purported to act under section 109A, sub-section 2 a second appeal lay against his order to the High Court. BAUL CHAND SEN *v.* SIRISH CHANDRA SEN **916**

Injunction. *See* EASEMENT.

———— ——Barrister agreeing not to practise for a certain time **822**

———— ——One partner opening a rival business **250**

———— ————Temporary injunction—Whether appeal lies against order refusing temporary injunction **553**

———— ————*Suit to set aside revenue sale on ground of fraud—Restraining defendant from taking out certificate of sale—Point of insufficiency of notice not made before Revenue offices.*

In a suit brought to impugn a revenue sale on the ground of fraud, the plaintiff obtained an *ex parte* injunction against the defendant restraining him from accepting a certificate under the Revenue Sale Act, section 28, because the plaintiff apprehended that the defendant would be in a better position for the purposes of proof of service of the notices, having regard to the provisions of the Land Revenue Sale Act of 1868. The ground of insufficiency of the notices had never been advanced in the Revenue Offices, and no such point was advanced before the Commissioner:

Held, that the question of notice was one that could not be agitated in the present suit, under section 33 of the Revenue Sale Law, 1859, and that the injunction should, therefore, be discharged as it will have the effect of withholding from the defendant the certificate which, in the words of the Act, should now be

Injunction—concld.

given to him. R. G. BROWN *v.* MOFIZUDDIN CHOWDHURY **575**

Insolvency. *See* PRESIDENCY TOWNS INSOLVENCY ACT; PROVINCIAL INSOLVENCY ACT.

———— ————Breach of contract—Sale of goods deliverable at future date—Rights of injured party—Damages, measure of—Promisor becoming insolvent—Duty of Official Receiver in assessing damages **653**

———— ————*Adjudicated insolvent not discharged—Suit on pro-note in his favour—Official Assignee not interfering—Defendant cannot object—Negotiable instrument—Holder's right to sue.*

An adjudicated insolvent, who has not obtained either his personal or final discharge, may, even if all his property both present and future has been vested in the Official Assignee, sue on a promissory-note in his favour, provided that the Official Assignee does not interfere. It is not open to the defendant to raise the plea that the plaintiff has no right of suit on the note.

Under the law of Negotiable Instruments, the rule is that the holder of such an instrument at the time of action brought, *i. e.*, the person who is then entitled to receive its contents, is the only person who can sue on it. RAM BULLAB RHIRKAWALA *v.* BICKRAJ, 6 L. B. R. 174; 6 BUR. L. T. 81 **88**

Insolvency Act (11 and 12 Vic. c. 21), s. 3 **421**

———— ———— ————**s. 24**—*Presidency Towns Insolvency Act (III of 1909), s. 47—Fraudulent preference—Surety or guarantor of principal—Creditor—Acceptor or endorser of negotiable instrument—"Voluntary payment", meaning of—Adjudication under old Act—Applicability of new Act—Adjudication of principal partners of firm—Partnership—Act of manager.*

Any surety or guarantor, who might, should a bankruptcy supervene before the debt of the principal were discharged, be entitled to claim among the other creditors in bankruptcy, is himself always regarded constructively as a creditor when the question is one of fraudulent transfer.

This legal position, with its attendant rights and disabilities, is not in the least affected by the fact that the principal has not been, even could not have been, called upon to discharge the debt at the time the payment to the surety was made.

The acceptor or endorser of a negotiable instrument, which has not yet reached maturity, is, for the purpose of section 24 of the Insolvency Act (11 & 12 Vic. c. 21), a creditor in regard to the maker or drawer. Any payment, made by the latter to the former, if otherwise fulfilling all the requirements of section 24, would be as much a case of fraudulent preference as though it were made to a creditor whose legal rights were at the time of the payment actually complete and enforceable at law.

Where an insolvency occurs before the Presidency Towns Insolvency Act, 1909, came into force and the insolvent has been adjudicated under the old Insolvency Act, all questions, arising in the course of that insolvency, except questions of pure procedure,

Insolvency Act—concld.

would have to be determined by reference to the terms and the provisions of the old Act.

Section 47 of the Presidency Towns Insolvency Act occurs in a chapter which deals with ways of proving in insolvency, and describes the methods, in which, in certain circumstances, mutual debtor and creditor accounts, as between the insolvent and a creditor claiming in insolvency or being pursued by the Official Assignee for a debt to the insolvent's estate, are to be handled and adjusted.

Where a suit is brought under section 24 of the old Insolvency Act, the allegation being that it is a case of fraudulent transfer, section 47 of the Presidency Towns Insolvency Act cannot be logically involved.

The meaning of 'voluntary payment,' discussed.

There is a common and current confusion between the use of the terms "voluntary" and 'spontaneous". A payment made on demand, although it is not a spontaneous payment, may be a perfectly voluntary payment. A demand, unaccompanied by any threat or menace whatever, would not take a case out of the operation of section 24.

All that is necessary to be shown in order to bring section 24 into operation are two facts:— (1) that the payment was voluntary; (2) that it was made when the insolvent firm was in insolvent circumstances and within two months of its adjudication.

The act of the manager in a partnership firm must be taken to be the act of the firm.

A voluntary payment was made within two months before the adjudication of the principal partners of a firm. But two other partners were not adjudicated till some years after the payment. These partners were, however, obscure persons who did not contribute any capital and whose interests in profits were proportionate to the work they did as representatives of the firm in foreign territory:

Held, that the payment must be held to have been made within two months of the adjudication of the firm. R. D. SETHNA *v.* KALLIANJI SANGJIBHAI, 15 BOM. L. R. 113 **57**

——————— **s. 76** **421**

Insolvency petition—*Minor, position of.*

A minor cannot be declared a bankrupt or made party to a petition for insolvency. JANKI PRASAD *v.* GIRDHARI LAL, 16 O. C. 68 **704**

Insolvent-debtor—*Trust—Assignment without consent of creditors—No trust created—Remuneration of trustee not recoverable until whole work completed — Pleader trustee — Appropriating first assets realised as his fee—Improper conduct.*

An assignment to trustees for the benefit of creditors operates, in the first instance, as a mere revocable mandate to the assignees. No trust is created until the creditors, or some of them, have assented to the deed. Until such assent is given, the assignees are in the position of trustees *de son tort*. If the debtor be adjudicated insolvent before the assignees have been duly constituted trustees, the assets immediately vest in the Official Receiver.

Ordinarily, remuneration is not, recoverable by a trustee until all the conditions of the trust deed have been fulfilled, that is, until the whole work has been completed, and Courts look with disfavour on any

Insolvent-debtor—concld.

transaction which has the effect of eating up an estate to the direct gain of the trustee.

It is improper for a Pleader, who is appointed trustee under a deed of assignment for benefit of creditors, to appropriate the first assets realised as his fee, before any creditor has assented to the deed. HASSOMAL *v.* KOTUMAL, 6 S. L. R. 209 **443**

Insurance policy - Wife named as beneficiary —Attachment in execution of decree against assured's assets **736**

Interest—Contract to pay interest on instalments of rent **625**

—— ——Heavy rate—No undue influence or fraud proved—Mortgagor bound to perform his contract. **856**

———— —, claim for, under inadmissible promissory-note, not enforceable—Damages in lieu of interest may be awarded by Court **840**

—— ——*Mortgage—Puisne mortgagee not party to prior mortgagee's decree—Reduction of interest in decree—Puisne mortgagee cannot get benefit of the reduction.*

A puisne mortgagee suing to redeem a prior mortgage is not entitled to get the benefit of a reduction in the contract rate of interest allowed in the prior mortgagee's decree to which he was not a party. AWATMAL *v.* GOKALSING, 6 S. L. R. 227 **614**

Interpretation of statutes—Conflict **347**

——— ——— ———Definition of words **40**

——— ——— ———— Express provision regarding right of appeal under old law **348**

——— ——— —— ——Jurisdiction **759**

——— ——— ———Limitation statute **387**

——— ——— ———Madras Revenue Recovery Act **68**

——— ——— ———Penal enactment — Intention of Legislature **204**

——— ——— ——Statutes relating to procedure **793**

Judgment. *See* CIVIL PROCEDURE CODE, 1908, O. XX, R. 2.

——— ——— *in personam*—Estoppel **656**

Judicial possession. *See* POSSESSION.

—— ——— **Hypothec**—*Declaratory decree creating lien not executed—Lien not extinguished.*

A judicial hypothec or a lien created by a decree, which is substantially a declaratory decree, does not cease to exist, merely because an application was not made for execution of the said decree in accordance with the provisions of Article 179 of the second Schedule of the Limitation Act, 1877. FATEH CHAND *v. Musammat* MENGHI BAI, 108 P. W. R. 1913; 181 P. L. R. 1913 **481**

Jurisdiction. *See* VALUATION OF SUIT.

——— ———Appellate Court deciding that Court of first instance had jurisdiction—Revision **237**

Jurisdiction—contd.

——— ——— Suit by tenant for possession of land against landlord as alienee from guardian of the tenant when minor - Civil Court competent to hear —*Venue*, how decided **759**

——— ——— to revoke Probate never issued **406**

——— ——— to set aside claim petition allowed *ex parte* **683**

——— ——— *High Court—Criminal Bench—Revision—Order by Civil or Revenue Court under section 476, Criminal Procedure Code--Criminal Procedure Code (Act V of 1898), ss. 435, 439, 476—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 & 25 Vict. C. 104), ss. 14, 15.*

When action is taken by a Civil or a Revenue Court under section 476 of the Criminal Procedure Code, its proceedings may be revised by the High Court under section 115 of the Civil Procedure Code on any of the grounds mentioned therein, or may be examined under section 15 of the High Courts Act. A Bench of the High Court exercising criminal jurisdiction cannot, as such, deal with these matters unless authorised by the Chief Justice under section 14 of the High Courts Act to do so.

But when action under section 476 is taken by a Criminal Court, subordinate to the High Court, its proceedings are open to revision under section 439 of the Criminal Procedure Code. HAR PRASAD DAS *v.* EMPEROR, 17 C. L. J. 245; 14 CR. L. J. 197; 17 C. W. N. 647; 40 C. 477 **197 F. B.**

——— ——— *Magistrate's power to try case after having made over charge of his duties to his successor.*

A Magistrate has no jurisdiction to try a case after having made over charge of his duties to his successor. HIRA LAL *v.* EMPEROR, 14 CR. L. J. 239 **335**

——— ——— *Place of suing—Principal and agent —Creditor and debtor—Place of performance not fixed —Right to sue at place chosen by creditor.*

Where an agreement to pay money between a principal and his agent is to be performed without application by the principal, and no place is fixed for payment, it is open to the principal to institute a suit to recover the money due on the agreement at the place where he resides, without proving any implied agreement to pay at such place.

The burden in such a case is on the defendant to prove that some other place was by express or implied agreement fixed for performance. HEMANDAS *v.* DEVISHAH DIN DAYAL, 6 S. L. R. 81 **433**

——— ——— **of Chief Court**—Appeal from decree refusing to allow dissolution of marriage passed by District Judge in Upper Burma **53**

——— ——— **of Civil Court**—Completion of partition proceedings no bar to civil suit for determination of title **702**

——— ——— ——— Interpretation of statutes —"Divided estate"—Portion of *mitta* acquired by Government—Suit against Government for contribution towards assessment—Maintainability **68**

——— ——— ——— Suit for declaration of possession during the pendency of partition proceedings **399**

——— ——— ——— Suit for rent of private lands **8**

——— ——— ——— to try questions relating to honors in temple **257**

Jurisdiction—concld.

——— ——— **of Civil or Revenue Court**—Suit for produce of mortgaged land **981**

——— ——— ——— *Compromise filed in Revenue Court--Suit to have the compromise declared invalid on ground of fraud.*

A suit to have a compromise, filed in a suit exclusively triable by a Revenue Court, declared invalid on the ground of fraud is cognizable by the Civil Court. RAMNANDAN SINGH *v.* PARBHU NARAIN SINGH **666**

——— ——— ——— *Suit for possession against rival claimants—One of zemindars also a party.*

Plaintiffs brought a suit to recover possession of their tenancy holding from certain persons who claimed that holding under the right of alluvial accretion. One of the *zemindars* also was made a party to the suit:

Held, that the suit was cognizable by the Civil Court. NAKCHEDI AHIR *v.* RAM DAS RAI, 11 A. L. J. 447 **247**

——— ——— **of Court** to correct obvious mistakes in awards **496**

——— ——— ——— *to allow one party conditionally to draw money paid into Court pending decision—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 7, powers under—Investment not allowed.*

When a certain sum of money paid into Court is claimed both by the plaintiff and the defendant, the Court has no jurisdiction to allow one of the parties to draw out the amount on his furnishing security for restitution of the amount with interest at 6 per cent. in case the other party obtains a decree in his favour.

Order XXXIX, rule 7, does not apply since such an order amounts rather to an investment carrying interest not contemplated by the rule.

The successful party is entitled to the money from Court without further proceedings. DORASINGAM *v.* VYRAVAN CHETTIAR, 13 M. L. T. 326; 24 M. L. J. 404; (1913) M. W. N. 363 **219**

——— ——— **of Magistrate** to include in costs penalty on documents **306**

——— ——— ——— **of Small Cause Court.**

See SMALL CAUSE SUIT.

——— ——— ——— Suit instituted during the absence of a Munsif who had Small Cause Court jurisdiction and tried by his successor who had no such power **362**

Justification. *See* DEFAMATION.

Kidnapping. *See* PENAL CODE, s. 363.

Lakheraj—*Registration—Regulation XIX of 1793, ss. 24, 29—Supplying of information, omission of—Collector to enter information in register, effect of—Registration of* lakheraj *and long possession without payment of rent—Road Cess Return—Admission by proprietor of existence of* lakheraj*—Evidence—Evidence Act (I of 1872), s. 13.*

Lakheraj—concld.

A *lakheraj* was registered under the provisions of Regulation XIX of 1793 and the *lakherajdar* in compliance with the requirements of section 24 of the Regulation supplied the necessary information. The Collector, however, omitted to enter the information in a register in accordance with the requirements of section 29:

Held, that the omission of the Collector could not deprive the *lakherajdar* of his title:

Held, also, that the entry in the register kept in the Collectorate showing that the *lakheraj* was registered, taken together with the long possession of the *lakherajdar* without payment of rent, would be good evidence of his *lakheraj* title.

An entry in a Road Cess Return in which a former proprietor of an estate admitted the existence of a *lakheraj*, although not binding on the auction-purchaser of the estate at a revenue sale, is evidence under section 13 of the Evidence Act. MANMOHINI DASSI *v.* ADWAITA MAITI **548**

Land, meaning of **416**

Landlord and Tenant. *See* AGRA TENANCY ACT; BENGAL TENANCY ACT; CENTRAL PROVINCES TENANCY ACT; MADRAS ESTATES LAND ACT; PUNJAB TENANCY ACT.

——— ——— ———Contract by landlord not to measure land or enhance rent—Right to additional rent for excess land added to tenure by alluvion **924**

——— ——— ——— ———Enfranchisements of *inams* —*Pattahs*—Quit rent land to be localised for imposition of quit rent—Who to localise—*Zemindar* not bound—*Pattah* cannot be forced on *zemindar* **667**

——— ——— ——— ———Illegal cess — Permanent tenure—Tenant to pay fixed sum of Rs. 4,310 of which Rs. 4,300 is *jama* Rs. 5 as *salami towji* and Rs. 5 as *tehwari dasahra* —Part of consideration for which tenancy was created—Sums legally recoverable **701**

——— ——— ——— ———Settlement of fair rent not authorised—Settlement Officer to record existing rent—*Jamabandi*, signed by defendant, whether amounts to assent to enhanced rent **675**

——— ——— ———*Adjustment of accounts—Money left in deposit with tenant for payment to superior landlord—Default by tenant—Suit by superior landlord against landlord of tenant and realisation of amount—Subsequent suit by landlord for amount paid to superior landlord, against tenant —Character of amount left with tenant, whether rent or not—Subsequent suit, whether one for rent or damages—Limitation—Contract Act (IX of 1872), s. 46—Limitation Act (XV of 1877), Sch. II, Art. 115.*

The defendant is the tenant of the plaintiff. There was an adjustment of accounts between them, and the defendant was found liable for Rs. 158 on account of rent for 1309 to 1312. It was arranged that Rs. 136 should be left with the defendant as a deposit for payment to the superior landlord on account of rent payable by the plaintiff to the latter for 1309 to 1312 and that the balance Rs. 22 was to be paid to the plaintiff. The defendant did not pay the said sum of Rs. 136 to the superior landlord who sued the plaintiff and obtained a decree for Rs. 225 which was realised from the latter. The plaintiff has brought a suit to recover the amount which she had to pay to the superior landlord:

Held, that the determination whether the money left in deposit with a tenant for payment to the superior landlord, is rent or not depends upon the terms of the contract in each case: that here there was a discharge for this portion of the rent, and although the superior landlord was not a party to the contract, so far as that portion of the rent was concerned, it ceased to be rent and recoverable as such; and that the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages and not for rent. LACHMI MISSIR *v.* DEOKI KUAR **752**

Landlord and Tenant—contd.

——— ——— ——— ———*Adverse title—Denial of title —Non-payment of rent.*

Mere non-payment of ground-rent by the tenant, unless it was coupled with a refusal to pay it and a denial of the landlord's title, would not terminate the relation of landlord and tenant or take away the landlord's right to rent. ABDUL KARIM *v.* CHUNNI BIBI **119**

——— ——— ——— ———*Agricultural tenancy—Kabuliat, execution of, by tenant and acceptance of, by landlord—Sufficient to prove tenancy—Evidence of tenancy.*

For the purposes of an agricultural tenancy, it is sufficient for the person who claims to be the tenant to prove that he executed a *kabuliat* and that the *kabuliat* was accepted by the landlord. KRISHNA CHANDRA JOGATI *v.* ABHIRAM NAIK **930**

——— ——— ———*Contract after Bengal Tenancy Act to pay rent in monthly instalments, whether valid—Contract to pay interest on each instalment from time it falls due, whether legal—Bengal Tenancy Act (VIII of 1885), ss. 53, 67, 178, sub-s. (3), cl. (h).*

By a contract between a landlord and tenant after the passing of the Bengal Tenancy Act and to which the provisions of that Act apply, provision was made for payment of the rent in monthly *kists*, and also for payment of interest on each, from the time when it fell due:

Held, that the landlord was entitled to impose an obligation on the tenant to pay the rent in monthly *kists*, for that is in accord with the provisions of section 53 of the Bengal Tenancy Act; that the contract having been made after the passing of the Act, the provision in section 178, sub-section (3), clause (*h*) came into play; that, therefore, the contract for the payment of interest on *kists* is invalid; and that the landlord is entitled to the interest secured to him by section 67 beyond which he cannot go, that is, to 12½ per cent. from the expiration of the quarter in which the *kist* fell due. MANAHAR MUKHERJEE *v.* KHETRA NATH SABUI, 17 C. W. N. 820; 18 C. L. J. 175 **625**

——— ——— ———*Denial of tenancy—Termination of tenancy—Eviction—Unexecuted decree for ejectment—No eviction.*

A tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without proving that he has surrendered possession to his landlord, or has been evicted by title paramount, or

Landlord and Tenant—contd.

has attorned thereto, or that at least he has given notice to his landlord that he intends to claim under another and more valid title.

Eviction must be actual and not merely constructive.

An unexecuted decree for possession would not amount to eviction. DEVALRAJU *v.* MAHAMAD JAFFER SAHEB, 36 M. 53 **555**

——————— *Ejectment—Forfeiture clause—Disobedience of order of lessor—Effect of such clause considered.*

The plaintiff, a Vicar of the Roman Catholic Church in Trichinopoly, sued to eject the defendant from a house site belonging to the Church and held by the defendant and his predecessors under the Church. Exhibit B, the document executed by the predecessors of the defendant, contained the terms on which the house site was held. After reciting a number of covenants the document contained a clause (*h*), that if without acting as aforesaid, they act contrary to the other orders also of the Swamimars, they shall pay off the Manai-tax of the said temple found due by them, remove the said terraced house without asking the price thereof, leave the said kovil land and walk out.

The plaintiff's ground for ejectment was that the defendant disobeyed an order of the plaintiff four years back asking the defendant not to proceed with the construction of a new building before first executing a fresh document in favour of plaintiff containing some more stipulations in addition to those in Exhibit B:

Held, that the Vicar was entitled to bring the suit since there was no evidence for the defendant that the property was vested in any one other than the Vicar and since he and his predecessors-in-office have for over 80 years been in possession of the lands of the Church.

Held, also, (*Sundara Aiyar, J., dissenting*)—that the tenancy is a tenancy-at-will or at sufferance and that the plaintiff is entitled to eject.

Per *Sundara Aiyar, J.*—The rent provided being a yearly one, the presumption is that the tenancy is at least one from year to year and there is no allegation that it was terminated by a proper notice. In the absence of any specific allegation in the plaint the tenancy cannot be held to be one at will or at sufferance.

Clause (*h*) of Exhibit B cannot work a forfeiture since the clause is only a condition for defeating the lease and it cannot be enforced because it is vague and uncertain.

Quære.—Whether the clause is not a mere threat such as in equity in the absence of specific mention of the nature of the disobedience which was to bring down the penalty of forfeiture ought not to be enforced? SEVATHAMUTHU ASARI *v.* REVD. J. N. K. MASQUITE, 13 M. L. T. 506 **721**

——————— *Ejectment — Homestead — Part of agricultural holding—Incidents of tenancy—Bengal Tenancy Act (VIII of 1885), ss. 3 (3), 4, 49, 182.*

Landlord and Tenant—contd.

Where the defendant holds a piece of homestead land under the plaintiffs, and the land forms part of the plaintiffs' agricultural holding, the incidents of the defendant's tenancy are governed by the Bengal Tenancy Act, and a notice to quit, under the Bengal Tenancy Act, must be served in order to bring a suit for ejectment of the defendant. SARBESWAR HALDAR *v.* RAI CHARAN BHADURI **78**

——————— *Land held as* raiyat *under* utbandi *for six years, then as* ijaradar *for nine years, then as* raiyat *for eleven years—Acquisition of right of occupancy—Right of occupancy in abeyance during* ijara*—Bengal Tenancy Act (VIII of 1885), s. 22, cl. (3).*

A person held a certain piece of land as a *raiyat* under the custom of *utbandi* from 1884 to 1889. From 1890 to 1898 he was the *ijaradar* of a considerable area which included the piece of land held by him as *raiyat*. During the *ijara* he continued to cultivate the land as before. After the *ijara* he held and cultivated the land till 1908:

Held, that there had been occupation as *raiyat* of the same land for 12 years continuously within the meaning of section 180 of the Bengal Tenancy Act and that a right of occupancy had been acquired in the land; and that during the term of the *ijara* the active operation of the possession as a means of acquiring the right of occupancy was suspended and remained in abeyance under section 22, clause (3) of the Act. JASIMUDDIN SHEIK *v.* SENI MADHAB DAS, 17 C. W. N. 881 **635**

——————— Land mortgaged sold in execution of rent-decree—Notice given by purchaser under section 167, Bengal Tenancy Act—Whether mortgage extinguished—*Ghatwali* tenure held upon quit rent payable to *H.* and *ghatwali* service—Resumption of land by Government and Settlement with *zemindar* who settled with mortgagor—Condition of settlement that mortgagor would pay quit rent payable to *H.* and value of *ghatwali* service to *zemindar*—Suit by *zemindar*—Whether suit for rent or for money—Whether *zemindar* and *H.* are joint landlords **776**

——————— *Lease for building purposes—No presumption of permanent tenancy—Instrument of lease—Construction of forfeiture clause.*

Where there is an instrument defining the terms of a tenancy, the fact that the tenancy is one for building purposes, that a substantial building has been erected on the same and that the property has descended from father to son or has been sub-let or alienated need not be taken into consideration in determining whether the tenancy was a permanent tenancy. There is no presumption of a permanent tenancy where land is let for building purposes and the tenant is not entitled to the value of buildings on ejectment.

If a clause imposing conditions is so wide as to include conditions the violation of which may not entail a forfeiture which would be enforced by the Courts the clause should not be disregarded in its entirety but should be given effect to so far as it can be. SIVATHA MUTHU ASARI *v.* REVD. J. N. H. MESGUITA, (1913) M. W. N. 480; 13 M. L. T. 513; 24 M. L. J, 642 **824**

Limitation Act—(1877)—contd.

(*d*) that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a 'thing done' within the meaning of section 6 of the General Clauses Act;
(*e*) that once the period of limitation has begun to run, it cannot be suspended;
(*f*) that the suit was barred by time;
(*g*) their Lordships of the Privy Council would not, as a matter of long established practice, allow on appeals to His Majesty in Council new cases to be made which were not made below;
(*h*) where no date for redemption is specified, the mortgage becomes liable to be redeemed immediately after it is made. SONI LAL *v.* KANHAIYA LAL, 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 BOM. L. R. 489; 35 A. 227; 25 M. L. J. 131; 40 I. A. 74 **291 P. C.**

——— ——— **Sch. II, Art. 11** 968
——— ——— ——— **art. 12** 694
——— ——— ——— ——— **arts. 12, 13, 14** 968
——— ——— ——— ——— **art. 60**—*Deposit—Limitation only from date of demand.*

A receipt was in these terms: "As Annammalai Chetty was not there, having gone out to Devakota and as it was learnt on inquiry that Karappiah Pillay who was the said person's *kariasthan* and Kanakkupillay had gone out to Poovanthe, etc., you have deposited, as they were not in the village, the said sum of Rs. 1,400 with us and we have received the same. This document is the receipt therefor:"

Held, that the sum was a deposit and was hence payable only on demand and that Article 60 of Schedule II of the Limitation Act applied. THANGASWAMY THEVAN *v.* RAJARAM NAIDU, (1913) M. W. N. 218 **3**

——— ——— ——— ——— **art. 91** — *Lease-deed registered—Suit for possession—Scope of Trusts Act (II of 1882), Ch. IX—Repudiation* in pais—*Impartible* zemindari—*Alienability—Burden of proof.*

Article 91 of the Limitation Act applies to a suit to set aside an instrument on the ground of undue influence.

If a sale is to be rescinded it must be by judicial rescission or a written instrument.

Sadasiva Aiyar, J.—The onus of proving a custom of inalienability in the case of impartible *zemindaris* lies heavily on the person who alleges it.

Section 96 of the Trusts Act was intended only to make provision consistent with the law in force for certain cases in which English Courts of Equity fastened a constructive or resulting trust upon holders of property and for which there was no statutory provision till then. Ownership and obligation should not be confounded in applying this rule.

Chapter IX of the Trusts Act sets down only the principles that should govern Courts in ascertaining the rights and obligations of parties in certain cases and not to relieve a party from any obligation to take

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the necessary steps required by the substantive or adjective law before a trust could be validly established and created in his favour.

A mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

A suit for possession of immoveable property when that relief is inconsistent with a registered lease-deed executed by plaintiff's predecessor-in-title is governed by Article 91 of the Limitation Act as it is necessary that the document should be first set aside.

For the application of the Article the cessation of the undue influence is not the period when time begins to run. RAJA RAJESWARA DORAI *v.* ARUNACHELLAM CHTTIAR, (1913) M. W. N. 453; 13 M. L. T. 469; 24 M. L. J. 592 **596**

——— ——— ——— **Sch. II, Arts. 110, 116**—Suit for arrears of commission and royalty **865**
——— ——— ——— ——— ——— **art. 115** 752
——— ——— ——— ——— ——— **art. 120** 291
——— ——— ——— ——— ——— **art. 132** 878
——— ——— ——— ——— **arts. 134, 144** 694
——— ——— ——— ——— **art. 144**—Adverse possession **367**
——— ——— ——— ——— ——— **art. 148** 291

Limitation Act (IX of 1908)—Retrospective action **793**
——— ——— ——— ——— **s. 5** 788
——— ——— ——— ——— **s. 5**—*Decree not filed at the time of appeal—Carelessness - Sufficient cause.*

In filing an appeal, Counsel for the appellant, by a piece of carelessness omitted to file a copy of the decree appealed against but instead put in a copy of a deposition. The mistake was not noticed until long after the expiry of the period of limitation for filing the appeal:

Held, that the Court should have allowed the copy of the decree to be filed, and should have extended the period of limitation under section 5 of the Limitation Act IX of 1908. HARJAS MAL *v.* KAHNI, 104 P. W. R. 1913; 173 P. L. R. 1913; 85 P. P. 1913 **438**

——— ——— ——— ——— **s. 5**—"*Sufficient cause*"—Bona fide *miscalculation by Pleader of period of limitation, whether sufficient cause—"Sufficient cause" to be liberally construed.*

The expression "sufficient cause" in section 5 of the Limitation Act, 1908, should be liberally construed so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant.

A *bona fide* mistake committed by a Pleader in calculating the period of limitation, in consequence of which an appeal is filed out of time, may constitute a sufficient cause within the meaning of section 5 of the Limitation Act. Whether the miscalculation of

Limitation Act—(1908)—contd.

the period of limitation by a Pleader does constitute a sufficient cause in any particular case, must be decided by the Court having regard to all the facts and circumstances of the case. RAKHAL CHANDRA *v.* ASHUTOSH GHOSH, 17 C. W. N. 807 **931**

——— **s. 10** **406**

——— **s. 12** — *Delay in obtaining copy of decree—Non-deposit of copying charges.*

Where an application for a copy of the decree is refused on account of the decree not being ready, the delay in the time taken in obtaining the copy will be excused, even though no deposit for copying charges may have been made. THE MANAGER INCUMBERED ESTATES IN SIND *v.* GANGARAM BACHOMAL, 6 S. L. R. 244 **671**

——— **ss. 17, 18** **406**

——— **s. 20**—*Interest—Intention to pay, as such, not to be inferred from creditor's statutory power to appropriate a payment—Appropriation in accordance with contract—Specific appropriation on each occasion not required by law.*

For the purposes of section 20 of the Limitation Act, 1908 an intention to pay interest as such ought not to be inferred merely from an act done by the creditor in pursuance of a power given him by law to appropriate a payment not appropriated by the debtor. But where the method of appropriation is determined at the outset by express contract between the parties, the law does not require a specific appropriation to be made on the occasion of each payment.

Compound interest in itself is perfectly legal. GOPAL *v.* GOVIND, 9 N. L. R. 78 **849**

——— **s. 20**—*Payment of interest as such—There must be something to indicate intention—Mere appropriation to interest by creditor, no such indication.*

Under section 20 of the Limitation Act the payment of interest will save limitation when the payment is made as such, that is to say, when the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditors of these payments to interest is not such an indication. CHANDERPAL KUNWAR *v.* DUNIA PRASAD **825**

——— **s. 21**—*Lawful guardian—Person lawfully acting as guardian—Though not legally appointed*

A person who is lawfully acting as guardian, though not legally appointed for the purpose, is 'lawful guardian' within the meaning of section 21 of the Limitation Act, 1908, when acting for the benefit of the minor.

Therefore, a payment made for the benefit of a minor by his natural mother, saves the bar of limitation, when the guardians appointed by the Will of the minor's adoptive father and all his relations have been unwilling to act as minors. TIRAPAYYA *v.* MALLIDI RAMASWAMI, 24 M. L. J. 428; (1913) M. W. N. 364 **362**

Limitation Act—(1908)—contd.

——— **s. 28, Sch. I, Art. 142**—*Suit for possession against trespasser—Plaintiff can succeed on proof of mere possession before his dispossession—Defendant must prove his own title to ownership—Adverse possession—Extinguishment of right to immoveable property.*

In 1884, *A.* sold his land to *B.* with a share in the village *shamilat*. *A.* brought a suit for possession against *B.* and obtained possession of the property in 1890. In 1898, *B.* mortgaged the land to *C.* In the same year, the sons of *A.* sued *B.* for possession of the land on the ground that the sale was without consideration and necessity, and they finally got a decree for possession of the land claimed on payment of a certain sum in 1903. In their plaint they made no mention of the *shamilat* land, and so it was not entered in their decree. In execution of their decree, however, they got possession of the *shamilat* as well from *C.*, the mortgagee of *B.*, who was in possession of both the land and *shamilat*. In 1907 *B.* sued *C.* for possession of the *shamilat* land by redemption. The sons of *A.* were impleaded as defendants:

Held, (1) that in taking possession of this *shamilat* land in the course of execution proceedings, the sons of *A.* acted unlawfully and their possession became that of trespassers;

(2) that *B.* could sue for possession simply on the strength of the possession which he had before dispossession, provided he sued within twelve years allowed by Article 142 of the Limitation Act.

In such a suit unless the defendant proves a title, plaintiff should succeed without being asked to prove his own title to ownership and even if he (the defendant) proves that he has no such title;

(3) that *B.* had acquired a good title by adverse possession extending over 12 years, and the right of *A.*'s sons, if any, had been extingnished, having regard to section 28 of the Limitation Act. PARAS RAM *v.* NATHU MAL, 19 P. R. 1913; 212 P. L. R. 1913 **222**

——— **s. 31,** *application of—Realisation of rents and profits in lieu of interest—Mortgage with possession—Dispossession—Limitation.*

Under the terms of a mortgage of 1850, the mortgagee was to take possession of the mortgaged property and to appropriate its rents and profits in lieu of interest.

In 1889 the mortgagee was dispossessed:

Held, (1) that the realisation of rents and profits in lieu of interest was equivalent to the receipt of interest as such;

(2) that the limitation began to run under the circumstances from the year 1889 when Act XV of 1877 had come into operation;

(3) that section 31 of Act IX of 1908, therefore, did apply to the case and the plaintiff's suit for sale of the property brought on 10th January 1910 was within limitation. INDARJIT *v.* GAJADHAR SAHAI, 11 A. L. J. 289; 35 A. 270 **238**

——— **s. 31**—*Period of grace—Applicability to Berar—Date of passing of the Act—Interpretation.*

In section 31 of the Indian Limitation Act, 1908, the words 'from the date of the passing of this Act' cannot be construed in Berar to mean 'from the date

Limitation Act—(1908)—contd.

of the *application* of this Act to Berar' and the Act as applied to Berar gives the same chronological period of grace as was given in British India—a preiod which began on the 7th August 1908 and ended on Monday, the 8th August 1910. SONBA *v.* MUNIRUDDIN, 9 N. L. R. 49 518

——— ——— ——— Sch. I, Art. 10 239

——— ——— ——— art. 14 565

——— ——— ——— arts, 30, 31, 115

—*Misdelivery not non-delivery—Loss of goods by carrier—Applicability of Art.* 115.

The words 'against a carrier for *losing* or injuring goods' in Article 30, Schedule I, Indian Limitation Act, IX of 1908, obviously suggest not a mere loss of the goods to the owner, which might be caused by misdelivery, but an actual losing of goods by the carrier himself.

Misdelivery or delivery to a wrong person in breach of agreement cannot be regarded as non-delivery of goods within the meaning of Article 31, Schedule I of the Limitation Act. The case of misdelivery falls within the purview of Article 115 of the Act. FAKIR CHAND *v.* SECRETARY OF STATE, 170 P. L. R. 1913; 122 P. W. R. 1913 477

——— ——— ——— art. 31 477

——— ——— ——— arts. 44, 91, 144—

Alienation by de facto *guardian of minor—Suit by minor for possession of property alienated—Void alienation—Cancellation of document not necessary.*

A suit by a Muhammadan for possession of land sold during his minority by his *de facto* guardian is governed by Article 144 of the Limitation Act, and not by Articles 44 and 91. The alienation of a minor's property being *ab initio* void, he is entitled to treat the transaction as a nullity and is not bound to sue for cancellation of the sale-deed. UTTAM SINGH *v.* BARKAT ALI, 15 P. R. 1913; 202 P. L. R. 1913 235

——— ——— ——— art. 91 235, 406

——— ——— ——— art. 95 406

——— ——— ——— art. 95—Suit for possession of *raiyati* holding after setting aside *ex parte* decree 980

——— ——— ——— arts. 95, 97—*Suit based on fraud or failure of consideration.*

Plaintiff sued on the allegation that 14 years before suit he purchased certain property from the defendant, that the defendant deceived him as to his title, and that some two years and nine months before suit a third person dispossessed the plaintiff claiming the property as his own. The suit was for the return of the purchase money and damages:

Held, that the suit was governed either by Article 95, or by Article 97, of the Limitation Act, and was within time. SOHAN SINGH *v.* LAKHUMAL, 96 P. W. R. 1913; 135 P. L. R. 1913 5

——— ——— ——— art. 97 5

——— ——— ——— art. 106 406, 513

——— ——— ——— arts. 113, 144—

Agreement declaring rights of parties—Completion of title—Suit for partition on basis of agreement—Accrual of right to sue—Compromise of disputed and doubtful rights—Consideration—Misrepresentation inducing agreement—Onus probandi—*Agreement acted upon—Minor—Hindu Law—Joint family—Members of Hindu joint family—Act of adult members for minor's benefit—Question taken up by Court* suo motu.

On the 19th January 1904, three sets of claimants to the property left by a deceased person entered into a compromise by which they settled their conflicting claims amicably and drew up an agreement which was registered.

Shortly after, however, some of the claimants applied for Letters of Administration to the estate. During the pendency of the proceedings, in March 1904, there was a note of the Court that the Counsel of one set of the claimants objected to the compromise on the ground that they had been imposed upon in the matter of the degree of relationship of the other claimants. Letters were given jointly to three different sets of parties as agreed in the compromise. None of the parties appealed. But another person, alleging himself to be the adopted son of the deceased entered a *caveat*, appealed and the case was sent back for re-trial. On the 24th May 1907, Counsel for one of the claimants stated that the agreement was void on account of compulsion and misrepresentation and because it was without consideration, it was added that the agreement had nothing to do with a suit for Letters of Administration. Issues as to the relationship of the parties to the deceased only were framed. Letters were granted to one of the claimants. No decision was given as to the mutual settlement.

On the 8th March 1909, one of the claimants instituted a suit for possession by partition of one-third share of the property left by the deceased, which was alleged to be in the joint possession of the parties on the strength of the registered agreement, dated the 19th January 1904:

Held, (1) that the suit was not barred by time. The Article applicable to the facts of the case was Article 144 of the first Schedule to the Limitation Act and not Article 113;

(2) that by the agreement, the whole of the property left by the deceased was considered as having become lawfully vested in all the three sets of claimants jointly in equal shares, and nothing remained to be done by any one party in future with a view either to complete its own title to the one-third share of the property or to convey to the other parties their respective shares in the same;

(3) that even if Article 113 were applicable, the right to sue accrued, not in March 1904, but in 1907;

(4) that the agreement embodied a compromise of disputed and doubtful rights, which was entered into in good faith by all the parties concerned and consequently there was valid consideration for the agreement;

(5) that the onus of proving that the agreement in question was entered into by the defendant by reason of certain misrepresentations on the part of the plaintiffs, lay upon defendants;

(6) that the compromise was to some extent at least acted upon by the parties as appeared from their conduct in relation to the Letters of Administration proceedings;

(7) that the point that the agreement was not binding upon some of the parties, who were minors

Limitation Act—contd.

at the time it was entered into, ought not to have been taken up by the District Judge on his own motion. The alleged minors, at the time of the agreement, being members of a joint Hindu family with the other defendants who were adults, must be bound by the agreement, as the latter acted as *de facto* guardians on their behalf and for their benefit in entering into the agreement in question. BASHESHAR NATH *v.* DEVI PERSHAD, 20 P. R. 1913; 101 P. W. R. 1913; 185 P. L. R. 1913 **411**

——— **Sch. I, Art. 115** **477**

——— **arts. 116, 120**—*Suit for money payable under an award—Suit for breach of obligation—Not specific performance—Suit on a bond—Not a suit for specific performance, but a suit for compensation for breach of contract.*

A suit for recovery of money due under an award is governed by Article 120 of the Limitation Act, the suit being one for compensation for breach of the obligation imposed by the award and not for specific performance of the award.

A suit on a bond or contract to pay a specified sum of money is not a suit for specific performance of that bond or contract. Such a suit would be a suit for compensation for breach of contract.

The word 'contract' in Article 116 does not include an award. SOMJIMAL *v.* TOLOMAL, 6 S. L. R. 148 **376**

——— **art. 120** **376, 406, 751, 986**

——— **arts. 124, 134, 144**—*Religious institution—Lease by holder of land to support services—Death of lessor—Suit for recovery of property—Civil Procedure Code (Act V of 1908), s. 11*—Res judicata—*First suit to recover property on allegation of mortgage—Suit dismissed—Second suit to recover property on allegation of mortgage.*

A. a *Fakir* of the Makan of Malapur, held the office of *Surguro*. Certain lands were assigned to support services rendered to the Makan and the religious community by successive holders. The property descended to the disciple of each holder of the office of *Surguro* in succession.

In 1891, *A.* alienated the lands to *C.* by way of a lease for a term of seventy-five years in satisfaction of an old debt. *A.* died in 1904, *B.*, who was the disciple nominated by *A.* to succeed him, sued *C.* in 1907, through his next friend, for possession of the property alienated by *A.* free of incumbrance.

In this suit it was alleged that the document by way of lease was in reality a mortgage and that as an agriculturist *B.* was entitled to sue for redemption prior to the expiration of the agreed term. It was also alleged that the alienation was void after the death of *A.* In defence, *C.* set up the case that the document was not a mortgage but a lease, that the alienation was not void and that the suit was time-barred. The suit was dismissed on the ground that *B.* had failed to establish his contention as to the character of the document upon which he had elected to go to trial.

In 1909, *B.* sued for a declaration that he was owner of the lands leased and for possession, alleging that *A.* had no right to alienate the lands beyond his life-time. *C.* pleaded limitation and *res judicata* in bar of the suit;

Limitation Act—(1908)—concld.

Held, (1) that the plea of limitation failed as there was no adverse possession during the life-time of *A.*;

(2) that the suit was not maintainable owing to the bar of *res judicata*, as the matter of the retention of the possession of the land by *C.* upon terms assented to by him had been heard and finally decided in the first suit and could not be raised again.

The holder of the lands, in the case of such an institution, may alienate them for his own life or any shorter period but cannot separate them permanently from the duties to which they are annexed so as to bind his successor.

An alienation by the holder for the time being is valid only during his life-time, and his successor can recover the property alienated within 12 years of his death.

In the case of a lease from the holder for the time being, time would begin to run not from the commencement of the tenancy of the person claiming to hold as tenant but from the date when the claims of the parties became openly and undoubtedly adverse. MAHAMADGAUS DADASAHEB *v.* RAJBAX ROSHANBAX, 15 BOM. L. R. 266; 37 B. 224 **558**

——— **Sch. I, Art. 132**—*Suit for* malikana *allowance as chargeable on property—Limitation.*

Where the plaintiff sued to recover *malikana* allowance for 11 years and asked for a decree against the property on which that allowance was chargeable:

Held, that Article 132 of the Limitation Act would apply. SHAIDA ALI *v.* PHULLO, 11 A. L. J. 206; 35 A. 185 **63**

——— **art. 134** **558**

——— **art. 134**—*Transfer of mortgagee's rights.*

Where the right of a mortgagee, and not full ownership, is transferred, Article 134 of the Limitation Act does not apply. FATTEH MUHAMMAD *v.* SULTAN MUHAMMAD, 97 P. W. R. 1913; 137 P. L. R. 1913 **122**

——— **art. 142** **884**

——— **art. 142**—Suit against trespasser **222**

——— **art. 144** **235, 411, 558**

——— **art. 182**—*Step-in-aid of execution—Application to have decree transferred to another Court for execution.*

An application for transfer of a decree to another Court for execution is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act. TODARMAL *v.* PHOOLA KUAR, 11 A. L. J. 533; 35 A. 389 **664**

——— **art. 182 (5)**—Payment of Court-fee to complete decree **410**

Lis pendens, *See* TRANSFER OF PROPERTY ACT, s. 52 **884**

Loan or Trust **406**

———Advances to brokers **145**

Landlord and Tenant—contd.

———— ———— ————*Occupancy holding—Purchase of non-transferable holding—Occupation by purchaser for more than* 12 *years—Rent paid by him as* marfatdar *for original tenant—Suit for possession by landlord—Plea of limitation—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 142.

A person after purchasing a non-transferable occupancy holding in 1896, held it in the name of the original tenant, and in 1898 paid rent to the landlord on behalf of the tenant, and the landlord gave him a rent receipt in which he was described as *marfatdar* for the tenant. Subsequently in 1904 the purchaser was described in the Record of Right as a trespasser and in 1909 the landlord brought a suit against him for possession; and he pleaded limitation:

Held, that he could not do so, and the suit was not barred. JADU NATH BELEL *v.* RAJ NARAN MUKHERJEE, 17 C. W. N. 459 **884**

———— ———— ———— ————Patni—*Suit for possession of land included in* patni—*Defence that land in suit is* lakhiraj—Onus *of proof—Limitation—Adverse possession—Want of possession—Non-payment of rent—Setting up* lakhiraj *title necessary.*

In a suit by a *patnidar* for possession of lands contained in the ambit of the *patni*, the *onus* of showing that the lands are *lakhiraj* and not *mal* lands, lies upon the defendant. The plea of limitation in such a suit depends upon the doctrine of adverse possession and not upon want of possession by the plaintiffs.

The mere non-payment of rent would not constitute adverse possession. The defendant must show that he set up a *lakhiraj* title adverse to the *zemindar* and the *patnidar* for more than 12 years before the institution of the suit and that he has been holding adversely since, and he must show that in respect of each plot in suit. CHINTAMONI DUTT *v.* JOGESHUR BHATTACHARYA **64**

———— ———— ———— ————*Rate for wet crop on dry cultivation—Clause "if wet crops raised on dry land by getting water in any way, wet rate as on adjoining dry lands payable," if valid.*

A clause that "if in any year wet or paddy crops raised on the lands by getting water in any way I shall pay according to the same rate as is collected in the neighbouring villages for wet and paddy cultivation on dry lands," is a valid.

The words "getting water in any way" include cultivation by means of rain water.

The rate mentioned in the clause refers only to the rate actually prevailing. It need not necessarily be an enhanced rate. RAJA OF VENKATAGIRI *v.* CHITTAMURA RAMALINGIAH, (1912) M. W. N. 1116 **144**

———— ———— ————*Suit for possession—Plea of tenancy and limitation—License—Status of tenant, if may be obtained by possession—User of land—Erection of structures to reside—Consent of plaintiff's predecessor—License, different kinds of.*

In a suit for possession of land brought against an alleged tenant who is really a trespasser, the defendant may set up a case of tenancy and also raise the issue of limitation.

But where the defendant not only does not repudiate but expressly admits the title of the plaintiff's predecessor and alleges a settlement from him, the defendant's possession has never been adverse to the extent of the entire interest of the owner.

If he never obtained a settlement, he may have acquired the status of a tenant or licensee by the assertion of such limited title and possession in that character for the statutory period.

If the plaintiff's predecessor allowed the defendant the use of the land in suit so that he might erect structures and reside therein, the plaintiff would not be entitled to revoke the license, at any rate, not till the defendant had been adequately indemnified.

A bare license may be revocable at the will of the granter and upon reasonable notice.

A license on the faith whereof works have been executed may be revoked only upon payment of compensation to the licensee.

A license coupled with a grant is irrevocable. MOTI LAL ROY *v.* KALU MANDAR **853**

———— ———— ———— ————*Tenancy—Rent not to be raised so long as tenant kept the property—Not a permanent tenancy entitling tenant to keep the property, so long as he liked—Transfer of Property Act* (*IV of* 1882), *s.* 105—*Principle applicable—Pleadings—Court not at liberty to go beyond.*

The defendants offered to take certain shops from the plaintiffs on lease, on the condition that the rent proposed should not be raised so long as the defendants kept them; the plaintiffs agreed by letter to rent the shops to the defendant on the proposed rent *per* month, to be paid regularly monthly. The plaintiffs themselves were lessees of the shop for a fixed term of twenty years. The defendant did not take the shops for agricultural or manufacturing purposes, and pleaded that he was entitled on the agreement to keep the shops as long as he liked:

Held, that the plaintiff did not let out the shops to the defendant upon an agreement that the latter should occupy them for as long as he liked or for the period of the plaintiffs' own term of lease.

The principle embodied in section 105 of the Transfer of Property Act, 1882, applied to the case, and the Courts were bound to presume that the tenancy was from month to month. The plaintiffs consequently had a right to eject the defendants after serving them with a valid notice to quit.

According to the pleadings of the parties the Court was not at liberty to fix a reasonable term of tenancy. JAMASJEE BOGA *v.* DUNI CHAND, 180 P. L. R. 1913; 120 P. W. R. 1913 **493**

Land Revenue—*Covenant running with land—Vendor and purchaser—Agreement to reserve land revenue free—Enforcement of agreement.*

In 1833, the owner of a certain *zemindari* transferred it with an agreement that the transferor should retain 50 *bighas* out of it and the transferee should pay the whole of the land revenue including that of 50 *bighas* reserved. Both the *zemindari* and the transferred portion passed through a number of hands:

Held, (1) that the agreement did not run with the land and the transferees of the vendee were not bound by the agreement for all time to come;

(2) that the reservation of the land could not be treated as a revenue free grant which would remain in force until resumed. SRI THAKURJI MAHARAJ *v.* LACHMI NARAIN, 11 A. L. J. 212 **67**

Land Revenue—concld.

——— ——— ———*Vendor and purchaser—Agreement to reserve land revenue free—Enforcement of agreement.*

Where the owner of a certain *mahal* has transferred it on condition that the transferor should retain certain plots of land and the transferee should pay the whole of land revenue including that of the land reserved, such an agreement for payment of revenue cannot be enforced for all time against the person, who might happen to be the owner of the *mahal*, at the instance of the person, who might happen to be the owner of the land reserved. RAM GOVIND *v.* SRI THAKURJI MAHARAJ, 11 A. L. J. 231 **126**

Lease. *See* LANDLORD AND TENANT.

——— of *inam* **694**

———*Implied covenant for quiet enjoyment—Disturbance of possession of lessee by owner of paramount title—Liability of lessor for damages to lessee—Transfer of Property Act (IV of 1882), s. 108, cls. (a) and (c)—"Interruption," "material defect with reference to intended use," meaning of.*

The word "interruption" in clause (*c*) of section 108 of the Transfer of Property Act includes disturbance of possession by a person with a paramount title; by that clause, the lessee is protected against interruption by whomsoever it is occasioned, and where the interruption is caused by the paramount owner of the property and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

The words "material defect in the property with reference to its intended use" in clause (*a*) of section 108 have reference to the nature and condition of the property demised, and a defect in the lessor's title, is not included within the meaning of the words.

On the death of the defendant's husband she took possession of his estate and granted a lease to the plaintiff on receipt of a *salami*. Subsequently, her husband's brother instituted a suit against her for a declaration that on the death of the defendant's husband he, the husband's brother, became the rightful owner and that she had no title. The suit was decreed and the plaintiff was dispossessed of the property leased to him by the defendant, by the defendant's husband's brother. This suit was, thereupon, brought for a refund of the *salami* and damages:

Held, that clause (*c*) of section 108, and not clause (*a*) of the Transfer of Property Act was applicable to the case and that the defendant was liable for damages for the interruption of the plaintiff's possession. MUKTAR AHMAD *v.* SUNDAR KOER, 17 C. W. N. 960 **815**

Legal Practitioner. *See* BARRISTER.

Legal Practitioners Act (XVIII of 1879), s. 28—*Agreements between Pleaders and clients—Work to be done not Court work.*

Section 28 of the Legal Practitioners Act, regarding the filing of agreements between Pleaders and clients in the District Court or in some Court where the work is to be done, applies to agreements for fees in respect of the practitioner's services where the business does not lie in any Court, Civil or Criminal. T. GAME *v.* U KYE, 6 BUR. L. T. 18; 7 L. B. R. 6 **209**

Legitimacy. *See* MARRIAGE.

Leprosy as a ground for exclusion from inheritance under Hindu Law **690**

Letters Patent, cl. 10 —*Attorney—Striking attorney's name off the rolls—Rule, service of—Practice—Grounds, copy of, to be served on attorney personally—Sufficient time to be given—Disciplinary action against attorney—Misconduct of attorney, by whom to be brought to Court's notice—Verification, importance of—Suspicion not enough to justify disciplinary action.*

The rules of the High Court make no special provision for the disciplinary procedure of the Court. The English procedure in its entirety cannot be adopted.

When the alleged misconduct of an attorney is the subject of consideration, it is expedient to initiate proceedings by a rule, or motion or notice calling on the attorney to answer the matter in the affidavits of the applicant. Service should be personal, a copy of the affidavits should be served with the rule or notice of motion, and the returnable date should allow sufficient time for an answer to be put in. Ordinarily ten days should suffice.

Disciplinary action against an attorney rests on the principle that the Court deems him an unfit person to act as an attorney, and not by way of punishment.

Any body is entitled to inform the Court of the misconduct of an attorney,

A verification is a matter of great importance as possessing the security of being made under the sanction of a solemn declaration for which the person making it would be liable to the penalties attaching to the crime of giving false evidence if the declaration were false to his knowledge.

Even a strong case of suspicion is not enough to justify the disciplinary action on a summary proceeding, especially when there is positive sworn denial and repudiation of the misconduct imputed. AN ATTORNEY, *In re*, 14 CR. L. J. 305 **993 S. B.**

Libel. *See* DEFAMATION.

License—Different kinds **853**

Lien. *See* JUDICIAL HYPOTHECATION.

Limitation. *See* BENGAL TENANCY ACT, SCH. III.

——— ——— ———Alienation by *de facto* guardian of minor—Suit by minor for possession of property alienated—Void alienation—Cancellation of document not necessary **235**

——— ———Application for restoration of the property of an absconding accused attached by Magistrate **333**

——— ———Application for setting aside *ex parte* decree **425**

——— ———Application to correct award **496**

——— ——— Date of decree—Date of judgment—Delay in complying with Court Fees Act in stamping decree—Payment of Court-fee to complete decree—Step-in-aid of execution **410**

——— ———Deposit **3**

——— ———Failure of mortgagee to pay prior mortgage **676**

Limitation—contd.

———————Lease by holder of land to support services in a religious institution—Death of lessor —Suit for recovery of property **558**

———————Loss of goods by carrier **477**

———————Money left in deposit with tenant for payment to superior landlord—Default by tenant—Suit by superior landlord against landlord of tenant and realisation of amount—Subsequent suit by landlord for amount paid to superior landlord, against tenant—Character of amount left with tenant, whether rent or not—Subsequent suit, whether one for rent or damages **752**

———————Mortgage with possession—Realisation of rents and profits in lieu of interests **238**

———————Period of, once begun cannot be suspended **291**

———————Permission obtained by guardian from Court to mortgage particular land of minor for specified amount—Mortgage by guardian of larger quantity of land for smaller amount—Mortgage, whether voidable—Suit upon mortgage after ten years **624**

———————Pre-emptor cannot be allowed to extend time on account of delay in Deputy Commissioner's auction **239**

———————Purchase of non-transferable holding—Occupation by purchaser for more than 12 years—Rent paid by him as *marfatdar* for original tenant—Suit for possession by landlord **884**

———————Suit for dissolution of partnership **513**

———————Suit for *malikana* allowance as chargeable on property **63**

———————Suit for money payable under an award—Suit for breach of obligation—Not specific performance—Suit on a bond—Not a suit for specific performance, but a suit for compensation for breach of contract **376**

———————Suit for partition on basis of agreement declaring rights of parties—Accrual of right to sue **411**

———————Suit for possession of land included in *patni* **64**

———————Suit for redemption—Law in force at time of suit applicable **291**

———————Suit to set aside *ultra vires* order **565**

———————Suit by auction-purchaser to recover purchase-money on the ground that judgment-debtor had no saleable interest in property **986**

———————Tenant holding over—No adverse possession until tenant is paid for improvements **563**

———————*Assignment of debt after expiry of period prescribed—Court closed—Suit by assignee not barred if filed on the day Court re-opens.*

Where the period prescribed for a suit to recover a debt expires during a Court vacation, and before the re-opening of the Court the debt is assigned, a suit by the assignee for the recovery of the debt filed on the day the Court re-opens, is within time. VISRAM *v.* TABAJI, 15 BOM. L. R. 348 **820**

Limitation—contd.

———————*Execution of decree—Mortgage decree under old Code—Several applications for execution—Last application under new Code, but after twelve years from decree—Applicability of the new Code—Civil Procedure Code (Act XIV of* 1882), *s.* 230—*Civil Procedure Code (Act V of* 1908), *s.* 48.

A mortgage decree passed under the old Civil Procedure Code cannot be executed after twelve years from the decree if the last application for execution is made after the new Civil Procedure Code of 1908 has come into operation.

A preliminary decree on a mortgage was passed on September 22, 1896, and it was made absolute on April 27, 1897. There were many applications for execution, and on April 28, 1908, the seventh application was preferred, but it was dismissed. Then the new Civil Procedure Code came into operation on January 1, 1909. On December 18, 1911, the present application was made twelve years after the date of the decree:

Held, that the present application was not in continuation of the next preceding application and was, therefore, barred under section 48 of the new Civil Procedure Code of 1908. BISSESHUR SANAMAT *v.* JASODA LAL CHOWDHURY, 17 C. W. N. 622 **391**

———————*Fraud—Partnership—Death of a partner—Assets retained in business—Executrix of deceased obtaining order of Probate but not taking out Probate—Revocation of Probate—Conveyance of assets by surviving partners and executrix—Estate bound—Letters of Administration obtained after death of executrix—Trust—Accounts, suit for—Limitation Act (IX of* 1908), *ss* 10, 17, 18, *Sch. I, Arts.* 91, 106, 120—*Contract Act (IX of* 1872), *s.* 241—*Probate and Administration Act (V of* 1881), *s.* 50.

A partnership business was carried on by *A.* and his brothers. On 7th February 1885, *A.* died, leaving him surviving a widow, *B*, and three minor sons, of whom the eldest was *C*. *A.* made a Will appointing his widow, *B.*, as the guardian of his minor sons and making the minors the residuary legatees of all his property including his share in the partnership business. After his death the assets of *A.* were retained in the firm by the surviving partners. Until 1895, certain sums were drawn by *B.* from the firm for the maintenance of herself and her children and she was credited with interest on the deposits and a share of the profits.

In 1895, *B.* applied for Probate of *A.*'s Will and though an order was made for the issue of Probate to her she did not actually take out Probate.

In the year 1895, the firm was in difficulties and the formation of a joint stock company was resorted to in order to prevent a financial disaster. Accordingly on 30th November 1895, the three surviving partners of *A.* and *B* transferred to the joint stock company the property of the partnership and the estate of *A.* in consideration of Rs. 1,04,000 in fully paid up shares of the value of Rs. 200 each; out of these shares the creditors of the partnership, received fully paid up shares to the amount of their claims and 360 fully paid up shares were held in trust for the surviving partners and *B.* The unfair dealing in this arrangement was disclosed to *B.* in 1897 but she took no action in the matter, and died in 1905.

Limitation—contd.

On 21st January 1909, *C.* brought this suit for rendition of accounts of all the assets of *A.* against two of *A.*'s surviving partners and the representative of the third deceased partner. In the plaint *C.* alleged that he became aware of the falsehood of the representations and fraudulent character of the transactions of 1895 in October 1907 for the first time.

On 21st April 1909, *C.* obtained Letters of Administration to the estate of *A.* with the Will annexed. After the institution of the suit, *C.* applied to the District Court to revoke the Probate supposed to have been granted to *B.* and an order of revocation was accordingly made:

Held (1) that *C*'s suit was barred by time;

(2) that the property left by *A.* and used in the business was a loan under section 241 of the Contract Act;

(3) that it was not proved that the consent of *B.* to the conveyance of 1895 was obtained by fraud;

(4) that *B.* was perfectly competent to enter into the arrangement of 1895 as executrix of *A.*, even without obtaining Probate;

(5) that the arrangement of *A.* was binding on the estate of *A*;

(6) that the claim of *C.* for an account on the footing of the continuance of the original relations between *A.*'s estate and the partnership could not be sustained;

(7) that the District Judge had no jurisdiction to revoke a Probate which had never been issued, especially after the death of *B.* and after the grant of Letters of Administration to *C.*;

(8) that time was running against *B.* as the executrix of *A.*'s Will from the date of *A.*'s death.

Fraud in the performance of a contract, apart from its making, is no ground for rescission for restoring the parties to the position which they occupied before the contract was entered into.

Article 95 of the Limitation Act has no application where, on the face of the plaint, no equitable relief is claimed on the ground of fraud. JAMSETJI NASSARWANJI *v.* HIRJIBHAI NAVROJI, 15 BOM. L. R. 192: 37 B. 158 **406**

——— ——— *Hindu Law*—Mitakshara—*Mortgage of ancestral property by father—Suit for sale against sons—Money charged on immoveable property—Limitation Act (XV of* 1877*), Sch. II, Art.* 132.

A suit to obtain payment of debts contracted by a father governed by the *Mitakshara* law upon a mortgage of the ancestral property, by a sale of the said property in the hands of the sons and grandsons, is a suit to enforce payment of money charged on immoveable property, and the 12 years' rule of limitation provided by Article 132 of the Limitation Act will apply to it. SHEONARAIN ROY *v.* MOKSHODA DAS MITRA, 17 C. W. N. 1022 **878**

——— ——— *Limitation Act into force at date of suit, applicable, not that which came into force during pendency of suit—Civil Procedure Code (Act XIV of* 1882), *s.* 332—*Limitation Act (XV of* 1877), *Sch. II, Arts.* 11, 12, 13, 14.

A suit is governed by the provisions of the statute of limitation, in force at the time of its institution,

Limitation—concld.

and not by the provisions of a subsequent statute, which comes into operation during the pendency of the suit.

A suit instituted under the last paragraph of section 332 of the Civil Procedure Code of 1882, is not governed by Articles 11, 12, 13 or 14 of Schedule II of the Limitation Act of 1877, and is not barred, if brought more than one year subsequent to the order, rejecting the application under that section. MAULA BAKSH *v.* BHABASUNDARI DASYA **968**

Limitation Act (XIV of 1859), ss. 1 (12), 2 **387**

Limitation Act (X of 1871), s. 2 **387**

Limitation Act (XV of 1877), s. 3 **367**

——— ——— ——— **s. 19, Sch. II, Arts. 120, 148**—*Mortgage—Date for redemption not specified — Redeemable immediately — Acknowledgment of mortgage rights by widow does not bind reversioners—Law of limitation at time of suit applicable—Acknowledgment of liability extends time but does not confer right—Period of limitation once begun cannot be suspended—Civil Procedure Code (Act XIV of* 1882), *s.* 13 *–Practice--No new case to be made in Privy Council.*

A.'s predecessor-in-title mortgaged certain properties in 1842 to *K.* In 1866, *J.*, who had succeeded to a Hindu widow's estate on the death of her husband, *K.*, sold a moiety of the mortgage rights to *D.* hypothecating to him at the same time the other moiety of the said rights.

After the death of *J.* the daughter of *J.* and *K.* in 1867 sold the hypothecated moiety also to *D.*, who in his turn assigned to *A.* the entire mortgage rights purchased by him. Both the mother and the daughter had described themselves in their deeds of sale to *D.* as mortgagees and had acknowledged the existence of the mortgage of 1842. The daughter died in 1898, and on her death her sons, *C.* and *S.*, brought a suit in 1904 for possession as mortgagees of the properties on the ground that the transfers made by their mother and grandmother became ineffectual as against them on the death of the ladies, and obtained a decree for possession. In the suit, however, there was no allegation or admission by the plaintiffs of the mortgagor's interest having become vested in *A.*

In 1907 *A.* sued *C* and *S.* for redemption of the mortgage of 1842. The defendants alleged that in the suit of 1904, *A.* had pleaded that he had a right to redeem, but the Court had decreed their claims for possession, and hence the suit was barred by section 13 of the Code of Civil Procedure. Limitation was also pleaded:

Held, (*a*) that the suit of 1904 did not by the operation of section 13 of the Code bar the present suit;

(*b*) that he law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary;

(*c*) that the defendants derived title through *K.* and were not bound by the acknowledgments of their mother and grandmother;

Madras Estates Land Act (I of 1908)—*Suits instituted before the Act came into force—No exchange of* pattas *and* muchilikas.

A suit instituted before the Estates Land Act came into force without exchange of *pattas* and *muchilikas* or a tender of *patta* cannot be maintained, though the trial is after the passing of the Act. YEDDAMAPUDDI LAKSHMI NARASIMHA ROW *v.* REPALLI SITARAMASWAMI, 24 M. L. J. 288; (1913) M. W. N. 282 **440**

——————— **ss. 3 (10), 19, 189**

— Rent — Suit for private lands — Jurisdiction of Civil Court.

A suit for rent of private lands as defined in section 3 (10) of the Madras Estates Land Act, 1908, is cognizable by a Civil and not by a Revenue Court. APPA RAO *v.* NAGANNA, 36 M. 7 **8**

——————— **ss. 3, 153, 157—**

Madras Estates Land Amendment Act (IV of 1909*), s.* 8*—Tenant of 'old waste'—Grounds of ejectment.*

Though section 153 of the Madras Estates Land Act, as it originally stood, does not make the expiry of a lease, granted before the passing of the Act, a ground for ejectment, the effect of the proviso, added to that section by Madras Act IV of 1909, is to make that an additional ground.

Section 157 of the Act expressly deprives a contract, entitling the landholder to eject a tenant of old waste, of its ordinary legal effect.

A tenant of old waste can be ejected only on the grounds mentioned in section 153 of the Act as it originally stood but he cannot be ejected on the ground of a contract entered into before the Act came into force. CHAGANTI ATCHAPARAZU *v.* RAJA YELUGOTI KRISTNA YACHANDRULAVARU, 13 M. L. T. 329; 24 M. L. J. 402; (1913) M. W. N. 378 **225**

——————— **s. 8** **225**

——————— **s. 19** **8**

——————— **ss. 153, 157** **225**

——————— **s. 189** **8**

Madras Irrigation Cess Act (VII of 1865) *—Madras Revenue Recovery Act (II of* 1864*), ss.* 2, 42*—Public revenue—Sale for arrears of water-cess—Conveys title free of encumbrance.*

A sale for arrears of water-cess payable under Act VII of 1865 would convey a title to the purchaser free of encumbrances. VEERANAN AMBALAM *v.* KARUPPAYYA PILLAI, 24 M. L. J. 511 **386**

——————— **s. 4**—*'Engagement,' meaning of—Implied or express*—Zemindar, *flow to the tank of, obstructed by Government irrigation works—Rights on obstruction.*

The 'engagement' referred to in Act VII of 1865 may be an implied engagement.

To ascertain the meaning of 'engagement', as used in that Act, the events which led to the passing of that Act must be looked to.

The rules, framed in 1864 in pursuance of various directions from the Secretary of State and ultimately embodied in the Act and particularly G. O. No. 101 Rev. dated 16th January 1864, show that it was not intended to levy any charge on water taken for lands which, owing to the construction of the several anicut channels and other works connected therewith, were found to have lost wholly or partially their pre-existing sources of supply.

When Government intercepts the flow of water to a *zemindar's* tank, the natural presumption is that he has been compensated in some form for the injury inflicted and in these circumstances if the *zemindar* receives a free supply of water from Government irrigation works for a number of years, the only presumption is that there was an implied engagement between the parties for such free supply.

That engagement, unless there is an express contract to the contrary, will ordinarily be taken to be only in respect of the extent of lands irrigable by the pre-existing irrigation works at the time when they are interfered with by Government. SRI RAJA VENKATA RANGAYYA APPA RAO BAHADUR *v.* SECRETARY OF STATE, 13 M. L. T. 330; (1913) M. W. N. 417; 24 M. L. J. 680 **227**

Madras Land Revenue Assessment Act (I of 1876) **68**

Madras Local Boards Act (V of 1884), ss. 59, 76 **694**

Madras Permanent Settlement Regulation (XXV of 1802) **68**

Madras Revenue Recovery Act (II of 1864), s. 2 **386**

——————— **s. 3 (10)** **694**

——————— **ss. 25, 26, 27, 44—**

Notice to defaulter—Regulation XXV of 1802*, s.* 7*—Order of procedure in respect of moveable and immoveable.*

White, C. J.—Service of demand and attachment notices on a defaulter under Act II of 1864 can be effected in any of the ways mentioned in sections 25, 26, 27. The sections do not provide for alternative modes.

To get the benefit of the proviso to section 44, it must be shown that a larger portion of the land was sold than was sufficient to discharge the arrears.

Section 6 of Act II of 1864 is exhaustive; it is for the plaintiff to show that he can claim the benefit of a *sanad* apart from section 7 of Regulation XXV of 1802.

Tyabji, J.—Section 44 of Act II of 1864 is only a permissive section.

To bring his case under section 6 of the Act, it is necessary for the defaulter to allege and prove that he holds a *sanad*. VENKANNA IYER *v.* SECRETARY OF STATE, (1913) M. W. N. 494 **732**

——————— **ss. 26, 27** **732**

——————— **ss. 32, 42A** **694**

——————— **s. 42** **386**

——————— **s. 44** **732**

——————— **ss. 64 (2), 66, 73** **694**

——————— **s. 58** — *Jurisdiction of Civil Court—Interpretation of statutes—"Divided estate"—Portion of* mitta *acquired by Government—Suit against Government for contribution towards assessment—Maintainability—Madras Permanent Settlement Regulation (XXV of* 1802*), ss.* 2, 3*—Madras Land Revenue Assessment Act (I of* 1876*).*

Certain land, acquired by Government by adverse possession against the owner thereof, was alleged by the plaintiff to have formed part of his *mitta*, paying assessment to Government. In a suit by the plaintiff *mittadar*, for the refund of a proportionate portion of the amount paid by him as one year's *peishcush* on the entire *mitta* and a declaration that he is only liable to pay *peishcush* proportionately to the extent of the *mitta* now in his possession:

Held, (Per *White, C. J., affirming the order of the lower Court*), that a Civil Court had no jurisdiction to fix the proportionate *peishcush* payable by the plaintiff to Government.

Section 58 of Act II of 1864 is a bar to such a suit and this enactment is a general one and not restricted to questions arising in proceedings under that Act.

The words 'divided estate' in that section ought not to be construed to have a restricted or technical meaning.

Though the Courts may apportion the assessment as between co-sharers, yet the Courts cannot have jurisdiction, by severing the capacities of Government, to apportion the assessment as between the *mittadar* and Government since the effect of that would be to exercise a right which the Legislature has taken away from the Courts by section 58.

Per *Tyabji, J.*—The prayer for declaration in respect of future *peishcush* cannot be granted even as a declaration for contribution by Government towards that liability as that would directly alter the assessment fixed on the land which the Courts have no jurisdiction to do.

The claim for refund of a proportionate portion of the amount already paid by the *mittadar* stands on a different footing and can be maintained in a Civil Court.

Such a claim is in effect a claim for contribution from joint owner and arises after payment of the assessment and recognises the propriety and validity of such payments and, consequently, there is no interference with the rights of Government.

If the Secretary of State can acquire land by adverse possession like a private individual, he must hold the land with the same incidents as a private individual.

In construing a particular section of an Act, we must look at the whole Act and it is necessary to consider the context in which such section occurs.

Section 58 of Act II of 1864 has no application to such a claim and the words 'divided estate' have a special meaning under that section.

The words "in the portions of a divided estate" in section 58 of Act II of 1864 qualify the words land revenue payable to Government.

The words "divided estate" in section 58 must be construed so as to have reference to such a division of the estate alone as is contemplated in the rest of the Act. The words have no reference where the estate has become divided by one portion of it having been acquired by a third person through adverse possession.

Enactments which take away the jurisdiction of Civil Court must be strictly construed.

Section 58 can be no bar to a Civil Court apportioning the assessment which is admittedly due to the Government on the whole of a particular *mitta*, when such apportioning is made for the purpose of deciding in what portions that total assessment has to be borne by two or more persons, who have become owners of portions of such a *mitta*. The section can have no application to the rights of joint holders of land amongst themselves as distinguished from th liability of each of them jointly and severally to pay the whole assessment to the Government. MUTHAMMAL *v.* SECRETARY OF STATE, 13 M. L. T. 293; (1913) M. W. N. 307; 24 M. L. J. 405 **68**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488; DIVORCE ACT.

———————Invalid marriage—Muhammadan Law—Wife's right to maintenance after death of husband **837**

Majority Act (IX of 1875) **452**

Malabar Compensation for Tenants Improvements Act (I of 1900), s. 5, 6 **563**

Malicious prosecution, suit for—Plaintiff to prove his innocence—Finding in criminal case not conclusive **24**

———————*Burden of proof—Absence of reasonable and probable cause, meaning of—Carelessness in deciding reasonableness and probability, not malice—Both malice and absence of reasonable and probable cause must be proved—Recklessness about the truth or falsity of charge—Malice.*

In a suit for malicious prosecution it does not rest on the defendant to show that there was reasonable and probable cause, but it is for the plaintiff to prove its absence.

Reasonable and probable cause means reasonable grounds for believing that the plaintiff was guilty of the offence charged, and not reasonable grounds for coming to the conclusion that the Court would convict him of it.

Carelessness on the part of the defendant in deciding whether there was reasonable and probable cause would not amount to malice, and both malice and absence of reasonable and probable cause have to be proved.

If a man has been reckless, whether the charge be true or false, that might amount to malice, but recklessness in coming to the conclusion that there was reasonable and probable cause would not. VAIDENADIER *v.* KRISHNASAWMY IYER, 24 M. L. J. 515 **665**

Marriage. *See* DIVORCE ACT.

———————*Persons* living as husband and wife—Presumption as to legitimacy—Burden of proof **634**

———————Repudiated woman—Sikh *Jats* of Gurdaspur District **460**

Married Women's Property Act (III of 1874), s. 6 *inapplicable to Hindus.*

Act III of 1874 does not apply to Hindus so a Hindu wife cannot claim the benefit of its provisions. SHANKAR VISHVANATH *v.* UMABAI SADASHIV WAGLE, 15 BOM. L. R. 320 **736**

Master and servant—Acts done by servants in exercise of sovereign powers—Liability of officer doing the act—Effect of Indian Enactments on the liability of the Secretary of State in Council—Government of Madras had no authority to ratify Collector's orders **353**

Maxims--"One who seeks equity must do equity" **755**

Merger—Merging of prior mortgage into subsequent ones **267**

Mesne profits—Pre-emption decree set aside by Appellate Court **I**

———— ————, meaning of **974**

Minor. *See* CIVIL PROCEDURE CODE, 1882, s. 462; MUHAMMADAN LAW.

————Act of adult members of Hindu family for minor's benefit **411**

————Agreement of reference to Arbitration on behalf of minor—Leave of Court not obtained—Minor not bound **424**

————Alienation by guardian **235**

————Estoppel—Representation made by father or brother of minor—Minor not bound by such representation—Plea of minority not taken in pleadings—Plea not allowed in argument in second appeal—Practice **55**

——— —Insolvency petition **704**

————Power to make Will **452**

————Sale executed in favour of minor—Minor deprived of property at the instance of third person—Suit by minor to recover consideration money **610**

——— —*Mortgage by guardian--Suit by mortgagee—Mortgage set aside—Mortgagee cannot fall back on prior mortgage paid off by him—"One who seeks equity must do equity," not applicable to cases where minor is defendant.*

Where in a suit by a mortgagee of minor's property mortgaged by the minor's guardian the mortgage is found not to bind the minor, the mortgagee cannot fall back on a prior mortgage paid off by him out of the consideration of the mortgage in suit.

The rule that a person suing to set aside a transaction purporting to have been effected on his behalf during his minority, and thus seeking equity, must do equity and restore any benefit derived by him from the transaction, does not apply where the minor is defendant, so as to enable the plaintiff, in whose favour the transaction was effected, to claim restoration from the minor. QAMARUDDIN *v* PRABHU DIAL, 128 P. W. R. 1913; 215 P. L. R. 1913 **755**

Mischief. *See* PENAL CODE, s. 430.

Misrepresentation inducing agreement—Burden of proof—Agreement acted upon **411**

Mokarari—Surrender **124**

Mortgage. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV **856**

——— **by guardian**—Suit by mortgagee—Mortgage set aside—Mortgagee cannot fall back on prior mortgage paid off by him—"One who seeks equity must do equity," not applicable to cases where minor is defendant **755**

Mortgage—contd.

——— ———Contending mortgagee **2**

——— ——— **decree** passed when old Civil Procedure Code in force—Expiry of twelve years—Application for execution—Which Code applicable **899**

——— ———Merging of prior mortgage into subsequent ones **267**

——— ———Puisne mortgagee not party to prior mortgagee's decree—Reduction of interest in decree—Puisne mortgagee cannot get benefit of the reduction **614**

——— ——— without possession—Share of produce to be paid as interest—On default in paying interest possession to be taken—Default—Suit for produce without asking for possession—Subsequent suit for possession barred **981**

——— ———*Attestation—Writer, when an attestator—Onus of proof.*

The mere statement by the writer of a document that he wrote it cannot be regarded as an attestation of it by him. The question whether, when the writer has signed his name below the executant's he can be regarded as an attestator himself must depend on the facts and circumstances of each case. It is not necessary that the writer should describe himself as a witness or that there should be a testimoniam clause. All that must appear is that he intended to attest the execution and where he subscribes his name at the time of execution it would not be improper to presume such intention.

The description of him as the writer cannot show that he was not also an attestator.

Where the fact of the attestator having been present at the time of execution is not put in issue in the lower Courts, it cannot be raised in the second appeal. If properly raised the onus will be on the plaintiff. VEERAPPUDAYAN *v.* MUTHU KARUPPA THEVAN, (1913) M. W. N. 400; 24 M. L. J. 534; 13 M. L. T. 463 **589**

——— ——— by way *of conditional sale—Time essence of contract—Sale absolute on expiry of term.*

In Sind, in the case of a mortgage by way of conditional sale, time is of the essence of the contract, and at the expiry of the term fixed for redemption, the contract executes itself and the transaction closes and becomes one of sale. FRAMJI *v.* SULLEMANJI, 6 S. L. R. 178 **428**

——— ———*Land mortgaged sold in execution of rent decree—Notice given by purchaser under section* 167, *Bengal Tenancy Act—Whether mortgage extinguished*—Ghatwali *tenure held upon quit rent payable to* H. *and* ghatwali *service—Resumption of land by Government and settlement with* zemindar *who settled with mortgagor—Condition of settlement that mortgagor would pay quit rent payable to* H. *and value of* ghatwali *service to* zemindar—*Suit by* zemindar—*Whether suit for rent or for money—Whether* zemindar *and* H. *are joint landlords—Bengal Tenancy Act (VIII of* 1885), *ss.* 159, 167.

The plaintiff brought this suit to enforce a mortgage security. The land mortgaged was purchased by defendant No. 13 at a sale held in execution of a decree for arrears of rent. After his purchase, he caused a notice to be served upon the mortgagee, the

Mortgage—contd.

plaintiff, in accordance with the provisions of section 167 of the Bengal Tenancy Act:

Held, that the mortgage was thereby extinguished, and the plaintiff's suit must fail.

The mortgaged land was comprised in a *ghatwali* tenure. The *ghatwal* held the land upon payment of quit rent to one *H.*, and was also liable to render *ghatwali* service. The land was resumed by the Government and transferred to the *zemindar* who settled the land with the mortgagor, upon condition that the quit rent which was to be paid to *H.* would be paid by the *zemindar*, and that the lessee, the mortgagor, would pay to the lessor, the *zemindar* a consolidated rent representing the value of the *ghatwali* service and the amount of quit rent. On default of payment the *zemindar* sued the lessee for arrears of rent and obtained a decree in execution of which the defendant No. 13 purchased the land:

Held, that the *zemindar* and *H.* were not joint landlords and the decree was not a decree for money as one obtained by a co-sharer landlord, but one for rent and the purchaser acquired the land with power to annul incumbrances. CHANDRA MOHINI DEBI *v.* KENARAM CHITI **776**

———*Mortgage decree—Execution sale—Surplus sale-proceeds taken out by fourth mortgagee—Suit by third mortgagee against fourth mortgagee for recovery of money as his own making no claim against mortgagor—Whether suit maintainable.*

The second mortgagee of certain property brought a suit on his mortgage and obtained a decree in execution of which the property was sold and purchased by the third mortgagee. The decree was fully satisfied from the sale-proceeds, and a surplus was left in deposit. The fourth mortgagee then sued on his bond, and obtained a decree and in satisfaction thereof withdrew from Court the amount of his decree out of the deposit there held. To this suit the third mortgagee was not made a party. The third mortgagee sues now to recover from the fourth mortgagee the sum withdrawn by the latter claiming the money as her own and making no claim against the mortgagor:

Held, that she cannot succeed on this footing; that she was entitled in equity to regard the surplus sale-proceeds as part of her mortgage security and to follow them in the hands of the fourth mortgagee; that she could establish her right to the money, not as the owner thereof, but as part of her security; and that her present suit claiming the money as her own and making no claim at all against the mortgagor cannot succeed.

The provisions of clause (*c*) of the proviso to sub-section (1) of section 73 of the Code of Civil Procedure operate, as the earlier part of the sub-section shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof. NATHAN SAO *v.* MRS. ANNIE BEASANT **226**

———*Mortgagee—Joint Hindu family—Family disputes between mortgagee's father and his sons—Arbitration—Award not touching the mortgaged property—Mortgagor paying off mortgage-debt to the sons—Re-payment ignored by mortgagee—No effect of award upon the title of mortgagee to recover the whole rent due in respect of the mortgaged property.*

Mortgage—contd.

Plaintiff was the mortgagee of a house. *H.*, a near relation of the mortgagor rented the house from the mortgagee. Family disputes arose between the plaintiff and his sons, members of a joint Hindu family, there was a reference to arbitration and an award between the parties to the dispute. The mortgagor paid off the mortgage-debt to plaintiff's sons. Plaintiff sued *H.* for rent:

Held, (1) that, as the particular house was not definitely awarded to plaintiff's sons by the arbitration proceedings, plaintiff was entitled to ignore the alleged re-payment of the mortgage-money to any one other than himself;

(2) that there was no justification for restricting plaintiff's decree to $\frac{1}{3}$th of the rent due merely because the arbitration award covered the bulk of the estate then in dispute. NARPAT RAI *v.* HARI RAM, 176 P. L. R. 1913; 130 P. W. R. 1913 **638**

———*Mortgage of lands some of which did not belong to mortgagor—Decree against lands belonging to mortgagor—Purchase of those lands by decree-holder in execution of mortgage decree—Mortgage decree whether valid—Decree-holder whether entitled to possession.*

A mortgagee brought a suit on his mortgage alleging that by mistake the mortgagor had included in the mortgage land which he had no power to charge, and the mortgagee sought to enforce his charge against those lands only which the mortgagor was able to mortgage. The mortgagee got a decree, brought the property to sale in execution and himself purchased it:

Held, that his purchase was valid; that he was entitled to possession; that he could throw the whole of the mortgage-debt on the lands belonging to the mortgagor, as he sought to enforce his lien against all the property which the mortgagor could charge and exempted nothing over which the mortgage lien really extended. HARKHU SINGH *v.* MUNNA LAL **423**

———*Mortgagee in possession purchasing* raiyati *lands—Accessions—Subject of redemption—Special advantage by reason of position as mortgagee, if should exist—Expense of acquisition to be borne by mortgagor in proportion to share—Transfer of Property Act (IV of* 1882*), s.* 63.

Although every purchase by a mortgagee in possession of a sub-tenure, existing at the date of the mortgage, must not be taken to have been made for the benefit of the mortgagor, yet many acquisitions by the mortgagee are treated as accretions to the mortgaged property and, therefore, subject to redemption.

The mortgagor's right to the accession under the provisions of section 63 of the Transfer of Property Act does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring the accession. But the mortgagor must pay to the mortgagee the expenses of acquiring it.

The *raiyati* lands purchased by a mortgagee in possession of the mortgagor's share of the *mehal*, are accessions to the mortgaged property to the extent of the mortgagor's share in the *mehal*; and the mortgagor is entitled to those lands upon redemption to the extent of his share in the *mehal* on payment to the mortgagee the proportionate share of the expenses incurred in acquiring them. RAM BRICH NARAYAN SINGH *v.* AMBIKA PROSAD SINGH, 17 C. W. N. 386 **90**

Mortgage—contd.

———— *Mortgagee undertaking to pay a prior mortgage—Failure of contract—Damages—Limitation.*

J. mortgaged his property to *B.* He subsequently effected a usufructuary mortgage of the same property to *D.* leaving sufficient out of the mortgage money with *D.* for payment to *B.* Subsequently *J.* sold his equity of redemption to *A.* *D.* did not pay the prior mortgage of *B.* who brought a suit for sale of the property and obtained a decree. In order to save the property *A.* paid the decretal money and brought a suit to recover the same from *D.*:

Held, that *D.* was liable, and that limitation would run from the date the decretal money was paid. HAKIM ALI KHAN *v.* DALIP SINGH, 11 A. L. J. 478 **676**

———— *Priority—Intention to keep priority alive—Presumption.*

Unless there are circumstances from which an intention to abandon the prior mortgage can be gathered, it must be presumed that the mortgagee did not abandon the prior mortgage but kept it subsisting, since it is to the interest of the mortgagee to keep up his rights under the prior mortgage. RAM KISHAN DAS *v.* FAKIR CHAND, 11 A. L. J. 386 **18**

———— *Redemption—Recorded co-sharer in possession of mortgaged property—Mortgagor bound to pay all co-sharers according to their respective shares—Manner in which money is spent after payment.*

A recorded co-sharer in mortgage rights, who is in joint possession of the property mortgaged, can hold the mortgagor responsible for the payment of the mortgage debt. The mortgagor is bound to pay the debt to all the co-sharers in accordance with their respective shares, and is not responsible for the manner in which the money is spent after it leaves his hands.

The payment to a widow of her share of the mortgage money as one of the heirs of the mortgagee is valid for the purposes of redemption. FATTEH MUHAMMAD *v.* SULTAN MUHAMMAD, 97 P. W. R. 1913; 137 P. L. R. 1913 **122**

———— *Simple mortgage, essentials of—Construction—*"Makful" *and* "mustaghrak," *meaning of—Redemption—Conversion of a suit for sale on simple mortgage into a suit for recovery of money charged on immoveable property, whether can be allowed in second appeal.*

One *J.* executed a document in 1871 whereby he agreed to pay one *A.* and her descendants a certain yearly allowance. He secured the allowance on certain *zemindari* property (*makful* or *mustagharak karke*) and agreed that if he failed to pay it the annuitants might take possession of a portion of it sufficient to give them the stipulated income. The allowance not having been paid since 1880, the plaintiffs sued for the whole amount due to them by sale of the property contending that the above document was a simple mortgage:

Held, (1) that the document was not a simple mortgage;

(2) that the words "*makful* and *mustagharak*" ordinarily do imply a power of sale but where the parties clearly did not contemplate the property being sold these words did not imply such a power;

(3) that it was an essential of a mortgage that it should be capable of redemption;

Mortgage—contd.

(4) that a suit for sale of property on the basis of a mortgage could not be converted in second appeal into a suit for recovery of money charged on immoveable property. MASUMA KHATUN *v.* TAHIRA KHATUN, 11 A. L. J. 580 **661**

———— *Simple mortgage—Mortgagee entitled to possession on non-payment of instalment—Mortgagee's right to take possession on failure of mortgagor failing to deliver possession—Transfer of Property Act (IV of 1882), s. 98, non-applicability of—Simple and usufructuary mortgage—Decree for sale.*

Where a mortgage-deed provided that the mortgage money with interest at 2 per cent. would be paid in two instalments and in case of non-payment of the first instalment the mortgagee would be entitled to be put in possession of the mortgaged property taking profits in lieu of interest and in case of failure to deliver possession the mortgagee would be at liberty to take possession with the help of the Court:

Held, that the mortgage was not an anomalous mortgage but the combination of a simple and usufructuary mortgage to which section 98 of the Transfer of Property Act did not apply.

If the mortgagors did not deliver possession, the mortgage continued to retain its character of a simple mortgage and a decree for sale is, therefore, permissible.

Held, also, that in the case of a simple mortgage a personal covenant is always implied and a decree for sale in such a case can be granted. LALTA PRASAD *v.* HORI LAL, 16 O. C. 90 **748**

———— *Simple mortgage—What mortgage-deed must indicate—*"Arh" *and* "mustagharak", *whether imply power of sale.*

In the case of a simple mortgage, the mortgage-deed, read as a whole, should indicate, that the parties to it intend that the property be sold in default of payment.

The use of the words "*arh*" and "*mustagharak*" alone do not always and necessarily imply a power of sale. MOTI BEGUM *v.* HAR PRASAD, 11 A. L. J. 570 **658**

———— *Substitution—First mortgage discharged—Intention of the parties to extinguish the first mortgage.*

One *J.* executed a mortgage in favour of *H.* in 1876. His nephew *P.* executed another mortgage over the same property and in favour of the same person in 1879. In 1887, both *P.* and *N.*, the widow of *J.*, executed a third mortgage in favour of the same mortgagee in consideration of the amount due under the previous mortgages. In 1876, the mortgagee brought a suit to recover the mortgage money on foot of mortgage of 1887. He obtained a decree against *P.* alone. The decree-holder executed the decree but the whole decretal amount was not realised.

He then brought a second suit on foot of the mortgage of 1876:

Held, that inasmuch as the intention of *P.* and the mortgagee was to supersede the mortgage sued upon by the mortgage of 1887, no suit could lie on the basis of the mortgage. SHEORAJ SINGH *v.* HARCHANDI LAL, 11 A. L. J. 365 **127**

———— *Widow's power to allow redemption of land inherited from her husband—Custom—Alienation—Reversioner's right.*

Mortgage—concld.

A widow, who has succeeded to a life-estate under the Customary Law, is entitled to receive the mortgage money for the land held by her husband as mortgagee and to allow redemption. The redemption by the widow cannot be regarded as a voluntary alienation.

The mortgagor is not bound to see that the money paid to redeem the land is secured for the benefit of the estate or to associate the reversioners in the transaction. DAL SINGH *v.* BAKHSHISH SINGH, 7 P. R. 1913; 136 P. L. R. 1913 **8**

——— **or charge**—Intention to create charge **221**

——— ——— Mere covenant not to alienate property **478**

——— **or sale** **729**

——— ——— Construction of deed **679**

——— **Redemption**—Date for redemption not specified—Redeemable immediately **291**

——— ——— **decree** not executed does not bar fresh suit **856**

——— ——— **suit** dismissed as premature—Subsequent suit for redemption not barred—First suit for declaration and account—Fixing time for payment—Power of Appellate Court **393**

——— ——— ——— Widow's power to allow redemption of land inherited from husband **8**

——— **suit,** costs of Appellate Court **729**

——— ——— Costs in an appeal in a mortgage suit—Personal decree against judgment-debtor **384**

——— ——— ——— Plaintiff making person in possession of mortgaged property defendant with representative of mortgagor—Representative not appearing—Other defendant pleading satisfaction of debt—Satisfaction proved—Plaintiff estopped from urging that other defendant had no right to redeem—No decree could be passed against representative **547**

——— ——— *Costs.*

In a mortgage suit, a mortgagee is ordinarily entitled to his costs unless he is guilty of grave misconduct. VADLAMAUNATI BALA TRIPURA *v.* DADA SAHIB, (1913) M. W. N. 334 **474**

——— ——— ——— *Some of the mortgagors holding distinct shares in the property not made party to the suit—Decree for proportionate amount.*

Where in a mortgage suit for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, the plaintiff has by an oversight omitted to implead some of the mortgagors, who owned a share in the property, distinct from the shares held by the defendant, a decree for the sum proportionate to the interest of the persons who were before the Court should be given. GANESHI LAL *v.* CHARAN SINGH, 11 A. L. J. 280; 35 A 247 **614**

Muhammadan Law—Maintenance—*Invalid marriage—Right of maintenance of wife after death of husband.*

Under Muhammadan Law, an invalid marriage does not entitle the wife to be maintained out of the estate of her deceased husband. ABDUL HAMID KHAN *v.* MEHR JAN, 49 P. R. 1913; 139 P. L. R. 1913 **837**

Muhammadan Law—concld.

——— ——— ——— **Minor**—De facto *guardian—Alienation of immoveable property of the minor—Powers of guardian* de facto, de jure—*Succession on the death of a Muhammadan—Universal or several.*

On the death of a Muhammadan, the heirs take an immediate estate in their shares, and hence the mere fact that one co-heir is in possession of more than his own share does not give him a right to alienate that excess portion.

The rules of Muhammadan Law which were supposed to lay down a doctrine of universal succession are merely rules of procedure now superseded by the Code of Civil Procedure, and a suit by a creditor against a single heir has no resemblance either in form or substance to an administration suit.

A Muhammadan mother cannot as a *de facto* guardian make an alienation of immoveable property that is binding on the minors.

To authorise a sale of immoveable property of a Muhammadan minor even by a *de jure* guardian, there must be an absolute necessity, or else it must be for the benefit of the minor. NARAINDAS *v. Musammat* OBHAI, 6 S. L. R. 268 **911 F. B.**

——— ——— ——— **Succession**—Universal or several **911**

——— ——— ——— **Wakf**—*Validity—Test—Substantial gift to charitable use—Two-thirds of income as allowances to members of settlor's family—Allowances to be reduced if income reduced, but amount of charity to be increased if income increased—Construction of* wakf *deed.*

A *wakf* deed will be valid if the effect is to give the property in substance to charitable uses. It will not be valid if the effect is to give the property in substance to the settlor's family.

A *wakf* deed provided that about two-thirds of the income of the property dedicated were to be paid as allowances to the wife and children of the settlor, and only about a third was to be spent for religious and charitable purposes; and that the allowances were to be reduced or increased in the event of the income being reduced or increased but the amount to be spent for religious and charitable purposes was not to be reduced for any reason but should be increased if the income increased:

Held, that the deed cannot be said to have been designed for the aggrandisement of the family property or for keeping it perpetually in the hands of the family, and that the *wakf* was valid. BAZLUL GHAZI MIA *v.* ADAK PATRAI, 17 C. W. N. 1018 **893**

Murder. *See* PENAL CODE, ss. 300, 302.

——— ——— committed in concert—Liability of each co-operator **331**

Mutt—*Lease of* inam—*Powers of Matadhipathi—Alienations, how far binding on successors—Limitation Act* (*XV of* 1877), *Sch. II, Arts.* 12, 134, 144—*Revenue sale for arrears of local cess—Madras Local Boards Act* (*V of* 1884), *ss.* 59, 76—*Procedure—Madras Revenue Recovery Act* (*II of* 1864), *ss.* 3 (10), 32, 42 A, 64 (2), 65, 73—*Civil Procedure Code* (*Act V of* 1908), *s.* 92 (1).

The *inam* in suit was leased out in 1872 to a *Brahmin*, Mudgula Chariar, by the then Matadhipathi. The lessee assigned his interest to the 1st and 2nd defend-

Mutt—concld.

ants and to predecessors of 12th and 13th defendants. The lessor died in 1890 and was succeeded by another Swamiar, who acting on behalf of the original lessor in 1889, leased the *inam* to 6th defendant, cancelling the lease of 1872. But as the 6th defendant could never obtain possession, the Swamiar treated the occupants under the old lease as tenants and collected rents from them. A portion of the land was also sold in auction to the 5th defendant by the Revenue Authorities for default of payment of local cesses.

In 1906, the plaintiff succeeded to the office as Swamiar and sued to set aside the lease of 1872 and recover possession of the *inam*:

Held, that the right of the Matadhipathi to the properties of the *Mutt* is an absolute right to dispose of the income, subject to the upkeep of the *Mutt*.

His position is not, in fact, that of a tenant for life.

Thongh the lease of 1872 was beyond the powers of the lessor, he could not have avoided it during his own life-time. An alienation by the head of a religions foundation is not necessarily utterly void and of no effect.

Though a Matadhipathi is in a certain sense an owner in fee simple yet in many respects he has only the powers of a tenant for life. His position is similar to that of a corporation sole in England.

A Matadhipathi cannot make nor validate a transfer beyond his tenure of office. As the 5th defendant never paid any rent to the *Mutt*, after the revenue sale to him it must be deemed that the owner's interest is sold by the Revenue Authorities. Since the sale took place without notice to the *Mutt*, it was irregular and liable to be set aside. But such a suit was barred whether under section 59 of Act II of 1864 or Article 12 of the second Schedule to the Limitation Act.

Per *Sadasiva Aiyar, J.*—The position of a Matadhipathi is in many ways analogous to that of the estate of a Hindu female heir to a male's estate. Therefore, he can contest an alienation and sue for possession within 12 years of his becoming Matadhipathi.

Section 92 (1) of the Civil Procedure Code is to be applied to *Mutts* and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable religious institution like a *matam*.

It is clear from section 3 (10), section 64 (2) and sections 66 and 73 of the Local Boards Act (V of 1884) that it is the *inamdar* (*matam*) who is liable for the road-cess and not any tenant of the *matam*. The procedure laid down for sales under this Act is the same as that under the Revenue Recovery Act, in virtue of section 76 of the Local Boards Act.

But the substantive provisions of the Revenue Recovery Act (sections 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act.

The irregularities complained of cannot be made the basis for attacking the sale after the time fixed by law for the setting aside of such a sale had expired. MUTHUSAMIER *v.* SREE SREE METHANITHI SWAMIYAR AVERGAL, 13 M. L. T. 498; (1913) M. W. N. 581 **694**

Native Indian Subject committing offence in foreign country—Sanction of Local Government not obtained **954**

Neglect does not include cowardice **505**

Negligence, proof of **756**

——— ——— *Contributory negligence—Damages—Accident caused by negligence of both parties—Railway Company—Passenger projecting arm out of window—Injury by contact with open door of another carriage—Notice of caution.*

The plaintiff was a passenger by one of the Railway trains owned by the defendant and occupied a seat in a second class compartment of the train. He sat in a corner seat with his arm projecting about four inches out of the open window. While passing a stationary train at a station, the plaintiff's projecting arm came into contact with the open door of one of the carriages of the stationary train and was fractured. Plaintiff sued the Railway Company for damages, for the injury sustained by him alleging negligence on the part of the Company.

It was found that the rails were so laid as not in any way to infringe the Government Regulations as to the standard minimum distances between two parallel lines. The carriages were also well within the Government maximum dimensions as to the width of the carriages.

In the compartment, in which the plaintiff was travelling, a precautionary notice in fairly large type was exhibited.

Held, (1) that the plaintiff was guilty of negligence which directly contributed to the injury and that such negligence formed a material part of the effective cause thereof;

(2) that plaintiff was not entitled to any damages.

In order that a plea of contributory negligence may be successful, it must be shown either that there was negligence on the part of the plaintiff, which contributed to the accident, and that the defendant could not, by using ordinary care, have avoided the accident, or that, notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary care, have avoided the accident.

If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. JEHANGIR MUNCHERJI LALI *v.* B. B. & C. I. RY. CO., 15 BOM. L. R. 252 **485**

Negotiable instrument—Holder's right to sue **88**

——— ——— ——— *Joint promisees—Pro-note—Discharge by one of entire debt—Negotiable Instruments Act (XXVI of 1881), ss. 78, 82—Holder—Contract Act (IX of 1872), ss. 38, 45.*

Per *Curiam*, (*White, C. J dissentiente*): One of two or more payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees.

Per *Sankaran Nair, J.*—English decisions are not precedents governing Indian Courts but are only referred to for the purpose of explaining Indian Statutes which are usually framed with reference to those decisions.

If the English decisions with reference to which any of the Indian Statutes are framed, are subsequently overruled, that fact ought not to affect the interpretation of the Indian Statutes.

Per *White, C. J.*—Section 38 of the Contract Act does not deal with the legal consequences of an accepted tender or offer of performance but only

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with the legal consequences of an offer which has been refused and hence no inference can be drawn from this section.

The 'holder' contemplated by sections 78 and 82 of the Negotiable Instruments Act of 1881 must be taken to mean all the payees jointly and not one or more of them. MANNAVA ANNAPURNAMMA *v.* UPPALA AKKAYYA, 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333 **12 F. B.**

Negotiable Instruments Act (XXVI of 1881), ss. 8, 37—*Promissory-note—Liability of maker to holder for consideration.*

The maker of a promissory-note is liable to the holder of it for consideration even though the instrument originally was made without consideration. HAZARI LAL *v.* TULSHI RAM, 11 A. L. J. 481 **637**

——— **ss. 9, 118**—*Holder in due course—Consideration—Antecedent debt—Estoppel.*

The mere existence of an antecedent debt is consideration within the meaning of section 118 of the Negotiable Instruments Act. Therefore, where a negotiable instrument of any sort is handed over by a debtor to his creditor in discharge of a pre-existing debt, the creditor becomes a holder in due course.

The holder of a bill of exchange, which is proved to have been obtained originally for unlawful consideration, must prove that he is a holder in due course and, therefore, in a better position than his transferor.

The mere neglect to answer a notice cannot make a good ground for estoppel. DAULATRAM *v.* NAGINDAS, 15 BOM. L. R. 333 **789**

——— ——— ——— **s. 16**—*Endorsement in full—Actual words of direction to pay not necessary—What is equivalent to a direction sufficient.*

If an endorsement contains what is equivalent to a direction to pay to the endorsee, though it may not contain actual words of direction, it would contain a direction to pay within the meaning of section 16 of the Negotiable Instruments Act.

An endorsement to the effect that the note had been made over to so and so on a particular date over the signature of the payee, with the delivery of the note to the endorsee, is an endorsement in full and can operate as a negotiation. SRINIVASA PILLAI *v.* KANNAN, 24 M. L. J. 296 **410**

——— ——— ——— **s. 37** **637**

——— ——— ——— ——— **ss. 78, 82** **12**

——— ——— ——— **s. 118** **789**

Non-joinder of necessary party—Failure of suit—Burden of proof—Appeal—Burden of showing judgment erroneous **963**

Notice. *See* CIVIL PROCEDURE CODE, 1908, s. 80 **361**

———— Transferee without notice of previous transfer or lease—Tenant's right—Occupation of property by tenant—No inquiry of tenant made by intending transferee—Notice of tenant's rights **9**

———— *Transferee without notice of previous transfer or lease—Tenant's right—Occupation of property by tenant—No inquiry of tenant made by intending transferee—Notice of tenant's rights—Specific Relief Act (I of 1877), s. 27 cl. (b)—Agreement—Specific perfromance.*

The occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice.

A property was leased on March 2, 1901, to defendant No. 1 for seven years. On May 1, 1901, the lessors entered into an agreement with the lessees for renewal under certain conditions on the determination of the term of seven years mentioned in the lease. On July 11, 1906, the lessors purported to settle the property with the plaintiff for seven years from May 1, 1908. The plaintiff sought to recover possession of the property on the ground that the lease of March 2, 1901, had come to an end:

Held, that the agreement of May 1, 1901, was one which could be specifically enforced against the plaintiff who, though a transferee for value had not paid money without notice of the original contract within the meaning of section 27 clause (*b*) of the Specific Relief Act, 1877, and that, therefore, the plaintiff was not entitled to possession. BABURAM BAG *v.* MADHAB CHANDRA PALLAY, 40 C. 565 **9**

Novation of contract—Burden of proof—Mere promise by creditor not to sue, effect of **981**

Nuisance—Brothel **714**

Obscene book. *See* PENAL CODE, s. 292.

Occupancy rights—Succession — Adopted son **40**

Occupancy Tenancy. *See* LANDLORD AND TENANT; PUNJAB TENANCY ACT, ss. 53 TO 59.

Offer and acceptance—Parties not of one mind **616**

Offer by advertisement — Acceptance without knowledge—Contract—Consideration **576**

Oudh Rent Act (XXII of 1886), s. 61—*Application for ejectment, whether an application for execution.*

An application under section 61 of the Oudh Rent Act made by a landlord holding an unsatisfied decree for arrears of rent is an application for execution of the said decree. DEPUTY COMMISSIONER, FYZABAD *v.* UDIT SINGH, 15 O. C. 381 **38**

Ownership — Presumption of surrender of ownership **565**

Pakka Aditya —Nature of agency **29**

Parties—Suit for salary against incorporated company **595**

———— *Suit for rent—All tenants, whether necessary parties—Sale of holding free from incumbrances—Bengal Tenancy Act (VIII of 1885), Ch. XIV—Contract Act (IX of 1872), s. 43.*

Whatever may be required for the purposes of a mere money decree, ordinarily all the tenants of a holding are necessary parties to the suit in order that the decree and the sale in execution of it may

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have the important consequences described in Chapter XIV of the Bengal Tenancy Act.

But where one of a number of tenants is put forward by the rest as their representative, he can be regarded as the sole tenant for the purposes of a suit for arrears of rent within Chapter XIV. Whether one of several tenants can be regarded as a representative of the rest, must depend on the circumstances of each case and is, if not essentially, at any rate largely, a question of fact. CHAMATKARINI DASI *v.* TRIGUNA NATH SARDAR, 17 C. W. N. 833 **989**

——— *Necessary party—Non-joinder of necessary party—Failure of suit—Partnership suit—All partners to be joined or suit should fail—Civil Procedure Code (Act V of 1908), O. I, r. 9—Limitation.*

If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or, if, when he is brought on the record, the suit as against him is barred by limitation, the whole suit will be dismissed.

In a partnership suit unless all the partners are made parties the suit must fail. AMBIKA CHARAN GUHA *v.* TARINI CHARAN CHANDA **963**

——— *Suit for rent—Tenant mentioning third party to whom he had paid rent—Third party should be brought on the record.*

The defendant took a shop on rent from the owner and with the latter's consent agreed to pay rent to the plaintiff, the lessee thereof. The plaintiff sued for rent due. Defendant alleged that he had paid rent to one *P.* at the request of the owner. The Court declined to make *P.* a party:

Held, that the Court should have made *P.* a party and have decided once for all whether he or plaintiffs were entitled to the rent. ALTAF-UL-RAHMAN *v.* AGHA JAN, 106 P. W. R. 1913; 168 P. L. R. 1913 **473**

Partition—Lists of properties allotted to each co-sharer, signed by other co-sharers—Registration compulsory **646**

——— of ancestral property by father with the consent of co-parcener—Consent of co-parcener binding on his sons **826**

——— *pendente lite*—Void against plaintiff—Covert dealing with property *pendente lite* does not cast duty upon the opposite party—Parties to suit incompetent to change to the detriment of opponent **885**

———Son's right to separate share—*Aroras* **11**

Partition Act (IV of 1893), ss. 1 (4), 2, 3—*Mortgagee right in* zemindari *property, sale of—U. P. Land Revenue Act (III of* 1901*), s.* 108, *applicability of—Partition.*

Where a mortgagee right in a *zemindari* property is sought to be partitioned, it is open to one of the parties to the suit to request the Court to have the property sold to the highest bidder and to distribute the proceeds amongst them.

The party who is entitled to less than a moiety share in the property is not alone entitled to request the Court to have it sold under section 2 of the Partition Act, 1893. BANKE LAL *v.* SHANTI PRASAD, 11 A. L. J. 534; 35 A. 287 **651**

——— ——— ——— **ss. 2, 3** **651**

Partition proceeding—Objection as to title dismissed as time-barred—Subsequent civil suit barred **978**

——— ——— **suit**—Agreement declaring rights of parties—Completion of title—Suit for partition on basis of agreement—Accrual of right to sue—Compromise of disputed and doubtful rights—Consideration—Misrepresentation inducing agreement—*Onus probandi*—Agreement acted upon **411**

——— ———Compromise-decree—Execution—Objection that decree-holder realised certain debts due to judgment-debtor—Distinct cause of action—Separate suit **622**

——— ———Costs—Liability of son **252**

——— ———Suit for partition and possession referred to arbitration—Declaratory award—Incapable of execution—Appointment of Commissioner to partition incompetent **374**

——— ———Value of share claimed, determines value of suit for purposes of jurisdiction—Parties consenting to refer inquiry into valuation for jurisdiction to Commissioner and to be bound by his finding—Waiver **870**

———Widow's right to claim partition **702**

Partnership—Act of manager **57**

———Barrister carrying on business in partnership—Injunction **822**

———Death of a partner—Assets retained in business—Executrix of deceased obtaining order of Probate but not taking out Probate—Revocation of Probate—Conveyance of assets by surviving partners and executrix—Estate bound—Letters of Administration obtained after death of executrix—Trust—Accounts, suit for **406**

———Hindu joint family in partnership with a third person **513**

———License — Condition prohibiting sale or transfer—Admitting partner in business **442**

——— *One partner opening rival business—Injunction—Contract Act (IX of* 1872*), ss.* 257, 259*—Specific Relief Act (I of* 1877*), ss.* 54 (*e*), 56 (*i*).

Where one of the two partners carries on a rival business in competition with and to the prejudice of the partnership, the other partner is entitled to an injunction restraining the former from carrying on the rival business. MUMTAZ ALI *v.* KASIM ALI, 11 A. L. J. 423 **250**

Pasturage—*Right of cultivators to pasture lands—Right based on custom—Reasonableness—Grazing cattle from time immemorial—Sufficient pasturage left in village.*

In a suit by certain cultivating tenants for a declaration that they have a right of pasturage over the land in suit, it was found that the land had been lying unoccupied from time immemorial and the villagers had grazed their cattle there for more than 30 years; that their user was open and peaceful without interruption and should be presumed to be as of right:

Held, that these findings did not entitle the plaintiffs to a decree; that a right of pasturage arising from

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immemorial user resembles a right based upon custom; that a custom must be reasonable; that it would be unreasonable that no land over which cattle had hitherto grazed should ever be brought under the plough; that immemorial grazing without more does not make waste land inviolable; and that the landlords would be entitled to plough waste land if only sufficient pasturage were left in the village, in which case the plaintiff would not be entitled to relief. SYED ALI *v.* SAYAM ALI **890**

Patni. *See* LANDLORD AND TENANT.

——— *Sale—Arrears of rent—Purchase by* zemindar *—Suit to set aside sale on ground of fraud—Sale set aside—Decree for mesne profits against* zemindar *—*Zemindar's *suit for rent for period of possession, whether maintainable—Original arrears for which sale held and subsequently set aside, suit for—Limitation—Bengal Tenancy Act (VIII of* 1885), *Sch. III, Art. 2, cl. iii* (b).

The first *kist* of rent for the year 1264 M. E. in respect of a *patni taluq* was due to the plaintiff, the *zemindar* who put up the *taluq* to sale and himself purchased it. He then remained in possession of the *patni* till the year 1270 M. E. when the sale by which he acquired the *patni* was set aside on the ground that it was brought about by fraud, and it was held that defendants Nos. 1 and 2 who were the owners of two-thirds share of the *patni* were in collusion with the plaintiff, and, therefore, the Court granted mesne profits to defendant No. 3, the owner of the remaining one-third share alone against the plaintiff. The plaintiff has brought this suit for rent upon the ground that as defendant No. 3 recovered mesne profits he is liable for rent payable by him in respect of the years during which the plaintiff was in possession:

Held, that the suit must fail, *first* because it was not known how the mesne profits had been calculated, and *secondly*, because although the plaintiff was in possession of the property of defendant No. 3 for seven years he had accounted for only one-third of the mesne profits that he received during that time, and it was likely that he had already received from the property more in the way of profits than any rent which would have accrued due from the defendants had they remained in possession:

Held, also, that the rent for the first half year's *kist* of 1264 M. E. was barred by limitation. FAKIR SHAH BULDIN *v.* SECRETARY OF STATE, 6 S. L. R. 210 **565**

Payment to one of three persons jointly entitled to receive money, whether good payment against others **865**

Penal Code (Act XLV of 1860), ss. 23, 430—*Mischief—Wrongful loss—Right to drainage waters.*

Where drainage water from higher grounds and other Government tanks flows in a defined channel above an embankment the overflow from which flowed without diminution also in a defined channel below and the bed of the channel was *poramboke*, the owner of the embankment has no right to raise the same to intercept the flow for irrigating his own lands.

Where the surface water of the upper land has once fallen into the defined channel, no body has a right to obstruct the flow of the same as usual over the embankment into the lower channel.

Penal Code—contd.

The accused, the owner of the embankment, applied to the Government to raise the *bund* and raised it before he received the permission:

Held, that the accused could not be presumed to have acted with wrongful intention or knowledge and hence could not be held guilty of mischief. KANDA KAMARLA VENKATA REDDI *v.* KUMARI RAE, (1913) M. W. N. 179; 14 CR. L. J. 209 **305**

——— ——— **ss. 34, 299, 300, 302**—*Assault causing death—Joint and several responsibility of assailant—Evidence as to who struck fatal blow—Common intention not inferred from fatal blow by one of several assailants—Persons causing bodily injury, guilt of—Common intention—Premeditated and unpremeditated acts, difference between.*

Per *Rafique, A. J. C.*—There are usually three classes of cases of fatal assault where the question of the joint responsibility of several assailants arises *viz.*, (1) where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (2) where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow and there is evidence of the latter's guilt; and (3) where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow.

In the first case, all the assailants are responsible for the fatal assault; in the second case, the person who is shown by the evidence to have dealt the fatal blow is alone responsible, and in the third case none of the assailants is responsible for the fatal blow.

The dealing of one fatal stroke by one of several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked.

Per *Kanhaiya Lal, A. J. C.*—Where persons go with the intention to prosecute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose.

But a distinction has to be drawn between unpremeditated acts done by a particular individual, which go beyond the object and intention of the original offence, and premeditated acts of the parties as shown by their conduct during the affair.

Per *Lindsay, J. C.*, dissenting.—Where the acts of a combination of persons proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused persons taking part in such combination is guilty of murder. EMPEROR *v.* MAHABIR, 16 O. C. 19; 14 CR. L. J. 241 **497**

——— ——— **ss. 37, 299, 300, 302**—*Culpable homicide—Murder—Issue—Proof—Practice—Trial by Sessions Court—Murder committed in concert—Liability of each person co-operating.*

Where culpable homicide has been committed, *prima facie* the principal issue is: Whether that culpable homicide does not amount to murder. In ordinary cases, that issue ought to be tried, and ought

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to be prejudged, by an authority less than the authority of a Court of Session.

A. and *B.* attacked *C.*, acting in concert in the sense that their attack was a single indivisible thing.

A. struck *C.* savagely on the head with a heavy stick and *B.* smashed *C.* in his skull by a blow dealt with a heavy stone held firmly in the hand. *C.* died in consequence of the injuries. There was no general fight of any gravity before the attack:

Held, (1) that *A.* and *B.* were both guilty of murder;

(2) that section 37 of the Penal Code made them both liable for the murder which was the result of their attack. SUBBAPPA CHANNAPPA *v.* EMPEROR, 15 BOM. L. R. 303; 14 CR. L. J. 235 **331**

——— ——— **ss. 39, 94**—*Accomplice in murder case—Doing an act under threat of death—Voluntary—Accomplice's evidence—Corroboration.*

A person, who by threats of death is induced to do an act in order to facilitate the commission of a murder, cannot claim the benefit of section 94, Penal Code. That section does not apply to cases of murder and the person is an accomplice, his action being voluntary under section 39 of the Penal Code.

Where the complicity of a person in an offence is due solely to coercion and his evidence cannot be ascribed to any desire to escape legal consequences, the discredit attaching to his evidence is so slight as to be practically negligible. KILLIKYATARA BOMMA *v.* EMPEROR, (1912) M. W. N. 1108; 14 CR. L. J. 207 **207**

——— ——— **ss. 71, 364, 365, 387**—*Abduction in order to extort money—Wrongful confinement necessary consequence—Murder not necessary—Relatives put in fear of death to abducted person in order to extort money—Separate sentences.*

Where a person is abducted in order that money may be extorted from his relatives, a conviction under section 365 of the Penal Code would be justifiable, because though the main object was to extort money, yet it necessarily followed that the abductor had the intent to secretly and wrongfully confine him. Section 364 of the Penal Code would not apply, as it does not follow as a matter of course that the abducted person was in danger of being murdered. And if, in order to compel the relatives of the abducted person to ransom him, they are put in fear of death of the victim, the provisions of section 387 of the Penal Code would be applicable. But, regard being had to the first part of section 71 of the Penal Code, separate sentences cannot be passed under both sections 365 and 387 of the Code.

Courts must administer the law as they find it, though punishment provided by law for a crime may be insufficient. PO LAN *v.* EMPEROR, 6 L. B. R. 160; 14 CR. L. J. 167; 6 BUR. L. T. 77 **167**

——— ——— **s. 94**—Doing an act under threat of debt **207**

——— ——— **ss. 99, 100, 101, 148**—*Right of private defence—Pure point of law.*

It is open to the High Court to deal with the point as a pure question of law, whether on the findings of the Sessions Judge on appeal the accused had a right of private defence.

Penal Code—contd.

The accused grew certain crops which the complainant's party cut, carried away and stacked in a neighbouring field belonging to another person.

The accused, forty or fifty in number then arrived armed with *lathis*, merely to take away their crops and not to use any force unless they were opposed or attacked. While they were removing the crop, they were attacked by the complainant's party first by clods of earth and then with spear. This resulted in a free fight and persons of both parties were more or less injured:

Held, that the accused were acting within their rights in collecting their own crops with a view to taking them away, and they had the right to defend their persons from the attack of the complainant's party, which reasonably caused apprehension that death would be the result, and they had, therefore, a right to cause any injury short of death. BABURAM RAUT *v.* EMPEROR, 17 C. L. J. 394; 14 CR. R. L. J. 295 **951**

——— ——— **ss. 100, 101, 148** **951**

——— ——— **s. 180** **948**

——— ——— **s. 182** **310**

——— ——— **s. 183** **335**

——— ——— **s. 186**—*Obstruction of public servant—Nature of offence—Proof—Municipality trying to remove goods from a strip of land*—Bona fide *dispute—Bombay District Municipalities Act (III of 1901), s. 122—Practice—Theory of guilt and innocence equally likely.*

Before an offence under section 186 of the Penal Code can be said to be established against any person, it is requisite, as the section itself expressly recites, to prove that the public servant obstructed was obstructed in the discharge of his public functions. That is a matter of fact and not a matter of the public servant's intentions. His intentions may have been perfectly honest, but if in fact and in law the functions in the discharge of which he was obstructed were not public functions then no offence can be committed under section 186. The functions would not be public functions if they fall wholly outside the jurisdiction or authority which a public officer possessed.

No man can be convicted of a criminal offence where the theory of his guilt is no more likely than the theory of his innocence.

A. owned a shop. Between the shop and the public road there was a small strip of land which *A.* had been using for forty years for the purpose of depositing his bales and other goods.

A dispute arose between himself and the Municipality with reference to the title to this strip of land.

The Municipality prosecuted *A.* under the Municipal Act for an alleged encroachment but the prosecution was unsuccessful. After this, the Chief Officer of the Municipality accompanied by a posse came to *A.*'s shop and attempted to remove his goods. *A.* obstructed the officer:

Held, that *A.* was not guilty of an offence under section 186 of the Penal Code. EMPEROR *v.* SHIVDAS OMKAR MARWADI, 15 BOM. L. R. 315; 14 CR. L. J. 251 **507**

Penal Code—contd.

——— ——— s. 193 190, 945, 958

——— ——— s. 193—*Contradictory statements in the same deposition, whether an offence—Right of witness to correct before finishing his statement—Perjury.*

It is desirable to give witnesses a *locus penitentiæ* and an opportunity to correct themselves, and if they do correct themselves immediately afterwards or on a second thought in the same deposition, a prosecution for perjury would hardly be desirable. No statement made by a witness in a deposition can, moreover, be regarded as a completed statement until the deposition is finished and corrected, if necessary, for till then, every statement is liable to be retracted, corrected, varied or qualified. The whole deposition must be read as one and if a later statement in it is contradictory to or at variance with a previous statement in the same deposition the statement first made will be deemed to be modified by the subsequent statement.

Intention to give false evidence is a necessary element to constitute an offence under section 193, Indian Penal Code. That intention can only be gathered from the surrounding circumstances and the subsequent correction or retraction by a witness of his statement in the same deposition might negative the existence of such an intention. LACHHMI NARAIN *v.* EMPEROR, 16 O. C. 81; 14 CR. L. J. 280 **712**

——— ——— s. 201 710

——— ——— ——— s. 203 508

——— ——— s. 211 310

——— ——— s. 292—*Obscene book—Test of obscenity—Proof—Particular passages obscene—Frankness of expression.*

In the case of a prosecution under section 292 of the Penal Code, in respect of a book alleged to be obscene, if the prosecution succeeds in showing that the detailed passages on which they rely are of an obscene character, the author's liability in respect of those passages would not be saved or avoided merely by reference to other passages in the book which contain moral precepts of an unexceptionable character.

The test of obscenity is whether the language complained of is such as is calculated to deprave or corrupt those whose minds are open to immoral influences. That being the test, the important point to look at would be rather the form of expression than the actual meaning, for the same meaning may be obscenely expressed by one form of language, and yet by the use of another form of language may be couched in expressions free from reproach.

A distinction should be observed between obscenity *i. e.*, language calculated to inflame the passions, and a certain primitive frankness of expression such as one would expect to find in a language like Marathi. It is not the primitive frankness or directness of expression which is most likely to corrupt or inflame the mind. EMPEROR *v.* VISHNU KRISHNA PURANIK, 15 BOM. L. R. 307; 14 CR. L. J. 248 **504**

——— ——— ss. 299, 300 331, 497

——— ——— ss. 300, 304—*Culpable homicide not amounting to murder—Circumstantial evidence—Wife receiving injury on her head—Presumption that it was inflicted by husband.*

Where the sole inmates of a house were a man and his two wives and it was found that the elder wife was habitually ill-treated and half-starved by her husband, she was admitted to hospital suffering from a serious injury to the head from the effects of which she died three days after but she was too ill to make any statement and there was no indication that the injury was accidental or self-inflicted, the explanation given by the husband as to the injury being unsatisfactory and highly improbable:

Held, that the presumption was that the injury was caused by her husband.

Held, also, that to inflict such an injury on the head of a woman already reduced by ill-treatment to such a poor condition was an act which warrants the finding that the culprit must have known that it was likely that death would be the result and was sufficient to bring him under section 304 part 2 of the Indian Penal Code.

In this case a sentence of ten years' rigorous imprisonment was not considered severe.

The co-wife was given the benefit of doubt and was acquitted. RAHIM DAD *v.* EMPEROR, 3 P. W. R. 1913 CR.; 14 CR. L. J. 283; 150 P. L. R. 1913 **715**

——— ——— ss. 300, exception 1, 302—*Grave and sudden provocation, husband seeing paramour of his wife leaving his house—Wife's annoying reception of his remonstrances—Husband killing the wife.*

The accused returned home unexpectedly and met the paramour of his wife coming out of his house, he remonstrated with his wife, and was annoyed by her reception of his remonstrances, and killed her with a hoe which was lying near him:

Held, that the act of the accused was covered by the 1st exception to section 300 of the Penal Code. RALIA *v.* EMPEROR, 3 P. R. 1913 CR.; 14 CR. L. J. 208; 209 P. L. R. 1913 **208**

——— ——— ss. 300, 411—*Murder—Stolen property belonging to the murdered man in possession of accused not sufficient for conviction of murder—Evidence.*

Where the only evidence against an accused person is a bundle of cloth, which he produced and which is identified as having been stolen from a person proved to have been murdered, and there is no admissible evidence against him upon the record to connect him more directly with the murder, it is impossible to do more than convict him under section 411 of the Indian Penal Code. AHMAD *v.* EMPEROR, 14 CR. L. J. 275; 220 P. L. R. 1913; 23 P. W. R. 1913 CR. **707**

——— ——— s. 302 208, 331, 497, 710

——— ——— s. 304 715

——— ——— s. 307—*Doubt — Circumstantial evidence—Blood stains on clothes—One person accused at thana and another at the spot.*

Where in a case under section 307, Penal Code, *A.* and *B.* were named at the *thana* as the assailants but when the Police went to the spot the name of *C.* was substituted for that of *B.* and the only eye witness said he saw their backs as they ran:

Penal Code—contd.

Held, that the accused could not be convicted on such evidence, the mere fact of there being blood stains on the clothes would not suffice, the evidence of the trackers being by no means infallible. SHERA *v.* EMPEROR, 14 P. W. R. 1913 CR.; 67 P. L. R. 1913 CR.; 14 CR. L. J. 196 **196**

——— ——— **s. 339** — *Wrongful restraint—Obstruction to passage of cart—No obstruction to person passing.*

Section 339 of the Penal Code requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong defined by the section is a wrong against the person and is not completed where the person is at liberty to go in any direction he pleases.

Therefore, a person cannot be said to be wrongfully restrained, when, though himself unobstructed, he is hindered from driving a bullock-cart through a passage. EMPEROR *v.* RAMA LALA, 15 BOM. L. R. 103; 14 CR. L. J. 177 **177**

——— ——— **s. 354**—*Indecent assault—Outraging modesty.*

An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged. FATIMA *v.* CAPTAIN MCCORMIK, 6 BUR. L. T. 21; 14 CR. L. J. 149 **149**

——— ——— **s. 363**—*Kidnapping—Evidence.*

To establish kidnapping, there must be evidence that the minor was taken out of the keeping of the lawful guardian without her consent. FATIMA *v.* CAPTAIN MCCORMICK, 6 BUR. L. T. 21; 14 CR. L. J. 149 **149 F. B.**

——— ——— **ss. 364, 365**—Abduction in order to extort money **167**

——— ——— **s. 376** **149**

——— ——— **s. 387** **167**

——— ——— ——— **s. 405**—*Breach of trust — Advances to brokers for supply of paddy—Absence of pro-notes—Undertaking to apply advances to purchasing paddy for advancing firm—Loan or trust.*

Where money was advanced to an accused on the undertaking that he should buy paddy at what rate he could and should sell to the advancing firm at the market rate on the day of delivery, the property in the money passed to the accused and his contract to use the money in a particular way did not operate to create a constructive trust.

The presence or absence of the pro-notes does not alter the character of these transactions.

As the accused had to make good the loss of money in any circumstances and as he had to bear any loss on a fall in the market price and to profit by any rise, the property in the money passed to him and no beneficial interest remained with the advancing firm. HOCK CHENG AND CO. *v.* THA KA DO, 6 BUR. L. T. 13; 14 CR. L. J. 145; 7 L. B. R. 16 **145 F. B.**

——— ——— **s. 406** **315**

——— ——— **s. 411** **707**

——— ——— **s. 411**—*Receiving stolen property—Railway receipt of goods, production of whether establishes possession of accused.*

Penal Code—concld.

Certain stolen goods were sent from one station to another. At the station of delivery, the accused returned the Railway receipt to the Railway office and paid the freight. The goods had not been removed by the accused when he was arrested, as he was not able to account for the fact of his receiving the goods. He was subsequently convicted under section 411 of the Indian Penal Code for having received stolen property:

Held, that the production of the Railway receipt established the possession of the accused and it was not necessary for the accused to have removed the goods from the Railway premises; that after the delivery of the goods by the Station Master, they came to be not merely in the potential possession of the accused but actually within his power and unrestricted control, the possession of the Railway Company having from the moment of delivery ceased and that of the accused having commenced: and that the conviction was right. SEWDHAR SUKUL *v.* EMPEROR, 14 CR. L. J. 318 **1006**

——— ——— **s. 420**—*Cheating by false representation as to future event—Proof—Evidence—Statement as to what witness said regarding particular period of time.*

Where a person is charged of cheating by false representation, and that representation is in respect of a certain future event and not as to an existing fact, the prosecution must prove that the representation was false to the knowledge of the accused at the time it was made.

It is but little to the purpose that in fact that representation has turned out to be true.

In India, where references to time are almost always the merest approximations, there is always a large margin of honest error when a witness makes a statement as to what he himself said, some time ago, with regard to a particular period of time. EBRAHIMJI *v.* EMPEROR, 15 BOM. L. R. 297; 14 CR. L. J. 232 **328**

——— ——— ——— **s. 430** **305**

——— ——— ——— **ss. 467, 471, 477**—*Forgery—Using forged document—Separate sentences.*

A person who is convicted of having forged a document should not be punished both under section 467 and under section 471 of the Penal Code even though he made use of the document.

Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under sections 467, 471 and 477, Penal Code. PIRBHU DIAL *v.* EMPEROR, 52 P. L. R. 1913; 4 P. R. 1913 CR.; 14 CR. L. J. 183 **183**

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Perjury. *See* PENAL CODE, S. 193.

Plaint, amendment of. *See* AMENDMENT OF PLAINT.

———, *amendment of—Suit for possession by reversioners against widow and daughter—Suit dismissed as premature in presence of widow—Plaintiff asking for declaration against daughters—Amendment allowed.*

Plaint—concld.

G., a nephew of one *R.*, deceased, sued *R*'s daughters and his alleged widow for possession of the property left by the deceased. In his replication, the plaintiff stated that if the alleged widow was proved to have been lawfully married to the deceased, he would be entitled to a declaration that he had a right to succeed after her death in preference to the daughters. The lower Court, deciding in favour of the widow on the question of legality of her marriage, dismissed the suit as premature:

Held,

(*i*) that the decree must be set aside and the case sent back for fresh decision;

(*ii*) that the suit for possession was, no doubt, premature, but, in the interests of justice, it was eminently desirable, since the parties had adduced whatever evidence they wanted to produce as regards the respective rights of the plaintiffs, the daughters of the deceased; that the lower Court should have given its decision one way or the other on those rights by asking the plaintiff, if necessary, to amend his plaint.

(*iii*) that the Court should allow the plaintiff to amend his plaint by inserting therein a prayer for a declaration of his right of succession after the death of the widow. GURDIT SINGH *v. Musammat* PARMESHRI, 238 P. L. R. 1913; 142 P. W. R. 1913 **928**

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——— ——— *Ground of claim never put forward before hearing of appeal not allowed.*

A ground of claim never put forward before and throughout the pleadings cannot be allowed to be raised at the hearing of the appeal in the Chief Court. MAHIDITTA MAL *v.* MRS. NICHOLSON, 133 P. W. R. 1913; 224 P. L. R. 1913 **770**

——— ——— *Inconsistent positions—Party if allowed to take up inconsistent positions—Statement that certain Hindu widow had no title—Subsequent statement that she was in possession as Hindu mother—Whether subsequent statement can be allowed to be made.*

Pleadings—concld.

A litigant is not allowed to occupy inconsistent positions in Court; he cannot be allowed to approbate and reprobate.

Where a person, when he was joined as a party to a foreclosure suit, stated that a certain Hindu widow had no title and that the title to the property was in himself, and he was consequently dismissed from that suit:

Held, that he could not subsequently be permitted to take up a position inconsistent with the position previously adopted by him and to assert that the widow was in possession as a Hindu mother and that he himself was entitled to succeed on her death. BHAGIRATHI DASS *v.* BALESWAR BAGARTI, 17 C. W. N. 877 **686**

——— ——— *Plaintiff alleging a fact—Defendant denying but admitting a certain sum due—Decree and judgment.*

Where the plaintiff sues for dissolution of partnership and for ascertainment of his share and the defendant pleads that the partnership was dissolved and a certain amount is due to plaintiff, the Courts ought to give a decree for the sum admitted to be due by the defendant.

The fact that the plaintiff was persistent in denying the defendant's case and has refused his offer of payment is not a sufficient ground for refusing him the decree for the amount admittedly due. KARUMUSI BRAHMANNA SASTRULU *v* JALDU VENKATA SUBHA ROW, (1913) M. W. N. 432; 24 M. L. J. 561 **848**

Police Diaries to be used in the interest of the accused **190**

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Poramboke—*Tank on village site—Rights of owners*—Taluk *Board—Right of fishing.*

Plaintiffs constructed a tank on the village *poramboke* and caused all the repairs to be made from time to time. The public had free access to the tank for the purpose of taking water for domestic purposes and for watering their cattle. The plaintiffs had the exclusive right to the fish in the tank and the trees on the bank. In 1885, the *Taluk* Board denied the title of the plaintiffs to the trees and auctioned their produce but the auction-purchasers never got possession of the trees:

Held, that the village site must be presumed to have been granted to the plaintiffs' family outright, perhaps subject to a condition that a tank should be constructed thereon and maintained for the use of the public.

Held, also, that the right to take fish and to enjoy the usufruct of trees was reserved to the plaintiffs. BHUPATHIRAZU VENKATAPATHIRAJU GARU *v.* PRESIDENT, TALUQ BOARD, NARASAPUR, 13 M. L. T. 419 **727**

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——— ——*Alleged mixing up of witnesses for defence with those for prosecution—Preliminary inquiry.*

Where a Magistrate is inquiring into the truth or otherwise of a complaint, he can examine all those who know about the matter and it is immaterial at what stage they are called as long as opportunity for cross-examination is allowed. FATIMA *v.* CAPTAIN MCCORMICK, 6 BUR. L. T. 21; 14 CR. L. J. 149 **149 F. B.**

———— ——*Mortgage suit—Plaintiff making person in possession of mortgaged property defendant with representative of mortgagor—Representative not appearing—Other defendant pleading satisfaction of debt—Satisfaction proved—Plaintiff estopped from urging that other defendant had no right to redeem—No decree could be passed against representative.*

In a suit for foreclosure of a mortgage the plaintiff joined the cultivator in possession of the property mortgaged with the representative of the mortgagor defendant. The representative did not put in appearance, but the other defendant pleaded satisfaction of the mortgage-debt by the mortgagor. The Court of first instance decided that the debt had been satisfied:

Held, (1) that the plaintiff having made the cultivator a party with the obvious intention of securing a foreclosure decree against him also, could not be allowed in appeal to allege in contradiction of his assumption at the trial, that the person in actual possession had no interest or right to redeem;

(2) that in face of the finding that the mortgagor had himself paid off the mortgage-debt, no decree could be passed on the mortgage even against the representative of the mortgagor who did not put in a defence. KASHAM KHAN *v. Musammat* SAWITRI, 9 N. L. R. 38 **547**

———— ——*Point appearing on the face of documents and raised—Privy Council bound to decide.*

Practice—concld.

Their Lordships of the Privy Council are bound to decide a vital point appearing on the very face of the written proofs of the parties, and plainly raised in the pleadings, notwithstanding the fact that it was not much discussed or not at all discussed on the hearing of the appeal before the Court from which the appeal to His Majesty was made. BASANT SINGH *v.* MAHABIR PERSHAD, 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 BOM. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 35 A. 273; 25 M. L. J. 301 **340 P. C.**

———— ——Vakalatnama—*Appeal—Pleader's name not mentioned in* vakalatnama *by oversight—Appointment—Presentation—Pleadings.*

Where by oversight the name of a Pleader, presenting an appeal, was not mentioned in the body of the *vakalatnama*:

Held, that the Pleader was not duly appointed and the appeal was not properly presented. MUHAMMAD ALI KHAN *v.* SUKHU, 11 A. L. J. 458 **674**

Pre-emption. *See* PUNJAB PRE-EMPTION ACT.

——— ——— ———Bhai hakiki, *whether includes sister—Vendee paying off a prior mortgage—Whether pre-emptor is bound to recoup—Price.*

The words '*bhai hakiki*' include a sister also.

Where a vendee, in disregard of the covenant in a sale-deed and apparently without any compulsion on the part of the mortgagee, pays off a prior mortgage-debt upon the property, a pre-emptor is not bound to recoup him. *Musammat* NAJIBAN *v.* NIHAL SINGH **647**

——— ——— ———*Construction of* wajib-ul-arz *—Resumed* muafi *plot sold—Whether co-sharer in village can pre-empt.*

Where the *wajib-ul-arz* of a village gives a right of pre-emption between co-sharers, no pre-emption can be claimed in respect of resumed *muafi* land by a person who is not a co-sharer in the plot although he is a co-sharer in the *mahal*. BATTU LAL *v.* BHOLA NATH **119**

——— ——— ———*Custom—Multan Tahsil—Transfer of* adhlapi *tenure.*

The custom of pre-emption exists in *Mauza* Fajja, Tahsil Multan, in respect of a transfer of land upon what is known as an *adhlapi* tenure. JESA RAM *v.* CHINKA MAL, 25 P. R. 1913; 213 P. L. R. 1913 **739**

——— ——— ——*Exchange or sale—Question whether exchange or sale—Question of law,—When amount of mortgage charges to be paid by purchaser—No part of purchase money—A small sum of money paid in a transaction of exchange—Merely adjusting factor does not alter nature of transaction.*

The question whether a particular transaction purporting to be an exchange of properties was in reality a sale amounts to a question of law, when the contention is that in the determination of the question the Court should have regard to the fact that one of the properties dealt with being under mortgage, the transferee must be taken to have paid as part consideration to the transferor, or on his behalf to the mortgagee, the amount of the mortgage charges.

The amount which the purchaser of property will eventually have to pay in respect of mortgage charges upon it, cannot be said to form part of the purchase-

Pre-emption—contd.

money when such property is sold for a definite amount.

In a transaction of exchange, the mere fact that one of the parties has in addition paid a small sum of money by way of adjusting the values, cannot alter nature. QAZI *v.* SHARFA, 100 P. W. R. 1913; 199 L. R. 1913 **301**

——— ——— ———*Limitation—Pre-emptor cannot be allowed to extend time on account of delay in Deputy Commissioner's sale—Punjab Land Alienation Act (XIII of 1900)—Punjab Pre-emption Act (II of 1905), s. 29—Limitation Act (IX of 1908), Sch. I, Art. 10—Practice—Hard cases.*

A pre-emptor is bound to bring his suit within time whatever the time may be, and he cannot be allowed to extend that time by asserting that the sale which gives him his cause of action is a nullity until the provisions of the Land Alienation Act are fulfilled. The sale is nonetheless a sale, merely because it may be unenforceable in consequence of that Act, and if eventually sanctioned by the Deputy Commissioner it becomes effective from its original date.

Certain land was sold on 9th July 1908 and possession was delivered to the vendee on the same date.

The sale required the sanction of the Deputy Commissioner, which was granted on 19th July 1909.

Mutation was formally sanctioned on 28th July 1909, and a suit for pre-emption was brought on 6th January 1910:

Held, that the suit was barred.

Courts are constrained to administer the law as they find it without reference to hard cases. SAGHAR *v.* NUR AHMAD, 59 P. W. R. 1913; 110 P. L. R. 1913; 79 P. R. 1913 **239**

——— ——— *Money deposited in Court by pre-emptor after first Court's decree—Decree set aside by Appellate Court - Whether plaintiff entitled to interest on deposit money—Mesne profits—Vendee's right.*

A pre-emption suit was decreed by the first Court. The plaintiff deposited the pre-emptive money in Court in proper time and obtained possession. On appeal, the decree was set aside.

The vendee then got back possession of the property and claimed mesne profits for the period during which plaintiff was in possession:

Held, (1) that the vendee was entitled to mesne profits for the period;

(2) that the plaintiff was not entitled to interest on the money he had deposited in pursuance of the first Court's decree. *Choudhri* BAHAL SINGH *v.* NAIT RAM **1**

——— ——— ———*Pre-emptor not in possession of the share on the basis of which pre-emption is claimed—Maintainability of suits.*

The plaintiff in a pre-emption suit was not and had never been in possession of the share on the basis of which her claim to pre-empt was founded. The persons who were in possession of the share were, as a matter of fact, claiming adversely to the plaintiff:

Held, that under the circumstances the plaintiff could not maintain the suit. SAFURAN BIBI *v.* SHAH MUHAMMAD **749**

——— ——— ———*Sale or mortgage—Onerous character of mortgage, effect of—Improbability of the redemption of mortgage, effect of—Transfer, short of sale, to circumvent the law of pre-emption not fraudulent—Evidence Act (I of 1872), s. 92—Exclusion of oral evidence—Third party.*

Pre-emption—concld.

The onerous character of a mortgage cannot alter the real nature of the transaction and convert it into a sale.

The fact that it is highly improbable that a mortgage would be redeemed would not make it any the less a mortgage, for it is capable of redemption, however remote the chance.

A person is not forbidden to circumvent the law of pre-emption by taking a transfer which falls short of a sale, but which may eventually have the same effect as a sale. There is nothing fraudulent in such a transaction.

The rule contained in section 92 of the Evidence Act applies only to parties to the contract and does not cover the case of a third party not privy to the contract. A pre-emptor is at liberty to produce oral evidence to prove that what purports to be a mortgage is in reality a sale. MAJIDA BIBI *v.* FAZL KARIM, 16 O. C. 9 **679**

——— ——— ———*Vendee purchasing defeasible title cannot give better title to his transferee—Pre-emptor can delay suit till the last moment of limitation allowed—His only risk in being forestalled by a person of superior or equal right of pre-emption.*

A person who purchases property subject to the law of pre-emption takes a title which is defeasible in the event of a pre-emptor coming forward within the time allowed by law with a claim for pre-emption, and during this period he cannot give a transferee from himself a better title than he possesses. If in such circumstances he and his transferee choose to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be preferred, they do so with their eyes open and at their peril.

A pre-emptor is entitled to delay his suit for pre-emption up to the very last moment, though, of course, he does so at the risk of losing his right, if, in the interval another person with equal or superior right has by exercise of greater diligence forestalled him in securing the bargain. PALA *v.* MANGALAN, 182 P. L. R. 1913; 132 P. W. R. 1913 **649**

——— ——— **decree**—*Extension of time fixed in the decree—Civil Procedure Code (Act V of 1908), s. 152, O. XX, rr. 3, 14—Interpretation of statutes—Conflict.*

A Court cannot extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired.

A right, extinguished by virtue of a decree of a competent Court binding on the parties, cannot be revived by any subsequent act of the Court or the party at fault.

Laws have to be interpreted in such a way as to avoid a conflict. BACCHHU LAL *v.* RAJA RAM, 16 O. C. 5 **347**

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Presidency Towns Insolvency Act (III of 1909), ss. 6, 121—*Attorneys—Right of audience before officer appointed under s.* 6—*Practice—Insolvent Act* (11 *&* 12 *Vic. c.* 21), *ss.* 3, 76.

Attorneys of the High Court have a right of audience before the officer appointed by the Chief Justice in the exercise of powers conferred upon him under section 6 of the Presidency Towns Insolvency Act. The words "in the way of his profession" in section 3 of 11 and 12 Vic., c. 21, are sufficiently wide to cover the exercise by Attorneys in matters of insolvency, except before Courts of Review or in Jury trial, of the functions ordinarily assigned in litigation to Advocates.

Section 121 of the Presidency Towns Insolvency Act preserves this right of audience possessed by the Attorneys. ADVOCATE GENERAL OF BOMBAY, *In re*, 15 BOM. L. R. 217 421 F. B.

——— ——— ——— ——— **s. 9**—*Substantial compliance—Amendment of petition of petitioning creditor—When can be granted—Prejudice considered.*

When there is no subsisting order of adjudication, there is no obstacle to granting leave to amend his petition to the petitioning creditor provided the amendment is made within three months from the date of the act of insolvency.

Quære:—Whether amendment could not be allowed even when there is a subsisting order of adjudication?

The omission to state the fact that the petitioning creditor is a secured creditor and the value of security is a defect which can be cured by amendment of the petition.

The act of insolvency under section 9 of the Presidency Towns Insolvency Act III of 1909 need not necessarily be verbatim in the words of that section; but it will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section and there is a substantial compliance with the requirements of that section. MAHOMED AYYAB SAHIB *v.* G. P. GUNNIS & Co., 13 M. L. T. 275; (1913) M. W. N. 264; 24 M. L. J. 562 19

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——— ——— ——— ———*Liability of principal to pay agent's hotel bill when travelling on principal's business—Agent to be paid by commission on orders—No stipulation to pay hotel bills—No liability—Decree by principal for value of his goods left by agent in hotel.*

In the absence of a stipulation that the principal is to defray his commission agent's hotel bills when he is travelling on business, the money spent by him in board and lodging cannot be said to have been incidental to carrying on the business of his principal.

The obtaining of a decree by the principal against the hotel-keeper for the value of their goods left by the agent at the hotel does not affect the question of their liability to pay the hotel bill incurred by their agent. RAMJI DAS AND CO. *v.* MUHAMMAD RAMZAN. 206 P. L. R. 1913 248

——— ——— ——— *Settled accounts, when may be re-opened—Surety, if bound by admission of a decree against debtor—Surety entitled to have accounts taken in his presence—Set-off—Arising out of same transaction—Agent's salary due from principal to be credited in account with surety—Civil Procedure Code* (*Act XIV of* 1882), *s.* 111.

As between a principal and an agent, settled accounts will not be re-opened, unless fraud or undue influence is established.

But if the principal seeks his remedy against the surety, he cannot successfully contend that the surety is bound by the admission of the debtor as to the sum due from him. A surety is not concluded even by a judgment or award against the principal: he is entitled to have the accounts taken in his presence.

A right to set off exists not only in cases of mutual debits and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross suit.

Therefore, in a suit for account by a principal against his agent's surety, the surety will be allowed credit for arrears of salary due to the agent in taking the accounts. KALANAND SINGH *v.* SRI PROSAD DAS, 17 C. W. N. 1060 901

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Provincial Insolvency Act (III of 1907)—*Receiver—Right to apply for instructions.*

A Receiver appointed under the Provincial Insolvency Act III of 1907 is entitled to apply for instructions from the Court. *Re* TIRATHDAS NATHUMAL, 6 S. L. R. 286 920

———— ———— ———— ———— **s. 11 (1) (d), (e)** 685

———— ———— ———— ———— **s. 15 (1)** 685

———— ———— ———— ———— **ss. 15, 46, 47**—*Letters Patent, cl.* 39—*Civil Procedure Code* (*Act V of* 1908), *s.* 109 (*c*)—*Insolvency, application for—Dismissal of application—Appeal to High Court—Dismissal under Order XLI, rule* 11 *of Civil Procedure Code,* 1908—*Debts and assets exceeding ten thousand rupees—Substantial question of law—Fit case for appeal to Privy Council—Privy Council appeal.*

A petition was presented to a District Judge under the Provincial Insolvency Act praying that the applicant be adjudged an insolvent, but the petition was dismissed. The petitioner appealed to the High Court, but his appeal was dismissed under Order XLI, rule 11 of the Civil Procedure Code He then applied for leave to appeal to His Majesty in Council. The assets and the debts exceeded ten thousand rupees, and the question was whether having regard to the provisions of section 15 of the Act the District Judge was competent to dismiss the petition:

Held, that the question was a substantial question of law, and that the case came within section 109 (*c*) of the Civil Procedure Code and, therefore, ought to be certified as a fit case for appeal to the Privy Council. CHATRAPAT DUGAR *v.* KHARAJ SINGH, 17 C. W. N. 752; 17 C. L. J. 547; 40 C. 685 435

———— ———— ———— ———— **ss. 24, 33, 39, 44 (2) (c), 45 (2)**—*Creditor not proving claim—Proved claim not to be excluded from equal division of assets.*

A creditor of an insolvent debtor held two decrees but in the insolvency proceedings he proved one only decree, reserving the other for settlement after the discharge of the debtor. The Court recognising the inequity of the tactics, excluded the decree that had been proved, from the benefits of the conditions imposed on the discharge of the insolvent under section 44 (2) (*c*) of the Insolvency Act:

Provincial Insolvency Act—concld.

Held, that in view of the provision for equal division of assets contained in sections 33, 39 of the Insolvency Act, the order of exclusion was incompetent.

Under the Provincial Insolvency Act, it is apparently open to any creditor to deprive an insolvent debtor of the remedies intended to be provided for him by the Act by the simple expedient of refraining from proving the claim and of thus excluding it from the schedule framed by the Court. DHANJI G. DESHMANAYA *v.* H. A. TAYLOR, 6 S. L. R. 163 385

———— ———— ———— ———— **ss. 33, 39** 385

———— ———— ———— ———— **s. 43**—*Bad faith, act of, committed by debtor—Imprisonment—Criminal case—Charge—Opportunity to answer charge to be given.*

So far as an order under section 43 of the Provincial Insolvency Act results in a sentence of imprisonment, the case must be treated as a criminal case.

In all criminal cases, it is necessary that there should be a charge, a finding, and a conviction, as a foundation for the sentence; and if in any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. An opportunity should be given to the alleged delinquent of answering the charge against him after it has been distinctly stated. AMIRUDDI KARIKAR *v.* JADAB KARIKAR 920

———— ———— ———— ———— **ss. 44 (2) (c), 45 (2) (c)** 385

———— ———— ———— ———— **ss. 46, 47** 435

Provincial Small Cause Courts Act (IX of 1887), s. 23, Sch. II, Art. 31—*Small Cause Suit—Suit for damages for withholding possession—Return of plaint - Civil Procedure Code* (*Act V of* 1908), *O. VII, r.* 10.

A suit for damages on the allegation that the plaintiff got a decree for redemption but for a year after he deposited the amount due in Court he was not put in possession of the property, is not cognizable by a Small Cause Court under Article 31, Schedule II, of the Provincial Small Cause Courts Act.

When a Small Cause Court finds that a suit is not cognizable by it, it should not dismiss the suit but should return the plaint for presentation to the proper Court.

Section 23 of the Act only sets out a special case and does not debar a Small Cause Court from returning a plaint when the suit is not cognizable by it. SHEO BODH *v.* SURJAN, 11 A. L. J. 238 427

———— ———— ———— ———— **s. 25**—*Limitation—Revision.*

The question of limitation is a proper ground for revision under section 25 of the Provincial Small Cause Courts Act. SHEO RAM *v.* BADRI DAS-BIHARI LAL, 11 A. L. J. 295 782

———— ———— ———— ———— **s. 25**—*Revision—Small Cause Court judgment—Finding of fact.*

A suit was based on a document which was neither a pro-note nor an acknowledgment of debt. It was merely a receipt.

A decree was passed on the mere statement of the plaintiff that the receipt was for money advanced as a loan. It appeared that the parties were at one time partners in business and it was impossible

Provincial Small Cause Courts Act —concld.

to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business:

Held, that the case was a fit one for interference on revision and that the suit must be dismissed. FAZAL HUSSAIN *v.* MRS. HOLMES, 133 P. L. R. 1913; 139 P. W. R. 1913 **943**

——————— **Sch. II. Art. 8**—*Jurisdiction—Suit by landlord for rent at enhanced rate after notice for vacating.*

Plaintiff served defendant with a notice to vacate his house occupied by the latter as a tenant, by a certain date, and warned him that on his failure to vacate he would be charged rent at an enhanced rate; the defendant did not vacate, and the plaintiff sued for rent at the enhanced rate and the question was whether the suit was cognizable by a Court of Small Causes:

Held, that the suit was one for the 'recovery of house-rent' and nothing else, and was cognizable by the Small Cause Court. BINDESHKI PRASAD *v.* VISHWANATHDAS, 9 N. L. R. 72 **858**

——————— **art. 13** **628**

——————— **art. 31** **427**

——————— **art. 35 (g)**—*Contract of betrothal—Promise of marriage—Breach—Jurisdiction.*

Plaintiff, the father of a Muhammadan girl, entered into an agreement with the defendant by which the minor son of the latter was to marry plaintiff's daughter. The defendant broke the contract and the plaintiff sued for compensation for loss of provisions, etc.:

Held, that the suit was not cognizable by a Small Cause Court as it falls within the exemption of Article 35 (*g*) of the Provincial Small Cause Courts Act. MOHIDEEN KUTTI *v.* PARKER, 13 M. L. T. 497; (1913) M. W. N. 637 **700**

Public Gambling Act (III of 1867), ss. 3, 4, 5, 10—*Criminal Procedure Code (Act V of 1898), s. 239—Keeping a common gaming house, and playing therein—Different offences committed in the same transaction—Joint trial valid—Presumption of credible information—Police report credible information—Police not chalaning some persons found in the house and producing them as witnesses—Section 10 inapplicable—Fine primarily to be the punishment—Offence under section 3 more serious than offence under section 4.*

Under the Public Gambling Act III of 1867 the offences of the keeper of a common gaming house and players therein arise out of facts so inseparably connected together as to form a single transaction, and, therefore, the house-keeper who commits one offence in that transaction, and his customer, who commits another (the house-keeper being in substance an abettor of the gambling) are clearly within the purview of section 239 of the Criminal Procedure Code, 1898, for joint trial as persons accused of different offences committed in the same transaction.

Where a warrant issued under section 5 of the Gambling Act, is duly signed and shows upon the face of it that it was issued on credible information

Public Gambling Act—concld.

it must be presumed that the Magistrate signing the warrant had such information.

A police report is *prima facie* credible information.

If the prosecution choose to proceed only against some of the persons found gaming or present in a common gaming house, that does not prevent the officer conducting the prosecution from calling as witnesses persons who are not proceeded against. Section 10 has no application to such persons. It applies to persons converted by the Magistrate into witnesses out of the persons brought before him for trial.

The wording of sections 3 and 4, where, contrary to the usual rule, the punishment of fine *precedes* the alternative of imprisonment, suggests that the Legislature intended that primarily fine should be used as the mode of punishment, and imprisonment awarded in aggravated cases only.

An offence under section 3 is more serious than one under section 4. SHEIKH MOTI *v.* EMPEROR, 9 N. L. R. 68; 14 Cr. L. J. 293 **949**

——————— **ss. 4, 5, 10** **949**

Public place **167**

——— **service**—Source of payment and place immaterial **765**

Punjab Courts Act (XVIII of 1884), s. 70 (a) **237**

——————— **s. 70 (1) (a)**—*Revision—Civil cases—Material irregularity—Question of law wrongly decided by lower Court.*

Where it was urged on revision that the lower Court had erred in law in relying upon an inapplicable ruling of the Chief Court:

Held, that revision must be rejected as the question of law involved was not an easy one. HONDA RAM *v.* CHIBBAR MAL, 132 P. L. R. 1913 **847**

Punjab Land Alienation Act (XIII of 1900) **239**

——————— **s. 16 (1)** **856**

Punjab Land Revenue Act (XVII of 1887), s. 37 (a)—*Correction of entry in annual record—Occurrence of fact need not be subsequent to the entry—Revenue Officer taking cognizance of error by new mutation—Not reviewing or reversing the previous order directing the entry.*

An erroneous entry in the annual record may under section 37 (*a*) of the Land Revenue Act be varied in accordance with facts proved to have occurred.

It is not necessary for the purposes of the section that the fact should have occurred since the date of the entry which it is sought to vary.

In taking cognizance of errors caused by mistaken or fraudulent action on the part of a *patwari* or *kanungo* when discovered and dealing with them by the method of a new mutation entry a Revenue Officer in not reviewing or revising any order of a predecessor or other Revenue Officer. TAJA *v.* KARAM ALI, 4 P. W. R. 1913 REV.; 4 P. R. 1913 REV.; 201 P. L. R. 1913 **302**

Punjab Municipal Act (XX of 1891), s. 92—*Punjab Municipal Act (III of* 1911), *ss.* 189, 193—Thara *new or old—Power of Committee to remove—Compensation—Repairs of* thara.

If no reply to a notice given to a Municipality under section 92 of Act XX of 1891, (sections 189 and 193 of Act III of 1911) for erecting, re-erecting or repairing a house is given within six weeks from the date of its service such silence amounts to an automatic sanction of the Municipality. Such sanction cannot be withdrawn afterwards.

A Municipal Committee is competent to remove a *thara* whether old or new, but in the former case it is necessary to give compensation before removal.

The mere substitution of new bricks for old ones in a platform on the ground does not constitute any thing more than repairs to such platform. GOPAL DAS *v.* MUNICIPAL COMMITTEE, LAHORE, 52 P. W. R. 1913; 122 P. L. R. 1913 **781**

Punjab Municipal Act (III of 1911), ss. 189, 193 **781**

Punjab Pre-emption Act (II of 1905), ss. 11, 12, 14—*Pre-emption—Rival pre-emptors—One belonging to same tribe and other being member of agricultural tribe—All* Aroras *form one tribe—Share of* shamilat *part of* khewat *after partition.*

The mere fact that a pre-emptor is a member of an agricultural tribe gives him no preferential right of pre-emption as against a person who fulfils the requirements of the proviso to section 11 of the Pre-emption Act.

All *Aroras* form one tribe although they may belong to its different sub-divisions.

After partition, the portion of *shamilat* separately allotted to a proprietor becomes part and parcel of his *khewat* holding and can, therefore, be taken into consideration for determining the respective rights of the rival pre-emptors with reference to section 14 of the said Act. DIL MIR *v.* DEVI DAS, 35 P. W. R. 1913; 77 P. L. R. 1913 **84**

——— ——— ——— ——— **ss. 12, 14** **84**

——— ——— ——— ——— **s. 13 cls. (1) and (5)**—*Rival pre-emptors—One having common entrance and the other co-sharer.*

A co-sharer in a part of the property sold has a superior right of pre-emption, under section 13, clause *first*, of the Punjab Pre-emption Act, II of 1905, to the vendee whose claim can only fall under clause *fifthly* of that section. RAM BHEJA MAL *v.* MUHAMMAD AMIN, 50 P. W. R. 1913; 119 P. L. R. 1913 **784**

——— ——— ——— ——— **s. 29** **239**

Punjab Tenancy Act (XVI of 1887), ss. 50, 51—*Suit for possession by tenant-at-will against the landlord of his landlord—No relationship of tenancy between the parties.*

Defendant was the owner of land held under him by *N.* as an occupancy tenant. Plaintiff held the land under *N.* as a tenant-at-will. Plaintiff sued defendant for recovery of possession of the land on the allegation that within six months before the institution of the suit he was dispossessed by the defendant:

Punjab Tenancy Act—contd.

Held, that the suit was not one between landlord and tenant, and, therefore, sections 50 and 51 of the Tenancy Act did not apply. KESAR SINGH *v.* MANGAL SINGH, 102 P. W. R. 1913; 198 P. L. R. 1913; 84 P. R. 1913. **346**

——— ——— ——— ——— **s. 51** **346**

——— ——— ——— ——— **ss. 53, 59**—*Occupancy tenant—Transfer of holding by gift to adopted son—Landlord not suing to set aside within limitation period—Gift ceasing to be voidable—Limitation to run from date of gift—Effect of heirs on nature of occupancy tenancy—Transfer of occupancy tenancy not avoided, effect of.*

Where the adopted son of an occupancy tenant derives his title from a gift-transfer under section 53 of the Tenancy Act, and not from inheritance under section 59 and the landlord does not bring a suit within the period of limitation to set the transfer aside, the gift transaction will cease to be voidable.

The landlord of an occupancy tenant can during the donor's life-time sue to oust the donee, and limitation, therefore, runs against him from the date of the gift transaction and not from the date of the donor's death.

The nature and statuts of the property held by an occupancy tenant is not affected by his having or not having statutory heirs.

When an occupancy tenant has, within his power of alienation, once made a transfer, which is not voidable at the suit of any reversioner, and has by reason of limitation ceased to be voidable at the suit of his landlord, the alienee will step into his shoes with all the rights and liabilities of the tenancy. RUHELA *v.* DULA, 5 P. W. R. 1913 REV.; 5 P. R. 1913 REV.; 200 P. L. R. 1913. **344**

——— ——— ——— ——— **s. 59** **344**

——— ——— ——— ——— **s. 59**—Nazdiki bhai *etc., in* wajib-ul-arz *of* Mouza *Bhawan, Tehsil Sirsa, District Hissar, interpretation of.*

Nazdiki bhai in the *wajib-ul-arz* of *Mouza* Bhawan, Tahsil Sirsa, District Hissar, taken in connection with succession to the rights of occupancy, should be taken to include only descendants of the first occupier of the land.

The passage in the *wajib-ul-arz* that "*jo khud zemin chhor jawe uska nazdiki bhai bashart khawahish mustahaq kasht zemin ka hoga*," (if he abandons possession of the land of his own accord, his *nazdiki bhai* will be entitled to possession if he so desires) does not touch the matter of inheritance of occupancy rights at all.

When it is sought to bring in agreements under section 111, Punjab Tenancy Act, to override section 59, the language of those agreements must be clear and the intention unmistakeable. SAHIB DITTA *v.* KHANDA, 39 P. W. R. 1913; 70 P. L. R. 1913 **243**

——— ——— ——— **s. 59 (1) (a)**—*Succession—Occupancy rights — Formally adopted son under Hindu Law—Male lineal descendant—Appointed heir—Interpretation of statutes.*

A formally adopted son under Hindu Law is a 'male lineal descendant,' of his adoptive father within the meaning of section 59 (1) (*a*) of the Punjab Tenancy Act, XVI of 1887, and he is entitled to succeed to the occupancy holding of the latter.

Punjab Tenancy Act—concld.

A customary adoption or an appointment of an heir does not fall within this section.

Per *Johnstone* and *Chevis, JJ.*—The definition of words in an Act should never be stretched so as to cover other words. DUNI CHAND *v. Musammat* PADMAN, 30 P. W. R. 1913; 2 P. R. 1913; 71 P. L. R. 1913 **40 F. B.**

Question relating to execution—Dispute between co-defendants **448**

—— —— of Law—Sale or exchange **301**

Railways Act (IX of 1890), ss. 55, 72—*Contract Act (IX of 1872), ss. 73, 161—Detention of consignment by Railway Company—Illegal detention—Tort—Liability of Railway Company for damages—Bailee and bailor.*

An ordinary bailee would not be entitled to detain the goods bailed for recovery of money due to him from the bailor on some other account but a Railway Administration has by section 55 the power to detain the goods. Where this power is exercised illegally or wrongfully the Railway Company is liable for the illegal or wrongful detention and it cannot claim exemption from liability any more than any other person who wrongfully detains another man's goods.

Section 73 of the Contract Act relates to breaches of contract and not to torts. EAST INDIAN RY. CO. *v.* SHEORATAN DAS MOTILAL, 11 A. L. J. 335 **370**

—— —— —— s. 72 **242, 370**

—— —— —— ss. 77, 140 **673**

Railway Company—Passenger projecting arm out of window—Injury by contact with open door of another carriage—Notice of caution **485**

—— —— ——*Loss of portion of consignment of* ghee*—Theft by unknown person—Matter put in hands of Police—Theft not by Railway servant—Discharge of* onus *by Railway Company—Liability of Railway Company—Contract Act (IX of 1872), ss. 151, 152—Railways Act (IX of 1890), s. 72.*

The plaintiff consigned 494 tins of *ghee* through the defendant Railway Company. Out of the consignment, 83 tins were lost owing to their theft by some person other than the Railway servants. The plaintiff contracted under section 72 of the Railways Act and took the benefit of reduced freight:

Held, that the Railway Company discharged any *onus* which lay upon them, and were not liable for the loss of the 83 tins of *ghee*. LAL CHAND SEW KARAN *v.* EAST INDIA RY. CO., 17 C. W. N. 635 NOTE **242**

—— —— ——*Claim in respect of damaged goods—Service—Railway administered by Company—Service of claim upon Divisional Traffic Manager instead of upon Agent, if sufficient—Railways Act (IX of 1890), ss. 77, 140.*

A claim under section 77 of the Railways Act, in respect of goods, which are delivered in a damaged condition, must be served, under section 140 of the Act, in the case of a Railway administered by a Company, on the Agent; the service of a notice upon the Divisional Traffic Manager is not sufficient and legal. E. I. RY. CO. *v.* MADHU LAL, 18 C. L. J. 147; 17 C. W. N. 1134 **673**

Raiyat, meaning of **395**

Rape—Accused charged of rape—Acquitted—Cannot be convicted of adultery without complaint by the husband **716**

Rateable distribution. *See* CIVIL PROCEDURE CODE, 1908, s. 73.

Receiver—Insolvency—Right to apply for instructions **920**

—— —*Selection—Judicial discretion—Non-interference by Appellate Court—Party to suit not to be appointed Receiver unless in special case—Residence beyond jurisdiction, not fatal objection—Adequate guarantee that he will be subject to control of Court—Residence at great distance from property, if absolute disqualification — Circumstance to be considered.*

The selection and appointment of a particular person as Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and the exercise of this like other matters of judicial discretion, will rarely be interfered with by an Appellate tribunal.

But one of the parties to a cause shall not be appointed Receiver without the consent of the other party unless a very special case is made.

Residency beyond jurisdiction is not by itself a fatal objection, but where a non-residence is appointed Receiver, there must be adequate guarantee that he will be subject to the effective control of the Court.

The fact that the Receiver chosen resides at a great distance from the property which is to be subjected to his management and control, while not regarded as an absolute disqualification for the office, is an important circumstance to be taken into consideration. KALI KUMARI *v.* BACHHAN SINGH, 17 C. W. N. 974 **873**

Recitals in deeds—*Admissibility in evidence against third person.*

Recitals in a deed are not relevant evidence against a person who is in no way concerned with the deed. But as regards the parties to the deed, it is reasonable to presume that they allowed the recitals to be embodied in the deed without objection. MAHIDITTA MAL *v.* MRS. NICHOLSON, 133 P. W. R. 1913; 224 P. L. R. 1913 **770**

Reformatory Schools Act (VIII of 1897)—*Criminal Procedure Code (Act V of 1898), s. 399—Detention in Reformatory School—Period to be definite.*

A., a lad of thirteen years, was convicted of theft. The Magistrate imposed upon him rigorous imprisonment for two months but directed that, instead of suffering the imprisonment, *A.* should be detained in a Reformatory School for five years "or until he attains the age of eighteen years" :

Held, that the words "or until he attains the age of eighteen years," should be deleted from the Magistrate's order as the period of detention should be an exact or definite period. EMPEROR *v.* RAMA SUDAMA MAHAR, 15 BOM. L. R. 306; 14 CR. L. J. 256 **512**

Registration—Agreement relinquishing certain portion of principal and interest due on a mortgage **449**

———— Compromise in Court **551**

———— of *lakheraj* and long possession without payment of rent **548**

———— Transfer of right to redeem **818**

———— *Deed of sale—Non-payment of purchase-money—When deed inoperative—Question of intention—Transfer of Property Act (IV of 1882), s. 54.*

A deed of sale which is intended to be operative upon registration, does not become inoperative by reason merely of non-payment of the purchase-money, where payment is not made a condition precedent. But if the parties intend that no title shall pass till the consideration money is paid and the deed delivered, the law would give effect to such transaction.

The mere registration of a deed of transfer is not in itself sufficient to convey title, but the Court has to see what was the intention of the vendor, if no consideration passed. Intention may be presumed from circumstances. SERAMOT ALI *v.* SAMAD ALI **562**

Registration Act (III of 1877), s. 17 **551**

———— **s. 48** **2**

Registration Act (XVI of 1908)—*Deed of exchange, not registered, effect of—Title defective—Possession recoverable—Defendant entitled to refund of benefit.*

Where the title of a person in possession of immoveable property is defective for want of registration of the deed creating that title, he must be regarded as a trespasser.

By an unregistered deed *A.* exchanged a house worth more than Rs. 100 with *B.* for a vacant site and Rs. 219 in cash. *A.* received the money and took possession of the site and gave *B.* the possession of the house. Subsequently, *A.* sued *B.* to recover the house:

Held, that *B.*'s title was defective, and that *A.* was entitled to a decree for possession but must return the vacant site and the sum of Rs. 219 received from *B.* UTTAM SINGH *v.* BASANTA, 203 P. L. R. 1913; 155 P. W. R. 1913 **236**

———— *Partition—Lists of properties allotted to each co-sharer, signed by other co-sharers—Registration compulsory.*

On the last day of partition, effected between the co-sharers of the joint family properties of considerable value, lists of the properties allotted to each co-sharer were prepared, and each co-sharer was given the list of his share of the properties, purporting to have been signed by the other co-sharers:

Held, that these lists or *chithas* formed the actual deed of partition and, therefore, its registration was necessary. UTTAM CHAND v. GHANISHAM DAS, 188 P. L. R. 1913; 127 P. W. R. 1913 **646**

———— **s. 17**—*Agreement relinquishing certain portion of principal and interest on a mortgage—Receipt—Compulsory registration.*

An agreement, by which a mortgagee relinquishes a part of the principal and all interest present and future in consideration of certain services rendered by the mortgagor, is compulsorily registrable.

Such an agreement cannot be regarded as an acknowledgment of payment within the meaning of the exception contained in section 17 (2) clause 11 of the Registration Act. GOBARDHAN SAHI *v.* JADUNATH RAI, 11 A. L. J. 253; 35 A. 202 **449**

Registration Act—(1908)—concld.

———— **s. 50**—*Registered and unregistered document—Priority—Auction purchase under the registered document does not extinguish the rights under the prior unregistered document.*

Certain property was subject to two mortgages, one by an unregistered deed and the other by a subsequent registered deed.

In execution of a decree obtained on the subsequent registered mortgage the right, title and interest of the mortgagor was purchased at an auction sale:

Held, that the earlier unregistered mortgage was not extinguished by such purchase. The debt secured under the unregistered mortgage was recoverable from the surplus money, if any, left after satisfying the registered mortgage.

Section 50 of the Registered Act does not mean that the unregistered mortgage is invalidated or the rights of the mortgagee thereunder are extinguished. DHANPAT SINGH *v.* BUDH SINGH, 11 A. L. J. 291; 35 A. 271 **783**

Regulation (XIX of 1793), ss. 24, 29 **548**

Regulation (XXV of 1802) **732**

Regulation (VII of 1822)—*Settlement of fair rent not authorised—Settlement Officer to record existing rent*—Jamabandi, *signed by defendant, whether amounts to assent to enhanced rent.*

Regulation VII of 1822 does not authorize the settlement of fair rent. All that the Settlement Officer is entitled to do is to record the existing rent.

As a result of Settlement proceedings, the defendant's rent was enhanced. He never admitted the enhanced rent, but signed the *jamabandi*:

Held, that the mere fact that he signed the *jamabandi* is not sufficient to warrant the inference that he did assent to the enhancement, and that he cannot, therefore, be made liable for the recorded rental. ISHUR CHANDRA SARKAR *v.* TROYLOKYA NATH SINGHA, 17 C. W. N. 865 **675**

Regulation (XI of 1825), s. 4 **924**

Regulation (XXIX of 1902), s. 9 **667**

Religious endowment—Mother succeeding son—Power of endowment—Temple built by husband—Idol installed without husband's authority by widow—Validity of endowment—Spiritual benefit **417**

Religious Institution. *See Mutt.*

———— Lease by holder of land to support services—Death of lessor—Suit for recovery of property **558**

———— *Mohunt* of *Asthal*—Suit against trespasser for ejectment by *mohunt* alleging himself as *malik*—Right of *mohunt*—Suit to be decreed **240**

Religious Institution—concld.

——— ——— ——— ——— ——Power of *mohunt* to alienate property **219**

——— ——— ——— ——— ——*Shebaitship*—Ballavacharya Gossain temple—Whether *debutter* property **337**

Remand—Additional evidence after remand **572**

Rent, arrears of, purchased by Pleader **129**

——— **suit** **473**

——— ——— ——Parties **989**

Repudiation *in pais* **596**

Rescission of contract **596**

Res judicata. *See* CIVIL PROCEDURE CODE, 1882, s. 13.

———————. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

——— ——— ——— ———Decree to be vacated for fraud—What constitutes fraud on Court—Discretion of Court **579**

——— ——— ———*Mortgage—Suit for redemption.*

Plaintiff mortgaged the suit properties to defendant and executed a subsequent mortgage to another who obtained a decree for redemption but did not execute the same and to which both the plaintiff and defendant were parties. The plaintiff paid the decree amount and brought the present suit for redemption:

Held, that it was *res judicata* by reason of the previous suit. VEERAPPUDAYAN *v.* MUTHU KARUPPA THEVAN, (1913) M. W. N. 400; 24 M. L. J. 534; 13 M. L. T. 463 **589**

——— ——— ———*Court of competent jurisdiction.*

A decision of an Assistant Collector of the second class cannot operate as *res judicata* in a subsequent suit not cognizable by him, even though the plaintiff had let off a portion of his claim in the first suit in order to bring his case within the jurisdiction of the Assistant Collector, second class. RAM GOVIND *v.* SRI THAKURJI MAHARAJ, 11 A. L. J. 231 **126**

Restitution **439**

——— ——— **of conjugal rights**—*Strained relations between husband and wife—Apprehension of breach of peace—Decree not to be passed.*

It is very incorrect for a Court in India to pass a decree for the custody of a woman's person when the relations between the parties are of such a condition that it is obvious that a breach of the peach is likely to occur. *Musammat* KARM JAN *v.* ABDUL JABBAR, 166 P. L. R. 1913; 121 P. W. R. 1913 **475**

Restoration to possession **172**

Re-trial—Defective charge **308**

Revenue sale—*Avoidance of incumbrances—Voidable at purchaser's option—Notice to avoid incumbrance, whether purchaser bound to give—Point of time when incumbrance to be considered avoided—Revenue Sale Law (Act XI of 1859), s. 29 - "Any person", meaning of - Holder of incumbrance, possession of, when to be deemed wrongful—Damages for use and occupation, to be calculated on what basis—'Mesne profits," meaning of—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (12).*

Revenue sale—concld.

A revenue sale does not *ipso facto* avoid incumbrances and under-tenures, but merely renders them voidable at the option of the purchaser.

It is not necessary for the purpose of avoiding an under-tenure, that the purchaser should give notice, before bringing his suit; the option may be exercised by the institution of a suit within the time allowed by law.

Where such a suit has been instituted, the tenure must be regarded as annulled, from the date of the commencement of the suit, and for the period antecedent to such a suit the possession of the under-tenure-holder is not wrongful and the purchaser is not entitled to claim by way of damages for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first degree.

The words "any person" in section 29 of the Revenue Sale Law, 1859, who refuse to vacate and be removed by the Collector, refer to the former proprietors or persons claiming proprietary right through them, and do not refer to under-tenure-holders, and the purchaser must bring a suit to remove a tenure-holder if he refuses to vacate.

Where the purchaser gave notice to a *mokraridar* indicating his option to avoid the *mokrari* and called upon the *mokraridar* to give up possession, within a certain time, the possession of the *mokraridar* not being wrongful before that date, the purchaser is not entitled to mesne profits, for the period prior to that date, and is entitled only to damages for use and occupation, on the basis of the *mokrari* rent.

"Mesne profits" mean those profits, which the person in wrongful possession of such property, actually receives or might with ordinary diligence receive, and not what the plaintiff has lost. DARSAN SINGH *v.* BHAWANI KOER, 17 C. W. N. 984 **974**

Revenue Sale Law Act (XI of 1859), s. 29 **974**

——— ——— ——— ——— **s. 33** **575**

——— ——— ——— **s. 37**—*"Settlement," meaning of.*

For the purposes of section 37 of the Revenue Sale Act, 1859, the word "settlement" in that section must be taken to mean the permanent settlement of the estate concerned and not the year 1793 in which the greater portion of Bengal was permanently settled. HAMED ALI SADAGAR *v.* ATLAS ALI **872**

Review. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII.

——— ———Order summarily rejecting application for revision **363**

——— ——— ———Revenue Officer taking cognizance of error by new mutation—Not reviewing or reversing the previous order directing the entry **302**

——— ——— ——— *Contract if legally valid must be enforced—Court not to dictate terms to parties—Contract Act (IX of 1872), ss. 51 to 54.*

A suit for work done for defendant was dismissed on the ground that owing to bad workmanship the work had proved ineffectual. On appeal, this finding was reversed but the decree was confirmed on the ground that the terms of the contract

Review—concld.

being vague, plaintiff was not entitled to relief though he had carried out the terms of the contract as it stood and that the plaintiff did his part of the work ahead of the work which was to be done by defendant along with it. Plaintiff asked for a review on the grounds, *inter alia*, that the decision was based on a case not set up in the pleadings and not even raised or argued in appeal, that on the contract, as it stood, plaintiff would not have been justified in delaying his part of the work and that the contract, as it stood, being valid in law, the Court was bound to enforce it:

Held, reversing the order dismissing the appeal, that the decision in appeal proceeded on grounds not raised at the trial; that the Courts should not dictate to the parties what the terms of their contract, ought to have been but if it was a valid contract should enforce it; that the contract did not consist of reciprocal promises to which sections 51 to 54 of the Contract Act would apply, that time being of the essence of the contract, the plaintiff could not delay the work and the work being for a lump sum, plaintiff could not claim *quantum meruit*. PETER VERTANNES *v.* MUTIAH CHETTY, 6 BUR. L. T. 53 **48**

——— ——*not to be granted without notice to the opposite party.*

An application for review cannot be accepted without notice to the opposite party. TAJ MUHAMMAD *v.* KANSHI MAL, 13 P. W. R. 1913; 237 P. L. R. 1913 **864**

Revision (Civil). *See* CIVIL PROCEDURE CODE, 1908, s. 115; PROVINCIAL INSOLVENCY ACT.

——— ——*Jurisdiction—Appellate Court deciding that Court of first instance had jurisdiction—Punjab Courts Act (XVIII of 1884), s. 70 (a)—Civil Procedure Code (Act V of 1908), s. 115.*

In an appeal before a District Judge, from an order of a Munsif of the first class who directed the filing of an award and passed a decree in accordance therewith, an objection was taken that the case was beyond the pecuniary jurisdiction of the Munsif. The District Judge dismissed the appeal, holding *inter alia* that the Munsif had jurisdiction:

Held, that the appellate judgment, though it erroneously decided that the Court of first instance had jurisdiction to hear the suit, was not open to revision by the Chief Court. HAZURA SINGH *v.* ILAM DIN, 204 P. L. R. 1913 **237**

——— ——*Jurisdiction of Small Cause Court—Suit instituted during the absence of a Munsif who had Small Cause Court jurisdiction and tried by his successor who had no such power—Appeal.*

A Munsif, having Small Cause Court powers, obtained privilege leave and left his District on 10th of April 1912. His successor, who had no such power, joined the District on 18th April. On the 15th of April a suit to recover Rs. 50 was instituted which was subsequently tried by the Munsif who had no Small Cause Court jurisdiction:

Held, that the suit was not tried as a Small Cause Court suit and hence an appeal lay to the District Judge. TIRBHUVAN *v.* SHAM SUNDAR, 11 A. L. J. 360 **362**

——— ——*Lower Court not inquiring into the question of limitation.*

Where a lower Court has made no inquiry into the question of limitation but has held rather that it had no jurisdiction to go into the question, the High Court will entertain an application for revision. HABIBULLAH *v.* KARANJU, 9 N. L. R. 35 **425**

——— ——*Where another remedy available.*

Where there is another remedy open to an applicant but of which he did not choose to avail himself, the High Court will not entertain an application for revision. SEUMAL NIHALCHAND *v.* PURSOMAL, 6 S. L. R. 166 **450**

——— ——*Misapprehension of nature of the claim and pleadings.*

The Chief Court will revise the orders of the lower Courts where they have misapprehended the nature of the claim, and the pleadings of the parties, and have wrongly dismissed the suit as barred by time. SOHAN SINGH *v.* LAKHUMAL, 96 P. W. R. 1913; 135 P. L. R. 1913 **5**

——— ——— **(Criminal).** *See* CRIMINAL PROCEDURE CODE, s. 439.

——— ——— ———. *See* JURISDICTION **197**

——— ——— ———Order of acquittal **177**

——— ——— ———*Concurrent finding of two Courts—Insufficient evidence—Criminal Procedure Code (Act V of 1898), s. 439—Evidence—Statement of witness.*

Though it is very unusual to interfere on revision on facts, but where the evidence is found insufficient, a conviction should not be allowed to stand.

A conviction should be based not upon what the Courts consider the witnesses ought to have said but upon what they actually do say; and if by reason of a witness having been won over, the evidence against the accused becomes too weak to justify a conviction the case for the prosecution falls to the ground, LEHNA *v.* EMPEROR, 12 P. W. R. 1913 CR.; 66 P. L. R. 1913: 14 CR. L. J. 148 **148**

Revival—Right extinguished by virtue of decree **347**

Right to sue. *See* CAUSE OF ACTION.

— ——— ———Adjudicated insolvent not discharged—Suit on pro-note in his favour—Official Assignee not interfering—Defendant cannot object **88**

——— ——— ———Default in the conditions of money bond **738**

——— ——— ———Person not party to contract **736**

——— ——— ———Suit against Government for contribution towards assessment **68**

——— ——— ———Suit for salary due from an incorporated Company **595**

——— ——— ———Mohunt *of* Asthal—*Suit against trespasser for ejectment by* mohunt *alleging himself as* malik—*Right of* mohunt—*Suit to be decreed.*

The plaintiff alleging himself to be the *malik* of an *asthal* sued to eject the defendant, a trespasser, from a room within the *asthal*. The plaintiff claimed to have an absolute right to turn the defendant out. It was found that the plaintiff was not the proprietor of the *asthal*, but was the *mohunt* or manager of the goddess who was the real proprietor of the *asthal*:

Held, that, as *mohunt* of the *asthal*, the plaintiff had a right to sue the defendant and that his suit should be decreed. SEARAM DAS *v.* MOHABIR DAS **240**

Road Cess Act (IX B. C. of 1880), s. 20 249

Road Cess Return Admission by proprietor of existence of *lakheraj*—Evidence 548

———————*Rent appearing in return—Recovery of higher rent if possible—Mistake in return—Road Cess Act (IX B. C. of* 1880*), s.* 20*—Rent due before filing of return.*

No landlord is entitled to recover any rent for any land at any higher rate than is mentioned in the Road Cess Return for such land, even if the entry as to rent in the return be a mistake, or if the rent fell due before the return was made. RAMESHWAR SINGH *v.* MOHENDRA NARAIN KOER 249

Rule, service of 993

Sale. *See* PATNI SALE; REVENUE SALE: VENDOR AND PURCHASER.

——, cancellation of—Consideration not paid or inadequate 746

——— Deed of sale—Non-payment of purchase money—When deed inoperative—Question of intention 562

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Sale-in-execution. *See* CIVIL PROCEDURE CODE, 1882, s. 311.

———————Application to set aside sale on the ground of execution-petition being time-barred 377

———————Bid—Offer—Finality—Acceptance—Bid, if may be withdrawn before acceptance 904

———————Application to set aside—Rejection of application as time-barred by first Court—Order set aside on appeal—Point of law—Question of jurisdiction 594

———————Execution proceeding against deceased judgment-debtor—Minor son and widow not brought on record—Auction sale set aside—Irregularity 120

———————Setting aside sale—Deposit within thirty days—Notice when to be served—"Decree-holder", meaning of—Rateable distribution, application for—Amount specified in sale proclamation 475

———————Surplus sale-proceeds taken out by fourth mortgagee—Suit by third mortgagee against fourth mortgagee for recovery of money as his own making no claim against mortgagor—Whether suit maintainable 226

—— or exchange 301

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———————Construction of deed 679

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, s. 195.

———————*granted by District Judge—Conviction of accused—Appeal before same officer as Sessions Judge—Practice—Power to hear appeal—Penal Code (Act XLV of* 1860*), s.* 193.

A Judge gave sanction for the prosecution of the accused on a charge triable under section 193 of the Penal Code. The accused was tried for that offence and convicted of it. The appeal against the conviction came up before the same Judge in his capacity as Sessions Judge:

Sanction to prosecute—concld.

Held, that the Judge was legally competent to hear and decide the appeal, as the question before him, when he was moved to sanction the prosecution, was a totally different question from that which would present itself when the appeal would be argued. EMPEROR *v.* GULAM AHMED ALI SAHIB, 15 BOM. L. R. 104; 14 CR. L. J. 190 190

———————*Second sanction—Repetition of first sanction—Period of limitation not to be extended.*

There can be no second sanction for a prosecution and, any subsequent order purporting to be a second sanction must be taken to be nothing more than a repetition of the first, and the same period of limitation, therefore, will apply running from the date of the first sanction. DURGA PROSHAD PATTAK *v.* LACHMAN BANIA, 14 CR. L. J. 213; 40 C. 584 309

Second Appeal. *See* APPEAL, SECOND.

Secretary of State for India—Liability for breach of contract or tort committed by servant—Libel by Madras Government 353

———————His status in the British Government and also with regard to his Council 765

Separate sentences 167

Service *inam* land inalienable 881

Service of notice. *See* RAILWAY COMPANY.

Service of rule 993

Set-off—Arising out of same transaction—Agent's salary due from principal to be credited in account with surety 901

——Whether Court-fee to be paid on written statement according to value of set-off claimed 918

——*Equitable set off—Unascertained amount—Distinct transactions—Credit given on faith of goods deposited.*

The equity of set off arises out of the recognition of the natural justice of allowing the balance only to be recovered in cases where there have been mutual credits. It arises as a rule when the cross-demands are connected by being part of the same transaction or series of transactions. But it may arise otherwise, it may arise where the transactions are distinct, if the one party has given credit to the other on the faith of goods deposited by the other party with him. SHIVANDAS *v.* MULOMAI, 6 S. L. R. 138 390

Shamilat, *rights in—Alienation of* khewat *rights—General principle as to passing of share in* shamilat.

In general when an alienation of *khewat* rights is effected and there is nothing to show that the alienor had any intention of reserving the *shamilat* rights, but his apparent intention was to place the alienee in the same position as himself, the natural conclusion is that *shamilat* rights pass as well. Where the sale is simply to an outsider or a money-lender, and there is no clause in the deed specifically stating that *shamilat* rights have passed, the position is, of course, quite different and only what is specifically stated in the deed as having passed may save in any particular case, be very reasonably held to be the limit of what has passed. SHER *v.* DULLAH, 186 P. L. R. 1913; 131 P. W. R. 1913 641

Simple money-bond—*Right to sue in default of any of the conditions in the bond.*

Where a simple money-bond provided that the money shall be re-paid with interest within three years, the interest should be paid monthly, that if default was made in the payment of interest for six months, the creditor would be at liberty to realize the principal and interest due on the bond without waiting for the expiry of the said term or after the expiry of the said term, whichever he thought proper:

Held, that, as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for re-payment, whether the interest for the first six months was paid, or not, the plaintiff's claim could not be regarded as barred by time because he chose to stick to the longer term. DURGA *v.* TOTA RAM, 16 O. C. 45 **738**

Slander. *See* DEFAMATION.

Small Cause Suit—Suit by landlord for rent at enhanced rate after notice for vacating **858**

——————Suit for damages for breach of contract of marriage **700**

——————Suit for damages for withholding possession **427**

——————Suit for participation in income of religious endowment **628**

Sonthal Parganahs Settlement Regulation (III of 1872), ss. 11, 25A—*Defendant found by Settlement Authorities as tenant—Suit to determine whether plaintiff or defendant is tenant, whether maintainable.*

In a suit for declaration of title to immoveable property, for correction of an entry in a Record of Rights prepared under the Sonthal Perganahs Settlement Regulation, 1872, and for consequential reliefs, the plaint alleged that the disputed land constitutes a *jote*, and the question in controversy is, whether the first defendant as found by the Settlement Authorities is the tenant in respect thereof or the plaintiff along with their brother, the second defendant, as asserted by them:

Held, that this is a matter decided by a Settlement Court within the meaning of section 11 of the Regulation and consequently a suit does not lie in a Civil Court except as provided in section 25A; that the rights in controversy in the present suit are not those mentioned in section 25A, that is, rights of *zemindars* or other proprietors as between themselves; and that, therefore, the suit was not maintainable. DIGAMBAR DAS *v.* JATINDRABALA DASI **874**

Specific performance—Agreement **9**

Specific Relief Act (I of 1877), s. 9—Suit for possession by tenant-at-will against the landlord of his land—No relationship of tenancy between the parties **346**

—————— **s. 27 (b)** **9**

—————— **s. 39** — *Cancellation of sale—Consideration not paid or inadequate.*

Where plaintiff sought to set aside a sale-deed executed by him in favour of the defendant on the ground of fraud, undue influence and absence of consideration and also inadequacy of consideration but subsequently abandoned the plea of fraud and undue influence:

Specific Relief Act—concld.

Held, that the non-payment or inadequacy of consideration was not sufficient to justify cancellation of a deed of sale. KILARU KOTAYYA *v.* POLAVARAPU MULLAYYA, 13 M. L. T. 521; (1913) M. W. N. 637 **746**

—————— **ss. 39, 42, proviso** —*Suit to have alienation of* wakf *property declared of no effect—Consequential relief—Plaintiff not bound to sue for cancellation of document or decree to which plaintiff is no party—Document or decree may be treated as nullity—Religious institution—Power of Mahant to alienate property—Hindu Law—Widow.*

Plaintiff sued for a declaration that an alienation by way of sale by defendant No. 1 in favour of defendants Nos. 2 and 3 of certain property alleged to be *wakf* was illegal, and that the decree for possession of the said property passed in favour of defendants Nos. 2 and 3 on the strength of the sale-deed should have no effect on the property sold:

Held, (1) that even if the plaintiff could have brought a suit under section 39 of the Specific Relief Act for cancellation of the deed of sale, he was not bound to do so;

(2) that there was no necessity for the plaintiff to get the decree complained of set aside specifically, when he was no party to it. He could regard it as a nullity and ask for a declaration that it should not affect the property.

The proviso to section 42, Specific Relief Act, 1877, is only applicable to such relief as is appropriate and consequent on the right asserted.

The powers of a *Mahant* of a religious institution in matters of alienation of endowment property are analogous to those of a Hindu widow. AMIN CHAND *v.* SANT MURLIDHAR, 18 P. R. 1913; 211 P. L. R. 1913; 151 P. W. R. 1913 **219**

—————— **s. 42 (proviso)**—Suit to have alienation of *wakf* property declared void **219**

—————— **ss. 54 (e), 56 (i)** **250**

Stamp Act (II of 1899), s. 36—*Document admitted—Admissibility whether can be questioned.*

Once a document is admitted in evidence no further question can arise under section 36 of the Stamp Act of 1899 as to its admissibility on the ground that it was not duly stamped. ABID HUSAIN *v.* ASGHAR HUSAIN, 11 A. L. J. 506 **445**

Stamp duty—Compromise in Court **551**

Statutes, interpretation of. *See* INTERPRETATION OF STATUTES.

Steamer Company—Liability for negligence or criminal act of servant **245**

Step-in-aid of execution. *See* LIMITATION ACT, 1908, SCH. I, ART. 120 **410**

———————*Notice for arrest of judgment-debtor served—Judgment-debtor failing to appear—Warrant issued—No record of application—Presumption—Civil Procedure Code (Act XIV of 1882), s. 245B.*

Where a judgment-debtor fails to appear after a notice under section 245B, Civil Procedure Code, 1882, is served on him, and a warrant for his arrest is issued by the Court in the presence of the decree-holder's Pleader, the proceedings constitute an application to take a step-in-aid of execution although there

Step-in-aid—concld.

is no record in the proceedings as to any application or requisition by the decree-holder for the issue of a warrant.

As the Court cannot issue a warrant without requisition on the part of the decree-holder, it may be presumed under the circumstances that due application was made for the issue of a warrant. CHINAPA KARBASAPA *v.* LADASAHEB BABASAHEE, 18 BOM. L. R. 205 **394**

Stridhan property—Prostitute — Inheritance **129**

Subrogation. *See* MORTGAGE.

Substitution. *See* MORTGAGE.

Succession. *See* CUSTOM; HINDU LAW.

Succession Act (X of 1865), s. 50 401

——— **s. 58**—*Alterations in the Will—Unattested and unimportant — Probate—Validity of Will—Amending Act (VIII of 1903), s. 2—District Judge to grant Probate beyond Province.*

In a case of probate, it is immaterial that the Will was executed long before the death of the testator, or that the circumstances under which it was written have changed before that event.

Section 58, Act X of 1865, applies only to alterations made *after* the execution of the Will.

Where alterations made in a Will are unattested and the intention of the Will is perfectly clear even without them and is not affected by them, the Will admitted to Probate will be the Will as it originally stood without the unattested alterations.

The Probate Court has nothing to do with the validity of the Will propounded before it.

Section 2 of Act VII of 1903 gives jurisdiction, under certain conditions, to a District Judge to grant Probates having effect throughout British India. NAGINDRA NATH BANERJEE *v.* P. N. BANERJEE, 21 P. R. 1913; 221 P. L. R. 1913 **692**

——— **s. 84 267**

——— **s. 111**—*Will—Construction—Not to be strict and technical—Restriction on inheritance—Time not mentioned for the occurrence of uncertain event—Reference to other Wills for constructions useless.*

A Parsee Will provided

(*i*) that the daughter of *P.*, the testator, when she attained majority and got possession of her portion of the legacy, was to be a sort of *ex officio* joint executrix with the then existing executors;

(*ii*) that in the event of the son of the testator coming and meeting the testator there without marrying, or if married, without any lineal heir, his share should revert equally to his surviving sisters or other heirs:

Held, that *P.* having attained majority and become entitled to be paid or given possession of a very substantial portion of the property bequeathed to her, was entitled to be co-executrix, and was so entitled without waiting for the possession of the whole of the legacy.

That section 111 of the Succession Act applied and the restriction sought to be placed on the son's inheritance by the testator was nugatory and ought not to be given effect to.

Succession Act—concld.

In construing a Will made in India by a native of India it is unnecessary to put a very strict or technical construction on every word or phrase. What the Court has to do is to ascertain the true intention of the testator from the whole clause.

To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills in reported cases is for the most part an unprofitable exercise. SARDAR NOWROJI *v.* PUTLIBAI, 15 BOM. L. R. 352 **832**

——— **s. 331 267**

Succession Certificate Act (VII of 1889), s. 9—*Hindu widow—Certificate to realize interest only*—Ultra vires—*Security.*

A District Court granted a Hindu widow a Succession Certificate on condition that she should draw interest only and was not to disturb the capital sum.

Held, that the condition was *ultra vires*. All that the Court could do was to require as a condition precedent to the grant of the certificate that the applicant should furnish security under section 9 for rendering an account of the debt and securities received by her and for indemnifying the persons who might be entitled to the whole or part of the assets.

The certificate when granted should include both principal and the interest. JAI DEI *v.* BANWARI LAL, 11 A. L. J. 248; 35 A. 249 **447**

Sufficient cause. *See* LIMITATION ACT, s. 5.

Suit against Government for contribution towards assessment **68**

——— for royalty and commission—Plaintiff jointly entitled with defendant No. 3—Form of suit whether bad **865**

———, *form of—Lessee agreeing to give up land required by lessor—Notice by lessor to lessee to give up land—Suit by lessor for possession—Suit for specific performance, not in ejectment.*

A lease contained a stipulation to the effect that the lessee should give up such quantity of land out of the land covered by the lease, as may be required at any time by the lessor and should get a proportionate remission of rent. The lessor gave notice to the lessee to deliver up almost all the lands in question. On his refusing to comply with this, the lessor brought a suit for *khas* possession:

Held, that the form of the action should be that of an action for specific performance of the contract and not that of an action in ejectment. JOGESH CHANDRA ROY *v.* ANANDA CHARAN CHOWDHURY **907**

Summary trial of offences under the Workmen's Breach of Contract Act not allowed **512**

Surety of judgment-debtor—Undertaking that judgment-debtor would apply in insolvency—Death of judgment-debtor before specified time—Right of decree-holder to enforce conditions of undertaking **981**

———, if bound by admission of a decree against debtor Surety entitled to have accounts taken in his presence **901**

Surrender—Mokrari—*Receipt of consideration—Actual surrender of lands—Validity of relinquishment without formal document.*

The receipt of consideration by a *mokraridar* and the actual surrender of the *mokrari* lands to the

Surrender—concld.

zemindar, are quite sufficient to constitute a valid relinquishment and give a title to the *zemindar*, even without a registered document.

Therefore, where a *mokraridar* returned his *patta* to the *zemindar* and gave up the lands, and endorsed a memorandum to that effect on the back of the *patta*, but the memorandum had not been registered:

Held, that there was a valid surrender which gave title to the *zemindar*. JANGLI RAI *v.* GHURA RAI 124

Taluk Board—Right of fishing 727

Tenancy. *See* LANDLORD AND TENANT.

Time, essence of contract—Contract of sale 462

—— essence of the contract 93

Title—Possession of donee from trustee for 30 years 387

Tort—Illegal detention of consignment by railway company 370

Transfer. *See* CRIMINAL PROCEDURE CODE, s. 526.

——— *Person acquiring rights of another—Validity of transfer to be proved.*

A person cannot claim to have acquired the right of another unless such acquisition is by a valid transfer from the person to whom such right belonged or by the operation of any law. GANPAT *v.* TRIMBAK, 9 N. L. R. 54 759

Transfer of Property Act (IV of 1882), s. 37 865

——— s. 43—*Alienation forbidden by law—Service* inam *land—Act VI of* 1895, *s.* 5—*Inalienability of service* inam *property.*

A purchaser of property from the holder of a service *inam*, who is prohibited by law from alienating the property cannot claim a valid title to it on the ground that the *inam* was subsequently enfranchised and a *patta* for the land was granted to the alienor.

The principle of section 43 of the Transfer of Property Act has no operation when the alienation is forbidden by law on grounds of public policy. NARAHARI SAHU *v.* SRI KORITHAN NAIDU, 24 M. L. J. 462; (1913) M. W. N. 415 881

——— s. 50 865

——— s. 52—*Partition* pendente lite—*Void against plaintiff—Covert dealing with property* pendente lite *does not cast duty upon the opposite party—Parties to suit incompetent to change person of incidence or inherence to the detriment of opponent.*

Plaintiff sued for redemption. The mortgagee defendants were four brothers, members of a joint Hindu family. During the pendency of the suit one of the brothers died sonless. It was held that the right to sue survived against the three other defendants' joint tenants of the mortgaged property. After the decree for redemption, the widow of the deceased brother intervened in execution, claiming that the property had fallen to her husband's share on partition between the brothers during the pendency of the redemption suit, that she being the sole heir of her husband and never having been made a party to the suit, could not be dispossessed of the property:

Transfer of Property Act—contd.

Held, that the partition fell within the mischief of section 52 of the Transfer of Property Act, and could not in any way be allowed to affect the plaintiff's right, either under his redemption decree or in execution.

A covert dealing with property in suit *pendente lite* by any party to the suit, cannot possibly cast any duty or obligation upon the opposite party.

No party during the conduct of a suit has any power, by dealing with the property, to change the person of incidence or inherence to the detriment of the other. ISHWAR LANGO DESAI *v.* DATTU GOPAL DESAI, 15 BOM. L. R. 366; 37 B. 427 885

——— s. 54 562

——— s. 54—*Right to redeem—"Other intangible thing"—Transfer without registration, whether valid.*

The right to redeem a mortgage comes within the meaning of the expression "other intangible thing" in the second clause of section 54 of the Transfer of Property Act, and as such cannot be transferred without registration. RAHMAT ALI *v.* MOHAMMAD MAZHAR HASAN, 11 A. L. J. 407 818

——— s. 59—*Execution of mortgage, proof of—Attestation.*

Where one of the attesting witnesses to a mortgage-deed is dead and the other denies all knowledge of it and there is no other evidence to show that the document was executed in the presence of any of the witnesses who signed it, due execution of the document is not proved. WAZIR KHAN *v.* RAMPHAL 643

——— s. 63—Accession 90

——— s. 72—*Property hypothecated sold in execution of a simple money-decree—Sale likely to imperil mortgagor's security—Usufructuary mortgagee not entitled to mortgage money nor to a personal decree.*

The plaintiff was the mortgagee in possession of certain plots of land. Subsequent to the mortgage the said plots were attached and proclaimed for sale in execution of a simple money-decree against the mortgagor. On plaintiff's objection the plots were ordered to be sold subject to his lien. The plaintiff thereafter paid the decretal money and filed the present suit against his mortgagor for recovery of the money paid with interest:

Held, that section 72 of the Transfer of Property Act is intended to apply to cases where the forfeiture or sale is likely to imperil the mortgagor's security:

Held, further, that if the plaintiff exercised his right by virtue of his having been a usufructuary mortgagee, that money became a part and parcel of the mortgage-money and he was not entitled to a personal decree for that amount. SHEO DULARE *v. Musammat* BATASHA, 16 O. C. 48 744

——— s. 90 971

——— s. 98 748

——— s. 105 493

——— s. 106—*Notice to quit, conditional, whether valid.*

A landlord gave a notice to his tenant that he must within fifteen days either execute an agreement binding himself to pay enhanced rent, or he must vacate the house:

Transfer of Property Act—concld.

Held, that the notice was valid. JUGLA *v.* HAR NARAIN SINGH 758

——————— **s. 108 (a), (c)** 815

——————— **s. 109** 865

——————— **ss. 111, 116**—*Malabar Compensation for Tenants' Improvements Act (I of 1900), ss. 5, 6—Tenant holding over—No adverse possession until tenant is paid for improvements—Limitation.*

The Transfer of Property Act does not apply to agricultural leases in Malabar.

According to the customary or common law of Malabar, a *Kuzhikanam* lease is a lease of waste land granted for 12 years (or such period as may be stipulated) on condition that the tenant shall make improvements and shall be paid for them before he is ejected.

The right to hold possession remains with the tenant until he has been paid the value of his improvements and till he is paid there can be no adverse possession. KUMMATHA VITTIL KUNHI KUTHALAI HAJI *v.* ANTONI GOVEAS, (1913) M. W. N. 339; 13 M. L. T. 350; 24 M. L. J. 472 563

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———*Charitable endowment—Whole income of property dedicated to charities—Absolute dedication of property—'Absolute right', meaning of—Trustee disposing of office by Will.*

Where a document gave the whole of the income of certain property to trusts, reserving nothing for any other purpose, and provided that *A.* should conduct the charities 'with absolute rights':

Held, (1) that the property was dedicated completely to the trusts;

(2) that the expression 'with absolute rights' was intended only to provide that no one else should have any right of interference with *M.*'s management;

(3) that the provision did not give *A.* the power to appoint a trustee by testament.

A trustee cannot legally dispose of his office by Will; he has no right to affect the succession which must be governed by the usage of the trust or the law of the land. RAJARAMA AIYAR *v.* RAMASAMI AIYAR, 24 M. L. J. 476; (1913) M. W. N. 557 660

Trusts Act (II of 1882), s. 5 736

——————— **ss. 53, 88**—*Executor* de son tort—*Trustee purchasing a permanent tenancy in the estate—Purchase to be held for the benefit for the minor.*

Trusts Act—concld.

An executor of the estate of a minor entrusted the management of the estate to *V.*, who after the death of the executor continued the management. During this period of management after the death of the executor, *V.* brought the Fazendari tenancy of a tenant of the estate:

Held, that *V.* was an executor *de son tort*, and therefore, a trustee. By taking over a permanent lease for his own benefit and use on the estate with which he was intermeddling, he came within the principle, if not the letter, of the prohibition contained in section 53 of the Trusts Act.

The case equally fell under section 88 of the Trusts Act, and the purchase by *V.* must be taken to have been a purchase on account of, and for the benefit of, the minor. GOKULDAS *v.* VALIBAI, 15 BOM. L. R. 343 844

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U. P. Excise Act (IV of 1910), s. 63—*Search warrant should be obtained before search of house—Conviction of offence—Search illegal.*

In a case under section 63 of the Excise Act of 1910, where it is necessary to search a house, a search warrant should be obtained beforehand.

Even if the search is illegal, the occupier of the house searched can be convicted under section 63 for unlawful possession of an excisable article. EMPEROR *v.* ALLAHDAD KHAN, 14 CR. L. J. 236; 11 A. L. J. 442; 35 A. 358 332

U. P. Land Revenue Act (III of 1901), s. 108 651

——————— **ss. 111, 233-K**—*Partition proceedings—Suit for declaration of possession—Jurisdiction of Civil Court.*

A suit for declaration that the plaintiff is in possession of a property which is the subject-matter of a partition, does not come within the scope of section 111 of the Land Revenue Act. Hence a suit filed for such declaration in a Civil Court while partition proceedings are pending is barred by the provisions of section 233-K. RAM CHARAN *v.* HUB BAHADUR SINGH, 11 A. L. J. 429 397

——————— **ss. 146, 148**—*Proprietor, meaning of*—Muafidar—*Sale for Government revenue—Right of purchaser.*

The word 'proprietor' used in sections 146 and 148 refers only to those who, in the *wajib-ul-arz*, are set out as being the persons on whom the revenue has been at the time of Settlement assessed jointly or severally. *Muafidars* are not such persons. Hence, if a *mahal* is sold for payment of the arrears of Government revenue, the *Muafidar's* right is not extinguished.

A mortgage of *nankar* property created by the *nankar* holders is not extinguished by the subsequent sale of the property for arrears of revenue, and is enforceable against the purchaser at the revenue sale. KUNWAR SEN *v.* JWALA PRASAD, 11 A. L. J. 217; 35 A. 190 79

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——————— **ss. 211, 233 (k)**—*Partition proceeding—Objection as to title dismissed as time-barred—Subsequent civil suit barred.*

U. P. Land Revenue Act—concld.

An objection as to proprietary title was taken beyond time in a partition proceeding. The partition officer dismissed the objection as time-barred:

Held, that a civil suit in respect of the same subject-matter was barred under the provisions of section 233 (*k*) of the Land Revenue Act. BHAGWAT PARSHAD *v.* LACHMI NARAIN, 11 A. L. J. 621 **978**

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Valuation of suit—*Valuation of claim by plaintiff determines jurisdiction—Jurisdiction not to be ousted by exaggerating claim—Partition suit—Value of share claimed, determines value of suit for purposes of jurisdiction—Parties consenting to refer inquiry into valuation for jurisdiction to Commissioner and to be bound by his finding—Waiver.*

The value that *prima facie* determines jurisdiction is the value put upon the subject-matter by the plaintiff.

But the jurisdiction of the Court properly having cognizance is not to be ousted by unwarrantable additions to the claim.

In a partition suit the value for jurisdiction should be determined according to the specific share claimed.

That law does not prevent the parties waiving an inquiry by the Court as to facts for the determination of the question as to jurisdiction when that fact depends upon facts to be ascertained.

Hence, where on a question of valuation of suit for purposes of jurisdiction, the parties agreed to be bound by the decision of a Commissioner, it would not be open to either party to object to the reference to the Commissioner as illegal. WADHUMAL *v.* CHELLOMAL, 6 S. L. R. 256 **870**

Vendor and Purchaser—Agreement to reserve land revenue free **126**

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——— ——— ——— ———*Advance—Time essence of contract—Contract Act* (*IX of* 1872), *ss.* 55, 64, 65, 74—*Return of deposit—Earnest money.*

Per *White, C. J. and Miller, J.*—(*Sadasiva Aiyar, J., dissentiente.*) Where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase-money at the essential time, cannot recover the deposit.

Where the deposit bears a small reasonable proportion to the price, it can be regarded as security which is liable to forfeiture if a stipulation as regards forfeiture exists.

Section 65 or 74 of the Contract Act does not apply to such deposits.

White, C. J.—If the purchaser repudiates the contract, the vendor may retain the deposit. Where time is not of the essence of the contract, if the vendor rescinds after the agreed date, it is for the purchaser to show that he was ready and willing to perform the contract, within a reasonable time after the agreed date. If time is not of the essence of the contract, failure to perform on the agreed date does not in itself amount to repudiation but express intimation by the purchaser that he repudiates his contract is surely not necessary. And if the party in default fails to fulfil his contract on the agreed date, the onus is on him to show that he did not intend to repudiate.

Sadasiva Aiyar, J.—As regards the enunciation of the general universal principles of the Law of Contracts, the Contract Act was intended to be as exhaustive as possible. Stipulations for forfeiture of deposit money are governed by the Contract Act.

In a breach of contract, the distinction between penalty and liquidated damages has been abolished by the Contract Act and Courts have full power to do equitable justice between the parties.

Money received by a vendor under a rescinded contract of sale (properly rescinded by the vendor) should be returned to the purchaser leaving the rescinding vendor to recover damages from the purchaser for his breach of the contract. NATESA AIYAR *v.* APPAVU PADAYACHI, (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391 **462 F. B.**

Verification, importance of **993**

Village Service Inams Act (II of 1894), ss. 11, 18—*Enfranchisements of* inams—Pattahs—*Quit rent land to be localised for imposition of quit rent—Who to localise*—Zemindar *not bound*—Pattah *cannot be forced on* zemindar—*Regulation XXIX of* 1902, *s.* 9—*Evidence Act (I of* 1872), *s.* 106—*Special knowledge.*

The village service *Inams* are enfranchised and *pattahs* are issued for the benefit of the *Inamdars*. If they do not accept the same, the proper course for the Government to follow is to resume these lands if they desire to do so. They cannot force the *pattahs* on the *zemindar*.

Before imposing the quit rent the Government should localise the lands. It is not open to them to tell the *zemindar* that he must be in possession of these lands, though they cannot now be identified.

In the absence of a statutory obligation on the *zemindar* to see that the *karnam* keeps a register of the service *inams* for their localisation or to keep one himself, the presumption of special knowledge within the meaning of section 106 of the Evidence Act on the part of the *zemindar*, or his predecessor cannot be sustained. SECRETARY OF STATE *v.* RAJAH OF PITTAPUR, 24 M. L. J. 530; (1913) M. W. N. 478 **667**

——— ——— ——— **s. 18 667**

Wager—*Wagering contract—Forward commercial contracts—Test—Proof*—Pakka adatia—*Nature of agency—Principal and agent—Defence of wagering contract by client of* Pakka adatia.

Where a forward commercial contract, regular in every outward particular from first to last, is repudiated by one party on the ground that it is a wager, the Court should always incline and incline strongly to take the contract to be in reality what upon its face and form it appears to be.

It should be a matter of great difficulty, and always against the inclination of the Court, to convince it that the "apparent rectitude of the documents" is not as real as it is apparent.

Wager—concld.

A Court should not be eager to strain the judicial machinery to its utmost limits, to pry microscopically into the minds of men, to open up a hundred transactions in the hope of throwing light on one, to alarm great markets and unsettle commerce, in order that if at last this wide ranging quest succeeds, a dishonest gambler may be excused from paying what, whether legally or not, he is morally bound to pay.

A *pakka adatia* is very like an ordinary *del credere* agent. He is a commission agent and something more. He receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due dates. His peculiar feature is that he can allocate his principal's contracts to himself when it suits him to do so.

Where a *pukka adatia*, who has been compelled owing to default of his client on one side or the other either to find goods or money, seeks to recover from that defaulting client the amount he has thus been obliged to pay on his account, it becomes, on the face of it, almost impossible to say that as between him and his client any defence of wagering can succeed. When a client comes in with a large selling order and the *pukka adatia* immediately gives it out in the market to any number of different buyers, it cannot possibly be contended that not one of those buyers, any more than the sellers even, had the intention of taking delivery.

Obiter dictum.— A true wager is where two persons agree to pay and receive respectively money or money's worth, merely upon the happening or not happening of an uncertain future event, and for no other consideration whatever. BHAGVANDAS PARASHRAM *v.* BURJORJI RUSTOMJI, 15 BOM. L. R. 85 **29**

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———, construction of. *See* PRE-EMPTION.

Wakf. *See* MUHAMMADAN LAW—*Wakf.*

Warrant—*Date fixed by Court for execution—Warrant endorsed to peon by* Nazir *fixing earlier date—Execution by peon between date fixed by* Nazir *and that fixed by Court, whether legal.*

A warrant for the attachment of the moveable properties of a judgment-debtor was issued by the Court and addressed to the bailiff to be executed within August 30th. The *Nazir* endorsed the warrant to a peon with a direction to execute it on or before August 25th. The peon executed the warrant between August 25th and August 30th:

Held, that the execution was lawful and in rescuing the property attached by the peon from him the accused were guilty of an offence. SABED ALI *v.* EMPEROR, 14 CR. L. J. 274; 17 C. W. N. 941 **706**

Water—*Engagement with Government—Proof.*

An agreement between a Collector and a private person will not bind the Government. But an implied engagement can be proved by the course of conduct followed for long by the Government officers and by such persons.

Water—concld.

It is wrong to hold that the Government can, under no circumstances, be bound not to interfere with the usual supply of Government water to plaintiff's land unless there was an express engagement with the Government. KATRAGADDA RADHA KRISHNAYYA NAIDU *v.* SECRETARY OF STATE, (1913) M. W. N. 427; 13 M. L. T. 466; 24 M. L. J. 678 **846**

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———*Attestation—Acknowledgment of signature—Succession Act (X of* 1865*), s.* 50.

It is not necessary that a testator should sign his Will in the presence of the attesting witnesses. It is a sufficient acknowledgment by a testator of his signature to his Will, if he makes the attesting witnesses understand that the paper which they attest is his Will, even though they do not see him sign it. BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS, 15 BOM. L. R. 387 **401**

———*Construction—Application of principles of interpretation of English Court of Equity—Will executed before Succession Act—Succession Act (X of* 1865*), ss.* 84, 331*—Merger—Merging of prior mortgage into subsequent ones—Pleading—Practice—Claim for absolute unconditional possession—Property found burdened with mortgage—Decree, form of.*

A., who had mortgaged some of his property, made a Will in 1864 in favour of "*B.*, his son, and his lawful male children according to the law of inheritance and in the event of *B.*'s death without lawful male children, the same to descend to any male heir". After *A*'s. death, *B.* created a fresh mortgage in lieu of the mortgage by his father and in addition to a few new mortgages.

B. died without male children and *C.* was the next male heir of *A*. *C.* brought a suit in ejectment claiming absolute proprietary possession of the mortgaged property. The plaint concluded with a prayer for such further relief as may be found necessary. In both the lower Courts, the case was conducted upon the footing that *C.* was entitled to proprietary possession in a full and unconditional sense without payment. Before the Privy Council, *C.* claimed in the alternative a decree for possession conditional on the payment of debts binding on *A.*'s estate;

Held, (1) that *B.* got only a life-estate,

(2) that the creation of fresh mortgage by *B.*, in lieu of the mortgage by *A.*, did not affect the radical rights under the mortgage by *A.*, and that, consequently, these mortgages were binding on the estate of *A.*;

(3) that as *B.* held the property only on a life-tenure, the fresh mortgages created by him were inoperative as against the rights of *C.*;

Wi .—concld.

(4) that in order to avoid further litigation between the parties, *C.* should be granted a decree for possession conditional on the payment of the amounts due on the mortgage created by *A.*

The English rules of interpretation, in so far at least as those are artificial rules of construction which have arisen in the administration of Courts of Equity, must not be allowed to govern the case and questions affecting the construction of such a settlement made before the Succession Act came in force or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to justice, equity and good conscience. The Succession Act, 1865, does not apply to Wills made before January 1, 1866. RICHARD ROSS SKINNER *v.* KUNWAR NAUNIHAL SINGH, (1913) M W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 BOM. L. R. 502; 17 C W. N. 853; 35 A. 211; 25 M. L. J. 111 **267 P. C.**

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Workmen's Breach of Contract Act (XIII of 1859), s. 2—*Summary trial not allowed.*

The proceedings of a Magistrate up to the order under section 2 of Act XIII of 1859 do not constitute a trial for any offence and, therefore, the procedure under section 260, Criminal Procedure Code, does not apply. EMPEROR *v.* SOHRAB, 6 S. L. R. 165; 14 CR. L. J. 256 **512**

Written Statement. *See* CIVIL PROCEDURE CODE, 1908, s. 99.

Wrongful restraint. *See* PENAL CODE, s. 339.

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